



**TC05824**

**Appeal number: TC/2016/01614**

*Excise Duty - seizure of alcohol - refusal of restoration - decision set aside by tribunal on appeal - second review decision also refusing restoration - whether all relevant information and in particular as directed by the first tribunal taken into account - yes - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**D.A.M. FOODS LIMITED**

**Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER MICHAEL BELL**

**Sitting in public at Fox Court, Brooke Street, London, on 28 February 2017**

**The Appellant in person**

**Ms Kate Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

1. This is an application made in an appeal by D.A.M. Foods Limited (“the Appellant”) against a second review decision of the Director of Border Revenue (“the Respondents”) to uphold an earlier decision issued on 20 April 2015 (“the first decision”), not to restore alcoholic drinks which were seized at Heathrow Airport on 1 January 2015. The goods seized were 324 litres of red wine, 1,440 litres of tonic wine and 240 litres of rum.

2. An appeal against the first decision heard on 8 January 2016 (“the first hearing”) was allowed by the Tribunal (Judge Gillett and Mr Adrain) in a decision released on 13 January 2016 (“the first tribunal”). The Respondents then conducted a further review on 19 February 2016, which confirmed the decision not to restore the Goods (“the second decision”).

3. This appeal, lodged with the Tribunal on 16 March 2016, is against the second decision.

#### 20 **Background facts**

4. At the first hearing, Mr Bedenham of Counsel appeared for the Appellant and Mr Shaw of Counsel appeared for the Respondents. Evidence was heard from Mr Steadman, the sole Director of the Appellant Company and Mrs Deborah Hodge, the Border Force review officer who made the first decision.

5. The Appellant was unrepresented in the present appeal and Ms Jones of Counsel appeared for the Respondents. Evidence was heard from Mr Steadman and Mr Brenton the UKBA officer who undertook the second review.

6. Paragraphs [3] to [37] of the decision of the First Tribunal set out the background facts and its findings of fact, as below:

30 *3. On 1 January 2015, at Heathrow Airport, a consignment of alcohol imported from Jamaica by the Appellant, DAM Foods Ltd, was examined by Officers of UK Border Force. The initial declaration stated that the goods were "low alcoholic beverages" with a value of £4,160. The VAT declared was £862.*

35 *4. The goods were examined and found to contain 240 litres of rum at 63% ABV, 1,440 litres of tonic wine at 16% ABV and 324 litres of Red Label wine at 13.7% ABV. The goods were seized on 2 January 2015.*

40 *5. On 12 January 2015 the Appellant's freight forwarders IFL Air & Sea Ltd ("IFL") wrote to Border Force requesting restoration of the seized goods. They stated that if the Appellant had made a mistake it was unintentional and that the Appellant would be willing to pay the duty.*

*6. On 30 January 2015, IFL was asked for proof of ownership and any other supporting documents and in a fax received on 13 February 2015 the Appellant provided an invoice from Campbell's Wholesale ("Campbell's") of Mandeville,*

5 *Jamaica, dated 29 December 2014 for a value of 734,947.20, assumed to be in Jamaican Dollars. We understand that this is approximately equal to £4,000. The Appellant also explained that the goods were not correctly described by the Jamaican shipping agent Neko Sun Foods Ltd ("Neko"), who the Appellant said had been instructed to declare the goods properly.*

10 *7. A commercial invoice from Neko was included within the shipping documentation, on which the goods are described as Magnum, Red Label and "low alcoholic beverage", and valued at £4,160.*

15 *8. On 4 February 2015 Mr Steadman had written to Border Force stating that the goods belonged to DAM Foods, enclosing a copy of the invoice from Campbell's, in the sum of 734,947.20. The letter explained that the goods had been incorrectly declared by the shipping agent, Neko, and that this was a new business which was still in its infancy and would learn from this mistake. It also offered to pay the duty and stated that IFL was appealing on behalf of DAM Foods.*

20 *9. On 4 March 2015 Border Force refused to restore the goods because they considered that the Appellant had failed to provide proof of ownership.*

25 *10. On 26 March 2015 a letter from the Appellant requesting a review of this decision was received by Border Force. This enclosed a letter from Campbell's dated 17 March 2015 confirming that the goods had been sold to DAM Foods on credit and that payment was to be made on 28 January 2015. The letter stated that payment would be made when the goods were sold and that if the goods were not returned, then DAM Foods would be in debt to Campbell's. The letter from the Appellant stated that he had no means of paying the money.*

30 *11. On 31 March 2015 the Appellant's request for a review was acknowledged and he was invited to provide any further information he may have. We understand that no further information was provided to Border Force at this stage.*

#### Evidence

*12. We heard evidence first from Mr Steadman, sole director of DAM Foods Ltd,*

35 *13. Mr Steadman explained that DAM Foods had started trading in late 2014, importing fresh produce from Jamaica and other Caribbean countries, He also imported alcoholic drinks and explained that Red Label is a brand name for cooking wine, Magnum is also a brand name but is wine intended for drinking. He confirmed that the rum which had been imported was also for drinking.*

40 *14. Mr Steadman stated that the goods had been purchased from Campbell's, and that they had been shipped by Neko, who had completed and retained all the export documentation. The importation into the UK had been handled by Mr Raj Patel of IFL. Mr Steadman also stated that he had known the director of Neko, Mr Ferguson, for a few years, and had in fact suggested the company's name to him, but that there was no other connection between them.*

45 *15. Mr Steadman then explained that he had purchased the goods from Campbell's for an initial payment of £4,160 plus subsequent payments of approximately £6,000. There were no invoices for this additional £6,000 payment but we were shown photocopies of three*

5 *Money Transfer slips transferring money from Mr Steadman in the UK to an account in his name in Jamaica, which we understood was to be used to make payments to Campbell's. The three additional payments totalled £6,721.*

10 *16. Mr Steadman stated that DAM Foods owned the goods throughout even though payment was to be deferred until the goods were sold. There was no written evidence of the terms of this contract. We were however shown a copy of a letter from Campbell's dated 1 September 2015 which confirmed that they had now been paid in full for the goods.*

15 *17. We also examined an invoice from Neko addressed to DAM Foods which showed a total price of £4,160 and described the goods as Magnum, Red Label (in both cases omitting the word "wine") and "low alcohol beverage" (i.e. the over-proof rum). Mr Steadman explained that this invoice and related shipping documents had been the sole source of the confusion in that this had been completed by a junior clerk of Neko in error. We did note however that the invoice had apparently been signed by Mr Ferguson, the director of Neko.*

20 *18. Mr Steadman stated that he would expect to sell the goods in question for approximately £23,000. Mr Steadman had stated that he paid approximately £10,000 (£4,160 plus £6,000) to Campbell's for the goods and that the duty and VAT avoided according to the letters from Border Force amounted to approximately £16,000. It appeared therefore that Mr Steadman would be selling the goods at a loss of around*  
25 *£3,000. Explaining this, Mr Steadman said that the rum had been ordered specifically by one customer and that the customer had agreed to pay DAM Foods the cost of the rum plus the duty payable.*

30 *19. Mr Steadman was also asked if he knew how much duty would be payable on the importation of the goods, He was rather vague as to how much duty would be payable on the wine and said that he did not know how much duty was payable on the rum. In this connection we noted that in his Notice of Appeal, Mr Steadman had stated that he believed that the correct amount of duty had been paid on the Magnum and Red Label wine, and that it was only the rum which had been wrongly declared. Since no duty had been paid on either the wine or the rum this was clearly incorrect,*

35 *20. Mr Steadman then explained the impact on the business of DAM Foods. He said that the impact had been very substantial, He was unable to pay the rental on his premises and he was now prohibited from entering them. He had been forced to sell his van to pay the additional amounts to Campbell's and DAM Foods had been forced to stop trading in around March/April 2015.*

40 *21. Mr Steadman said that he had imported further cases of Magnum in early 2015 and that these had again been seized but this time they were released to him. It was unclear why this had happened but we were informed that the notice of seizure had been sent 11 days late and this may have been the reason.*

45 *22. Under cross-examination Mr Steadman agreed that he was aware of the need to pay Excise Duty on importing alcoholic drinks, He also agreed that he had appointed IFL as his agents but he did not accept responsibility for their errors. Mr Steadman said that he knew nothing of the importation process and had appointed IFL because this was their business.*

5 23. We were referred to the seizure notice which was issued on 2 January 2015 and which included details of how to apply to the Magistrates' Court if he wished to challenge the legality of the seizure. Mr Steadman said that he had not made this application because Raj Patel of IFL had said that he would do so, but it appeared that this had not been done.

10 24. Mr Steadman said that he had tried to persuade Mr Patel to appear before the tribunal but had been unable to make contact with him recently.

25. Mr Steadman was asked if he had made any legal claim against IFL as a result of this error, to which Mr Steadman replied that he had not, but that he might do so.

15 26. Mr Steadman was also asked if he had notified HMRC that DAM Foods had ceased trading. Mr Steadman confirmed that he had, but acknowledged that this may just have been in connection with VAT.

27. We then heard evidence from Mrs Deborah Hodge, the Border Force Review Officer who had carried out the review which is the subject of this appeal.

20 23. Mrs Hodge's witness statement, which was essentially a list of the documents referred to above, was taken as read.

29. Mrs Hodge explained that the evidence available to her was the normal import documentation and the commercial invoice for £4,160. She confirmed that she did have the letter from DAM Foods of 4 February 2015 which stated that the goods belonged to DAM Foods, together with the letter from Campbell's of 17 March 2015, which also stated that DAM Foods was the owner of the goods, although she could not initially record this letter from Campbell's.

30. She noted that the invoice described the wine as Magnum and Reb Label, with no further description indicating that they were wine. She also noted that the invoice and Movement Certificate, showing the invoice total of £4,160, both of which described the rum as "low alcohol beverage", had been signed by Mr Ferguson, the director of Neko,

35 31. Mrs Hodge stated that prior to the hearing she had no knowledge of the additional payments made by Mr Steadman over and above the £4,160 shown on the initial invoice. She also confirmed that she had no knowledge of the financial difficulties of DAM Foods or that it had ceased trading. She agreed that this was all new information but said that this would not change her views on restoration.

32. Under cross-examination by Mr Bedenham, Mrs Hodge agreed that she had come to the conclusion that the goods were not owned by DAM Foods because they had not been paid for. Mr Bedenham suggested that this was not a sound legal analysis.

40 33. In addition, in her review letter, Mrs Hodge had stated that she believed that there had been a "deliberate misdeclaration". Mr Bedenham suggested that since the declaration had been made by IFL, who had claimed that it was an innocent mistake, and had nothing to gain from making such a misdeclaration, it was difficult to see the rationale for this statement.

45 34. The tribunal asked Mrs Hodge to explain HMRC's policy on restoration in so far as it was relevant to this case. Mrs Hodge stated that she would regard it as appropriate to

5 *restore goods if there had been any misdirection by HMRC, i.e., if HMRC had given the importer incorrect guidance or information.*

10 *35. Mrs Hodge also explained that ownership was considered important. She agreed that she had seen the letter from DAM Foods of 4 February. She could not recall the letter from Campbell's of 17 March 2015 but she did later acknowledge that she had received this letter. She confirmed however that she believed that since the goods had not been paid for they did not belong to DAM Foods, although the review letter only referred to the fact that the goods had not been paid for.*

15 *36. Mrs Hodge also agreed that in reviewing the restoration decision the question as to whether the misdeclaration was deliberate or negligent was important. She was however clearly suspicious about the issue as to whether this was deliberate or negligent misdeclaration since she said that she had heard similar explanations in other cases.*

20 *37. Mrs Hodge confirmed that she had no knowledge of any hardship issues and no knowledge of the subsequent seizure. She also stated that she had not taken into account the fact that this was the first time goods had been seized and that the business was in its infancy.*

#### Decision

*39. The grounds given by Mrs Hodge for confirming the decision not to restore the goods were:*

- (1) *The goods had not been paid for, and*
- 25 (2) *Even if they did belong to DAM Foods, the goods would not be restored because there had been a deliberate misdeclaration.*

30 *40. In her testimony, Mrs Hodge had stated that ownership of the goods was important in considering whether or not goods should be restored. There does however seem to be some confusion on this point because, in her review letter, she had given as her rationale for refusing restoration the fact that the goods had not been paid for, which she seemed to equate with the goods not belonging to DAM Foods. We accept that payment can be a relevant factor in deciding to whom goods might belong but we heard no evidence that the terms under which the goods had been sold contained any provisions as to reservation of title in the event of non-payment.*

35 *41. As regards the question of deliberate misdeclaration, the evidence all stated that the misdeclaration had been negligent or accidental. Clearly it might be necessary to examine the wider evidence to determine if this explanation was satisfactory, but this is something which the tribunal was not asked to do.*

40 *42. The key issue from our viewpoint however is the fact that there was considerable additional information disclosed during the hearing of which the Review Officer admitted she was unaware or had not taken into account. The important elements of this additional information were:*

- 45 (1) *There had been additional payments of over £6,000 made to Campbell's in respect of these goods, although no invoice or contract had been produced or was in existence setting out these payments, and*

5 (2) *DAM Foods was placed into considerable financial difficulties by the refusal to restore the goods and had been forced to leave its commercial premises, to sell its van and gone out of business shortly after the seizure.*

(3) *This was a small business in its infancy and that this was the first time goods belonging to that business had been seized.*

10 42. *Having considered these issues the tribunal decided that the decision of the Review Officer had not taken into account all the relevant information which she should have taken into account, especially the very significant additional information which had been disclosed during the hearing.*

15 43. *We therefore decided that the Appellant's appeal should be upheld and that, in accordance with our powers under S 16(4) FA 1994, we should require HMRC to conduct a further review of the decision not to restore the goods, taking into account the additional information which emerged during the hearing and specifically those issues mentioned at paragraph 42 above.*

7. The Tribunal's decision was released on 13 January 2016.

20 8. Following the hearing, Rogers and Norton Solicitors on behalf of that Appellant wrote to the National Post Seizure Unit by email on 19 February 2016 saying:

*"In addition and as reconfirmation of the points the points made at the hearing..., I have the following comments to make:-*

25 1. *Trevor Steadman of Dam had no role to play in the completion of any of the shipping documentation all completed by Neko Sun Food Ltd and ILF Shipping. He therefore did not have the opportunity to check any of the documentation to verify the accuracy of the documentation. There was no deliberate misdeclaration by Mr Steadman and Dam Foods Limited.*

30 2. *You have seen the letter from Neko in which they admitted it was their fault, and accordingly there is no suggestion that Mr Steadman misinformed them or misled them in any way (and of course he did not). Mr Steadman has dealt with ILF and its director's (Mr Patel) former company in excess of 8 years and trusted them, just as he did with Neko.*

35 4. *Dam Foods Limited ceased trading as a consequence of the seizure. It had initially started importing fresh produce.*

5. *The Company paid for the goods "up front" and therefore suffered financial hardship which as stated caused it to cease trading. Its employees were made redundant. £10,000 was paid.*

6. *The Company's van, ...was sold at a loss...*

40 7. *The Company was evicted from its warehouse as the rent was not paid ...*

8. *Mr Steadman has suffered financially and we will send a statement of his own financial position. He is now reliant on a pension only and not an income from, company as a result of the seizure.*

5           9. Mr Steadman has and is suffering stress and is under medication from his GP for this, caused by the seizure. We will try and get a report from his GP but this takes time...

10. The Company was not at fault and there are clearly exceptional circumstances and severe hardship. Our client will pay the duty as it can still sell the goods, allowing for it to start trading again.”

10       9. On the same date, that is on 19 February 2016, Border Force Officer R Brenton reviewed the restoration application but concurred with the first decision in concluding that the goods should not be restored. Officer Brenton said:

15           *“I have 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 exist that should be taken into account. I have examined all the representations before and after the Tribunal hearing and taken into consideration the findings of the Tribunal dated 13th January 2016 and other material that was available to the Border Force both before and after the time of the decision.*

20           *Following the Tribunal hearing you were given the opportunity to provide any further information in support of the re-review and in particular provide evidence to corroborate the additional information that you disclosed at the hearing. However, as nothing further has been received I have to make my decision based on the evidence that t already have.*

25           *It was purported ...that Neko Sun Foods Ltd, Jamaica were at fault for the errors caused...because a junior trainee clerk put the wrong description of the goods on the form and unfortunately this was not checked by a senior clerk before the goods was shipped to the UK.*

30           *I am not persuaded by these assertions because the documents completed by Neko Sun were all signed by Mr Ferguson, Company Director of IFL. I have also concerns that the 'commercial invoice' bearing the name of Johnathan Ferguson shows the 'seller' as Neko Sun Foods Ltd. yet you have evidenced that the seller of the goods was Campbell's Wholesale, Mandeville, Jamaica. In fact other than the one invoice from Campbell's*  
35           *there is nothing on any of the shipping documentarian to show that the goods were being supplied by Campbell's Wholesale.*

40           *Enquiries made by me show that not only are you the current Director of D.A.M. Foods and Drinks Ltd [previously D.A.M. Foods until 12/01/2015] but you were previously the Director of Neko Sun Foods Ltd, Unit 31 Zenith House Properties, London — Struck off and dissolved on 27th April 2010. As you have also evidenced that you have a bank account based Jamaica, it would not be unreasonable on the balance of probabilities that you have an interest in Neko Sun Foods Ltd, Jamaica.*

45           *You have stated that the supplier of the excise goods was Campbell's Wholesale and produced an invoice dated 29th December 2014 for the goods payable within a month, which I accept can be common terms of payment. This invoice shows the goods purchased; their unit price and total net payable = Jam 734947:20 which equates to*  
50           *£4,160, which is the value reflected in all of the shipping documents.*

*At the hearing you told the Tribunal that the £4,160.00 was an initial payment with subsequent payments of approximately £6,710 which would give a total purchase price*



5 of almost £11,000. Three transfer payments were evidenced dated 19th March 2015 for £1,500 [after the date BF refused restoration of the goods]; 16th April 2015 for £2,550 and 21 April 2015 for £2,660 [after the date BF upheld the decision to refuse restoration of the goods on review] The Tribunal noted that each of these transfers were to your bank account in Jamaica.

10 To date no evidence in the form of an audit trail has been produced to show that any payment has been made to Campbell's Wholesale and why, when you were issued an invoice for the goods that clearly showed that a total of Jam\$ 734947.20 you allege to have paid in excess of £10,000. Furthermore, the money transfers were to your account and I can only conclude it is only you that has access to that account.

15 I will now examine the economics of this venture. These goods were imported with an invoiced value of £4160. You informed the Tribunal that you expected the goods to have sold for approximately £23,000.

20 Scenario 1: If you had paid as invoiced and also paid the import VAT this venture would have been highly profitable = £4,160 + £862 vat payable = £5,022 - £23,000 = £18,000 profit.

25 Scenario 2: If it were to be believed, which I do not - Payment for the goods £10,700 + excise duty £12,224 + VAT @ 20% = £27,508. This would give a loss of £4,000+.

30 Furthermore, in an attempt to explain this loss you stated in evidence that the rum had been ordered by a customer who had agreed to pay the cost of the rum plus the duty payable. This is not the usual practice for any business and I believe it is yet a further implausible explanation and a facade for the illicit movement.

35 To date you have not evidenced payment for the goods. No evidence of initial payment has been produced and I give little weight to the money transfers to your own bank account in Jamaica.

40 You as the importer must bear the full responsibility for the importation and those actions of your agents. I am wholly unconvinced of the alleged errors and in particular the blameworthiness of a junior employee. It is clear that had these goods been imported correctly this would have not been an economically viable venture. At best I believe you were culpable for the mis-declaration and undervaluation of the goods but believe on the balance of probabilities that you were at least complicit if not instrumental in this illicit importation.

45 You also gave evidence as to the hardship experienced by you in the loss of the goods. In evidence you told the Tribunal that because of this seizure you have had to sell your van, move from Unit 31 Zenith House Properties, London and gone out of business. However no sales invoice; monies received or bank statement has been evidenced to corroborate the sale of the van.

50 Enquiries made show that D.A.M. Foods & Drinks Ltd are registered at 18 Hibbert Road, London, [a residential address] but ceased trading as D.A.M Foods Ltd on 12 January 2015 [11 days after the seizure of the goods].

55 Based on the above I believe your evidence was disingenuous. I have also paid particular attention to the degree of hardship caused by the loss of the goods. One must expect considerable inconvenience as a result of having goods seized by Border Force,

5           *and perhaps considerable expense in making other arrangements in replacing the goods. Hardship is a natural consequence of having goods seized and I would consider only exceptional hardship as a reason not to apply the policy not to restore the goods. I do not regard either the inconvenience or expense in this case as exceptional hardships, over and above what one should expect, in the circumstances I do not consider that you*  
10           *have suffered exceptional hardship by the loss of the goods. With the evidence before me I conclude that there is no reason to disapply our policy of not restoring the goods in all of the circumstances.*

15           *I must also refer you to the recent decision by the First Tier Tribunal in the cases of Malt Beverages v BVBA. In his decision released on 29th January 2016, Judge Swami Raghavan States:*

*Decision 3: TC/2012/08651*

20           *127. As above the decision was not one that could reasonably have been reached as it failed to consider and address the issues on ownership of the goods which were a matter of dispute between the parties. However given our findings on lack of ownership above and the subsequent condemnation of the goods we consider the decision not to restore would inevitably be the same if a further review was redirected.*

25           *142. In the absence of findings that the appellant had undertaken reasonable due diligence we think that if we directed the decision to be reviewed again the decision would inevitably be to not restore the goods even if it could be shown the goods belonged to the appellant. We therefore dismiss the appeal”.*

### **Relevant legislation**

30           10. The Customs and Excise Management Act 1979 (“CEMA”) s 49 (1) (e) provides that “any imported goods are found, whether before or after delivery not to correspond with the entry made thereof” those goods shall be liable to forfeiture.

11. Certain other provisions of CEMA are also relevant.

35           a) Section 139(1) of CEMA provides:  
          *“Anything 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.”*

40           b) Section 141(1) of CEMA provides:  
          *“(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*  
45           *(b) any other thing mixed, packed or found with the things so liable; Shall also be liable to forfeiture”*

50           (c) Section 152 of CEMA establishes that:  
          *“They think proper, anything forfeited or seized under the Customs and Excise Acts.*  
          *The Commissioners may, as they see fit —*  
          *... (b) restore, subject to such conditions (if any)”*

5 (d) Section 167(1) of CEMA provides that:

*“(1) If any person either knowingly or recklessly —*

*(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or*

10 *(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer, being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained; and any goods in relation to which the document or statement was*  
15 *made shall be liable to forfeiture.”*

12. Sections 14 to 16 of the Finance Act 1994 provide:

*Section 14*

*“Any person who is -*

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

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

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

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

*Section 15(1):*

30 *“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 or the withdrawal or variation as they may consider appropriate.”*

35 *Sections 16(4) to (6):*

*“(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 —*

40 *(a) to direct that the direction, 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*

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

50 *(6) On an appeal under this section the burden of proof as to —*

*(a) the matters mentioned in subsection (1)(a) and (b) or section 8 above,*

*(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and*

5           (c) the question whether any person has such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use official substitute or road fuel gas on which duty is not paid).

10    13. In the judgment in the case of *McGeown International* sitting in public in Belfast on 15 March 2011 Judge Huddleston stated:

15           “Applying the principles, therefore, set out in that case, it is the function of this Tribunal only to consider if HMRC have erred in law, or if they have taken a decision which is so unreasonable that no other Review Officer would have come to the same conclusion... The burden of proof in relation to that question, very firmly rests with the Appellant.”

20    14. Following the case of *HMRC v Lawrence Jones & Jones in the Court of Appeal (Civil Division)* before Lord Justice Mummery, Lord Justice Moore-Bick and Lord Justice Jackson (2011 *ECWA Civ 824*) the tribunal does not have the jurisdiction to consider the legality of the seizure.

### **The Appellant’s Case**

15. In the Notice of Appeal against the second decision, the Appellant’s grounds of appeal are:

25           “*The Decision to refuse the restoration is unreasonable.*

*The Appellant did not complete any of the shipping documentation.*

30           *Neko Sun Foods has accepted that it incorrectly completed the documentation. Their letter of admission is compelling and it is irrelevant who made the mistake at their company; a mistake was made and one that was not facilitated by the Appellant. The Respondent has ignored the admission. There has not been any allegation that Mr Steadman of the Appellant misinformed them or misled them in any way (and for the avoidance of doubt, he did not).*

35           *IFL was made aware of the details of the shipment. They failed to check the declaration and customs entry. This company has not suggested that DAM or Mr Steadman was responsible for the incorrect declarations.*

40           *The Appellant had no role to play in the completion of any of the shipping documentation, it was all completed by Neko Sun Food Ltd and checked by ILF Shipping. DAM did not have the opportunity to check any of the documentation to verify the accuracy of the documentation. There was no deliberate mis-declaration by Mr Steadman and Dam Foods Limited.*

*The goods were purchased from Campbell’s of Manchester, Jamaica. Campbell’s has confirmed in writing that payment has been made and title passed to DAM. There is no ownership issue.*

5        *There is no connection between Neko Sun Foods Limited registered in the UK and Neko Suns Food registered in Jamaica, save for the name. They are different legal entities.*

*The Appellant ceased trading as a consequence of the seizure. The Appellant paid for the goods "up front" and therefore suffered financial hardship. Its employees were made redundant. It was evicted from its warehouse and sold its only asset (a van) at a loss.*

10       *£10000 was lent to the Appellant (used to pay for the goods), and demands have been made for the repayment of this. It cannot be paid unless the Appellant trades again.*

*The Appellant was not at fault and there are clearly exceptional circumstances, with severe hardship being caused.*

15       *The Appellant will pay the Duty as it can still sell the goods, allowing for it to start trading again. It will also consider paying a penalty to secure the release, subject to the sum that is sought. The refusal not to agree to this was unreasonable."*

16. At the hearing, Mr Steadman said that he had "nothing new to say or produce" by way of evidence to support his assertions to the first tribunal that he had paid additional monies to Campbell over and above the amount shown on their invoice amount.

17. Mr. Steadman said that he did not have a written contract with Campbells. He initially paid in full by cash 'up front'. It was only later that he was allowed credit. The trust between the parties had to be built up.

18. In evidence, he said that his understanding with Campbells was that once the goods were paid for they would belong to him. This contradicted his assertion in evidence to the first tribunal that title to the goods had passed on delivery. He was also unable to explain why title to the goods would pass on delivery without payment or evidence to show that he had been allowed to purchase on credit. He said that he did not have any documentation to support his assertion that Campbells had received the invoice amount £4,170 plus the additional monies from the amounts which had been paid into his account in Jamaica.

19. He disagreed that he had to bear responsibility for any mistakes made by the shipping agents but said that he would not be taking proceedings for negligence against them because he wanted to get his goods back (and he saw litigation with them as counter-productive).

20. Mr Steadman was unable to explain the arrangement with the 'end customer' who he said had agreed to pay the duty on the goods, even though apparently neither Mr Steadman nor the end customer knew what the duty was, or how such an arrangement would have allowed Mr Steadman to make a profit.

#### 45       **The Respondent's Case**

21. The legality of the seizure was not challenged and the goods were duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of

5 Schedule 3 of CEMA, and deemed to be imported improperly. The Tribunal has no jurisdiction to permit the re-litigation of the legality of the seizure. *The Commissioners for Her Majesty's Revenue and Customs v Jones v Jones* [2011] EWCA Civ 824.

10 22. The Appellant had an opportunity of raising issues pertaining to the lawfulness of the seizure in the Magistrates' Court. A second chance is not afforded to do so at a tribunal or by way of statutory review because the tribunal does not have jurisdiction to consider this. The Review Officer cannot do so either.

15 23. Mr Brenton on behalf of the Respondents said that all the paperwork relating to the goods showed their value to be approximately £4,170. There was no evidence of further monies being due to Campbells and the payments Mr Steadman made to his own bank account meant nothing. Mr Steadman had produced no audit trail to support his assertion that the initial payment of £4,170 was only part of the consideration to be  
20 paid for the goods.

Mr Steadman had not produced any evidence relating to the sale of his vehicle. In Mr Brenton's view there had been some complicity between the parties involved in the importation of the goods.

25 24. Mr Steadman had been invited to provide any further information in support of his request for a review but at the time of the Reviewing Officer's decision no further information had been received. The decision was therefore rightly based on the information before him at the time.

30 25. Mr Brenton said that even if the Appellant had paid for the goods, they should in any event not be restored to the Appellant. The goods were entered with a value of £4,170. The tariff code was 2208906900 for 'Other spirituous beverages'. The tax code was 01431 tax type 431 'wine based beverage of less than 1.2% abv'. This was  
35 clearly incorrect, as the actual goods abv ranged from 13.7% to 63%, and resulted in no excise duty being calculated. The estimated UK cost of the goods was £60,000. Mr Brenton considered this to be a deliberate misdeclaration in order to avoid substantial excise duty and VAT.

40 26. The first tribunal gave the Appellant the opportunity of producing evidence, whether by way of additional documentation, witness statements from those involved in what he maintains was a negligent but innocent mistake or oral evidence at this hearing, to refute the conclusions of the review officer. He has not however availed himself of that opportunity. He accepts that he has no documentary evidence that the  
45 cost of the goods was not £4,170 but approximately £11,000. In such circumstances it can only be assumed that he is unable to do so and accordingly the review officer's decision not to restore cannot be seen as being unreasonable.

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5 **Conclusion**

27. The Appellant was offered the opportunity by the first tribunal of producing documentation to show that title to the goods had passed to the company on delivery.

28. The Appellant was also offered the opportunity of producing evidence to show payment to Campbells of the additional amount totalling approximately £6,721,  
10 which he said was transferred to his account in Jamaica to cover further monies payable to Campbells.

29. No contract documentation or other evidence has been produced to show that the Appellant had agreed to purchase the goods at more than the face value of Campbells invoice for £4,170.

15 30. Campbell's letter of 1 September 2015 says that the Appellant owns the goods, but no other information or revised receipted invoice has been produced. In any event, according to the information we have been given, by that date the company had already ceased trading

20 31. There does not appear to have been any mention of additional monies being due to Campbells until Mr Steadman gave evidence to the first tribunal. Given the potential significance of the assertion, it is difficult to understand why Mr Steadman did not raise the issue with the UK border force review officer before his review decision.

25 32. We have not been provided with a satisfactory explanation to support the authenticity of the transaction with Campbells. The goods were imported with an invoiced value of £4,160. Mr Steadman said that he expected to sell the goods for approximately £23,000. After allowing for VAT on the import the profit would have been around £18,000 or £12,000 if a further sum of £6,000 was indeed payable to Campbells. Either way, the profit would have been very significant.

30 33. Conversely, if the consideration for the goods was, as Mr Steadman says, approximately £11,00, the excise duty would have been £12,224 which after allowing for 20% VAT would have resulted in a total cost to the Appellant Company of £27,508, leaving it with a loss of more than £4,000.

35 34. The Appellant has not produced any evidence to support his explanation that the end customer had agreed to pay the duty payable on the goods. The arrangement which Mr Steadman describes would appear to mean that the Appellant and the end customer had agreed to a transaction where neither knew what the payable duty was and would have also left the Appellant breaking even on the transaction without any profit.

40 35. Mr Steadman has not provided any plausible explanation as to why he has not seriously considered taking legal action against the shipping agents if indeed the misdeclaration was entirely their fault.

36. No evidence has been produced to show monies received to corroborate the sale of the van.

5 37. We have not been provided with any evidence to show evidence of the  
Company's financial difficulties or that the Company was forced to leave its  
registered office premises at Unit 31 Zenith House 210 Church Road Leyton London.  
Records show that its registered office changed from 31 Zenith House to 18 Hibbert  
10 Road Walthamstow London on 10 June 2015, around six months after the seizure, and  
that the company was dissolved via voluntary strike-off on 16 August 2016.

38. In all the circumstances we have to conclude that the decision not to restore the  
goods was correctly issued. There is insufficient evidence to show the true nature of  
the transaction; that the goods had been paid for and that title had passed to the  
Appellant Company. Even if the goods did belong to the Appellant there had in our  
15 view been a deliberate misdeclaration.

39. The appeal is accordingly dismissed and the decision not to restore the goods  
confirmed.

40. 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  
20 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.

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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 25 APRIL 2017**