[2018] UKFTT 452 (TC)

TC06630

Appeal number: TC/2017/03684

EXCISE DUTY – restoration of a vehicle – whether a decision to restore a vehicle that has been modified for the purpose of concealing goods upon payment of an amount equal to 30% of the purchase price of the vehicle together with an amount equal to the costs of reinstatement was unreasonable – yes – failure to comply in all respects with the directions of the First-tier Tribunal in relation to the making of that decision – consideration of the doctrine of issue estoppel – direction to conduct a further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIGITO EKSPRESO TRANSPORTAS **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 9 May 2018

Ms G Diminskyte for the Appellant

Mr W Dean, instructed by the Cash Forfeiture and Condemnation Legal Team of the Home Office, for the Respondent

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DECISION

Introduction

1. This decision relates to an appeal by the Appellant against review conclusions contained in a letter from the Respondent to the Appellant dated 3 April 2017. The letter set out the terms on which the Respondent is prepared to restore to the Appellant a DAF tractor unit registration HUE 812 (the "Vehicle") that was seized at Dover Docks on 31 December 2015. The Vehicle was seized because certain modifications had been made to its fuel tank. The Respondent has offered to restore the Vehicle to the Appellant for a payment of £18,548.00, of which £548.00 is attributable to the cost of removing the modifications. The Appellant is prepared to pay the £548.00 that is necessary to remove the modifications but considers that the balance of the payment required by the Respondent - £18,000.00 – is excessive. It has therefore appealed against the review conclusion pursuant to Section 16(1) of the Finance Act 1994 (the "FA 1994").

Background

2. Whilst there is a dispute between the parties as to the reason why the modifications were made, the following are the relevant, undisputed facts:

(a) at the time when the Vehicle was seized, the fuel tank had been modified in a manner which created two separate sections;

(b) the Vehicle was seized by the Respondent pursuant to its powers under Section 88 of the Customs and Excise Management Act 1979 (the "CEMA"), which provides that "where … a vehicle is or has been within the limits of any port … while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that …vehicle shall be liable to forfeiture" and Section 139 of the CEMA, which 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";

(c) the Appellant did not challenge the legality of the seizure pursuant to paragraph 3 of Schedule 3 to the CEMA but, by a letter dated 27 January 2016, the Appellant requested the Respondent to restore the Vehicle to it using the Respondent's powers under Section 152 of the CEMA;

(d) by a letter dated 1 March 2016, that request was refused and, following a request by the Appellant for a review of the decision, the refusal was upheld by a letter dated 26 April 2016;

(e) the Appellant appealed against that decision to the First-tier Tribunal pursuant to Section 16(1) of the FA 1994 and, in its decision dated 6 January 2017 – see *Mr Sigitas Pusinskas; Trading as Sigito Ekspreso Transportas v Border Force* [2017] UKFTT 172 (TC) (the "Original Decision") - the First-tier Tribunal (Judge Geraint Jones QC and

Mrs Sheila Cheesman JP) held that the Respondent's decision to refuse restoration was unreasonable. The First-tier Tribunal accordingly exercised its powers under Section 16(4) of the FA 1994 to require the Respondent (acting through an officer other than the one that was involved in the initial review) to conduct a further review in accordance with its directions;

(f) those directions were set out at paragraphs [49] and [50] of the Original Decision and were as follows:

"[49] We direct that the new Review must be undertaken in accordance with the facts which we have found proved, as detailed above. For the avoidance of any doubt we set out those facts as follows:

(1) Each fact asserted by the appellant in his evidence, as summarised above.

(2) That no measurable quantity of "red" diesel was found in any part of the fuel tank of the tractor unit on 31 December 2016.

(3) That the fuel tank had not been divided, altered or configured for the purpose of concealing goods liable to duty and/or tax in, or upon entering into, this country.

(4) That there is no evidential basis for proceeding on the basis that "red" diesel purchased in a foreign country is or equates to "rebated diesel" in this country. We say "evidential basis" advisedly. No assumption should be made to that effect.

(5) The appellant had not fuelled his tractor unit with red (rebated) diesel purchased, or otherwise acquired, in this country.

We direct the respondent, when undertaking a new Review, not to assume that the use of diesel purchased abroad, whatever its colour, would be unlawful in this country. We use the word "assume" advisedly."

(g) in reaching the Original Decision, the First-tier Tribunal was critical of a number of points in the Respondent's review conclusion letter and, in particular, the fact that the letter made no reference to the principle of proportionality, whether the decision to refuse restoration was disproportionate and the fact that no evidence had been provided in relation to the quantity of rebated fuel that was found in the fuel tank when the Vehicle was seized or in relation to the purpose of the modifications being to conceal goods for the purpose of avoiding the payment of duty or tax; and

(h) following the Original Decision, the Respondent, acting through a Mr Brenton, who had not been involved in the case hitherto, conducted a further review and concluded that the Respondent would offer to restore the Vehicle to the Appellant for a sum of £18,548.00. It is that decision which is the subject of the present appeal.

The relevant law

3. Before summarizing the terms of Mr Brenton's letter, I think that it would be helpful to describe the provisions of the tax legislation and the case law authorities which, in each case, I believe to be relevant to the present appeal. These are as follows:

(a) Section 139(6) of the CEMA provides that, in relation to any thing seized as liable to forfeiture, Schedule 3 of the CEMA shall have effect;

(b) under paragraph 3 of that Schedule, any person claiming that any thing seized as liable to forfeiture is not so liable has 1 month from the date of the notice of the seizure in which to give notice of that claim to the Respondent;

(c) under paragraph 5 of that Schedule, in the absence of a notice of a claim under paragraph 3, the seized goods "shall be deemed to have been duly condemned as forfeited";

(d) it has been held in a number of decisions by the higher courts that, once goods are deemed to have been duly condemned as forfeited, then, in any future proceedings before the First-tier Tribunal, the fact or facts on which the forfeiture was based must be deemed to be true and there is no room for the First-tier Tribunal to find facts that are contrary to that fact or those facts – see the Court of Appeal decisions in *Gora v CCE* [2003] EWCA Civ 525; [2004] QB 93 ("*Gora*") and *The Commissioners for Her Majesty's Revenue and Customs v Lawrence Jones and Joan Jones* [2011] EWCA Civ 824 ("*Jones*") and the decision of Morgan J in the Upper Tribunal in *Her Majesty's Revenue and Customs v European Brand Trading Limited* [2014] UKUT 0226 (TCC) ("*EBL*");

(e) however, it is still open to the First-tier Tribunal to find the relevant facts other than those on which the condemnation is based – see *EBL* at paragraphs [63], [67] and [69];

(f) as mentioned above, Section 152(b) of the CEMA provides that the Respondents may, as they see fit, restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts;

(g) Section 14(2) of the FA 1994 provides that a person in relation to whom, or on whose application, a decision under Section 152(b) of the CEMA has been made may require the Respondent to review that decision;

(h) Section 16(1) of the FA 1994 provides that the person who required the review may then appeal against the review decision;

(i) Section 16(4) FA 1994 provides that, in relation to any such appeal, the powers of the First-tier Tribunal are confined to a power, where the First-tier Tribunal is satisfied that that the decision could not reasonably have been arrived at, to direct that the decision is to cease to have effect

from such time as the First-tier Tribunal may determine, to require the Respondent to conduct, in accordance with the directions of the First-tier Tribunal, a further review of the original decision or, in the case of a decision which has already been acted on or taken effect, to declare the decision to have been unreasonable and to give directions to the Respondent as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future;

(j) the above provisions make it clear that the decision as to whether or not to restore a forfeited asset is a matter for the Respondent to determine at its discretion and that the First-tier Tribunal can disturb that decision only if it is unreasonable in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the First-tier Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondent has reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondent has reached a conclusion that no reasonable person could have reached, for example, by taking into account matters that it ought not to have taken into account or disregarding matters that it ought to have taken into account. The Respondent's decision cannot be impugned simply because the First-tier Tribunal or some other person might have reached a different conclusion on the relevant facts as properly understood. Moreover, if the First-tier Tribunal finds that the Respondent has acted unreasonably in the *Wednesbury* sense as described above, which was the conclusion reached by the First-tier Tribunal in relation to the initial review decision to refuse restoration, then it cannot substitute its own conclusion for the impugned decision. It can direct only that a further review takes place in accordance with its directions;

(k) it is for the Appellant to prove that the decision which is challenged is unreasonable in the sense described in *Wednesbury*, and not for the Respondent to prove that the opposite is true – see the decision of the First-tier Tribunal (Judge Huddleston and John Adrian FCA) in *McGeown International Limited v Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 407 (TC) at paragraphs [45] and [46];

(l) in considering the reasonableness or otherwise of the Respondent's decision in relation to restoration, the First-tier Tribunal should take into account the deemed facts (as described in paragraph 3(d) above) and, to the extent that they are not inconsistent with the deemed facts, the actual facts, as found by the First-tier Tribunal, in the latter case, even if those actual facts were unknown to the decision-maker at the time when the decision was made – see paragraphs [38] and [39] of the judgment of Pill LJ (with which Chadwick LJ agreed) in *Gora;* and

(m) in determining the actual facts in any particular case, the First-tier Tribunal may be precluded by the doctrine of issue estoppel from making a finding of fact if that fact is contrary to a fact that has been determined

in prior judicial proceedings – *see Arnold and others v National Westminster Bank plc* [1991] 2 A.C. 93 ("*Arnold*").

The review conclusions

5 4. In his review letter, Mr Brenton gave the following reasons for reaching his conclusion that the Respondent should offer to restore the Vehicle to the Appellant for a payment of £18,548.00:

(a) the policy of the Border Force is that a vehicle adapted for the purpose of concealing goods will not normally be restored but, in
10 exceptional circumstances, the vehicle may be restored for a fee which includes the cost of removing the adaptation;

(b) the policy should be applied firmly but not rigidly, so as to allow an exercise of discretion on a case by case basis and to ensure that his decision is not constrained by it;

15 (c) in reaching his conclusion, he had considered the events which occurred on the date of seizure, the evidence and findings of the First-tier Tribunal at the original hearing and all representations and other material that was available to the Border Force both before and after the original review decision but did not consider the legality or correctness of the
20 seizure itself;

(d) after reciting extracts from the decisions in *Jones* and *EBL* to the effect set out in paragraph 3(d) above, he noted that this meant that, in exercising his discretion, he was relying on the deemed fact that the Vehicle had been constructed, adapted, altered or fitted in a manner for
25 the purpose of concealing goods because that was the basis on which the Vehicle had been forfeited under Section 88 of the CEMA;

(e) he then went on to observe that, whilst the Appellant had accepted that the deemed fact referred to above was correct, in that the fuel tank had been modified for the purpose of concealing goods, the Appellant had
30 at all times asserted that the goods in question were solely unrebated fuel and that the purpose of concealing the unrebated fuel was to avoid the theft of that fuel;

(f) Mr Brenton then pointed out that the Appellant had produced no evidence to corroborate this assertion and that therefore the Appellant had
35 not discharged the burden of proving that to be the case. He went on to say that the Appellant's explanation was "wholly implausible" and that, in the opinion of the Border Force, the sole purpose of the modifications that had been made to the fuel tank was to conceal illicit goods;

(g) this meant that, if the Border Force's general policy were to be
40 applied in this case, the Vehicle would not be restored. In considering whether this case involved exceptional circumstances, he said that he did not think that the hardship suffered by the Appellant in this case was any

greater than the hardship suffered by anyone else whose vehicle was seized but noted that the Vehicle had been only 5 months old at the time of the seizure and that this was relevant in considering whether non-restoration would be disproportionate; and

(h) he concluded by saying that, "taking into account the findings of Judge Jones QC and all the evidence before me I am exceptionally prepared to restore the unit for a fee based on your knowledge and culpability in this case plus the costs involved in removing the fuel tank".

The witness evidence

5. At the hearing, I heard evidence from both Mr Pusinskas (for whom his representative, Ms Diminskyte, acted as interpreter) and Mr Brenton.

6. Mr Pusinskas maintained that, as a result of a prior theft of unrebated fuel from the tank while he was sleeping in the Vehicle one evening two or three years ago, he had decided to modify the fuel tank so as to create two separate tanks in order to conceal part of the fuel from prospective thieves. The modifications had been carried out in Lithuania when the Vehicle was being serviced. He said that it was never his intention to hide illicit goods in either of the tanks and pointed out that no such illicit goods had in fact been found at the time of seizure.

7. While I am aware of the fact that the First-tier Tribunal at the original hearing saw no reason to doubt Mr Pusinskas's assertions set out above, there were several aspects to his evidence which I found troubling. First, Mr Pusinskas alleged that he had reported the theft to the police and been given a report reference number but had lost the number. So he was unable to produce any evidence to corroborate the fact that the theft had occurred. Secondly, Mr Pusinskas was forced to concede that there would have been a cheaper, easier and quicker solution to avoiding potential thefts from the fuel tank than making the modifications in question – for example, the server unit through which the fuel passes from the tank to the engine could have been welded to the outside of the tank and access to the tank through the filler could have been prevented by the use of a cylindrical anti-filter device. Thirdly, Mr Pusinskas was unable to explain how the modifications in question actually served to avoid potential thefts. At the point when the Vehicle was seized, the whole of the fuel tank was freely accessible to potential thieves, either through the server unit or the filler.

8. In his evidence, Mr Brenton said that he had worked for over 45 years in aggregate for Customs and Excise and the Border Force and had been a front-line anti-smuggling officer for over 20 years. He therefore had vast experience of fuel tank adaptations and, in his view, the modifications in this case were commonly made for the purpose of smuggling illicit goods. Mr Brenton pointed out that the modifications to the fuel tank included an additional point of access to the fuel tank just behind the server unit and that this was a common device for hiding illicit goods.

9. Mr Brenton confirmed that the reasons for his decision to restore the Vehicle were the criticisms made of the Border Force in the Original Decision, the fact that nothing illicit had been found in the fuel tank at the time of seizure and the fact that

the Vehicle was very new at that time. He conceded that his decision might in fact be regarded as more lenient than it should have been.

10. Most significantly, Mr Brenton went on to say that, even if the assertion made by Mr Pusinskas was true, the modifications that had been made to the fuel tank meant that the Vehicle could easily be used for the future smuggling of goods and that there were sound policy reasons for discouraging such modifications by imposing a penalty for restoration over and above the modification removal costs. He said that, under general Border Force policy, even in a case where the operator of the vehicle in question had no intention of using the vehicle for smuggling illicit goods, the only situation where a vehicle with modifications such as these would be restored for no payment (apart from the modification removal costs) was where a vehicle which was on lease was to be restored to an owner who was not the operator and was unaware that the modifications had been made. In the case of a vehicle owned by the operator, even if the operator had no intention of using the modified fuel tank for smuggling illicit goods, general Border Force policy would be to require payment of a sum over and above the modification removal costs in order to deter both that operator and other operators.

11. Mr Brenton went on to explain how he had concluded that, leaving aside the modification removal costs of £548.00, £18,000 was the appropriate payment to be required in this case. The Vehicle had cost the Appellant €70,000.00, which, using the €/£ exchange rate on the date of seizure, equated to £60,000. £18,000.00 was 30% of that sum. He said that any penalty in a case of a modified fuel tank would need to be more than de minimis in order to achieve the desired deterrent effect referred to in paragraph 10 above. So something above 10% and in the 15% to 20% range would be the very least that one would expect in a case where the operator/owner had no intention of using the modified fuel tank for smuggling and he thought that, in the circumstances, 30% was, if anything, very lenient taking into account the present facts.

Discussion

12. The conclusions that I have drawn in relation to this matter are as follows.

13. I start by noting that, as is mentioned in paragraphs 3(j) and (k) above, I am not entitled to consider the position de novo and thus to reach a view on whether or not I agree with the conclusions set out in the review letter of 3 April 2017. Instead, I am confined to considering whether the decision of the Respondent set out in the review letter is so unreasonable that no reasonable person could have reached it, for example, because the Respondent took into account matters that it ought not to have taken into account or disregarded matters that it ought to have taken into account

14. In seeking to answer that question, I would start by saying that, in my view, despite saying that he had taken into account in reaching his review conclusion the directions made in the Original Decision, the matters which Mr Brenton took into account in reaching his review conclusion – as outlined in paragraph 4 above - did not entirely comply with those directions.

15. In this regard, I do not think that it matters that the review conclusion letter did not refer specifically to the directions set out at paragraphs [49](2), [49](4), [49](5) or [50] of the Original Decision. Those directions are arguably of limited relevance to the review conclusion and it is therefore sufficient in relation to those directions for the review conclusion letter to have referred generally to the directions in the Original Decision and not to have taken into account any facts that contradicted those directions.

16. However, the same cannot be said of the directions in paragraphs [49](1) and [49](3) of the Original Decision. Those paragraphs directed the reviewing officer to undertake his review on the basis that each fact asserted by the Appellant in his evidence was correct and that "the fuel tank had not been divided altered or configured for the purpose of concealing goods liable to duty and/or tax in, or upon entering into, this country".

17. I agree with the submission that has been made by the Respondent (both at the hearing and in response to my subsequent question in relation to issue estoppel) that an assertion made by the Appellant to the effect that the modifications were not for the purpose of concealing goods at all (as appears to be recorded at paragraph [42] of the Original Decision) was not one that the First-tier Tribunal in the Original Decision was entitled to direct the Respondent to take into account in its subsequent review (and therefore was not one that the Respondent was required to take into account in that subsequent review) because that assertion was clearly contrary to the deemed fact that the modifications were for the purpose of concealing goods – see paragraph 3(d) above. However, the First-tier Tribunal in the Original Decision was entitled to direct the Respondent to take into account in its subsequent review (and therefore the Respondent was required to take into account in that subsequent review) any assertion made by the Appellant that was not contrary to that deemed fact – such as the assertion that the modifications were for the purpose of concealing unrebated fuel from prospective thieves. This is because the only deemed fact arising pursuant to the operation of paragraph 5 of Schedule 3 to the CEMA and the decisions in *Gora*, *Jones* and *EBL* referred to in paragraph 3(d) above was that the Vehicle had been modified for the purpose of concealing goods. There is no necessary implication in the terms of Section 88 of the CEMA that the modifications in question need to be for the purpose of concealing illicit goods. In order for the section to apply, it is merely necessary for the modifications to have been made for the purpose of concealing goods. It therefore follows that the conclusion that the Vehicle had been duly condemned as forfeited leads merely to the deemed fact that the modifications were made for the purpose of concealing goods and does not require any deeming as to the nature of the goods that were intended to be concealed or the purpose of the Appellant in seeking to conceal the goods. Thus, the Appellant's assertion that his purpose in making the modifications was to conceal unrebated fuel from prospective thieves and not to conceal illicit goods from the UK authorities was not inconsistent with the fact that was required to be deemed pursuant to paragraph 5 of Schedule 3 to the CEMA.

18. It follows that, in the paragraph of the review conclusion letter commencing "However, no evidence was produced to corroborate this assertion" and the immediately following paragraph of the review conclusion letter commencing "If you were

concerned about the theft of fuel from the tank…", Mr Brenton departed from the directions given in the Original Decision by calling into question a fact that he was required to assume to be true – namely, that the purpose of the Appellant in making the modifications was to conceal unrebated fuel from prospective thieves and not to conceal illicit goods from the UK authorities. This means that, in reaching his decision, Mr Brenton failed to take into account a fact that he was required to take into account and instead took into account a fact that he was not entitled to take into account.

19. It is very difficult to determine the precise extent to which Mr Brenton's failure influenced the quantum of the restoration fee set out in the review conclusion letter. It is clear from the evidence that Mr Brenton gave at the hearing that, other than in a case where the vehicle in question is on lease and is being restored to an owner who is not the operator and was unaware that the modifications had been made, the general policy of the Border Force is to require a payment (in addition to the modification removal costs) of a more than de minimis amount on the restoration of a vehicle which has been modified, even if the intention of the operator in making the modifications is not to conceal illicit goods. This is for the simple reason that a vehicle so modified could be used in the future to smuggle illicit goods and therefore such modifications need to be discouraged by the imposition of a financial penalty regardless of the motive for the modifications. Mr Brenton stated that (apart from the modification removal costs) the payment required to be made in such a case would be anything from 15% to 20% of the value of the vehicle when seized. It seems to me that this policy is eminently reasonable.

20. And that general policy would suggest that, as a result of failing to take into account the motive for the modifications that he was required by the Original Decision to take into account, Mr Brenton alighted on a percentage that was too high (30%, instead of 15% to 20%) and applied that percentage to a value for the Vehicle on the date of seizure that made no allowance for the fact that the value of the Vehicle on that date would have been slightly below the original purchase price because the Vehicle had been in operation for 5 months by that time.

21. My conclusion is that, subject to the discussion which follows, the restoration price set out in the review conclusion letter was unreasonable in the *Wednesbury* sense because, in determining it, Mr Brenton imputed a motive to Mr Pusinskas that was contrary to directions given in the Original Decision which the First-tier Tribunal in the Original Decision was entitled to make and that that led him to determine too high a price for restoration.

22. That is not the end of the matter because, as I noted in paragraph 3(l) above, pursuant to the decision of the Court of Appeal in *Gora*, I am required to assess the reasonableness of Mr Brenton's decision not only by reference to the facts that were known to Mr Brenton at the time of his decision but also by reference to the facts that are determined pursuant to the proceedings before the First-tier Tribunal. To that end, during the course of the hearing, I had the opportunity to hear at first hand the evidence of both parties to this appeal and I was not persuaded that the reason given by Mr Pusinskas for the making of the modifications was true. As mentioned in

paragraph 7 above, there are certain aspects of Mr Pusinskas's evidence which I find troubling. So my conclusions in relation to the reason why the modifications were made are not the same as those reached by the First-tier Tribunal in the Original Decision. Based on the evidence that was presented to me, it is in my view more likely than not that the modifications in this case were made for the purpose of concealing illicit goods from the UK authorities and not for the purpose advanced by Mr Pusinskas.

23. It follows that, in my opinion, as long as I am not prevented from reaching my own view on the reason why the Appellant made the modifications that he did, then, even though Mr Brenton's review conclusion was based on a fact that was contrary to directions set out in the Original Decision which the First-tier Tribunal in the Original Decision was entitled to make – that is to say, the fact that the modifications were for the purpose of concealing illicit goods from the UK authorities - I would be entitled to take that very fact into account in assessing the reasonableness of Mr Brenton's review conclusion. And this means that, as long as I am not prevented from reaching my own view on the reason why the Appellant made the modifications that he did, the decision to restore the Vehicle to the Appellant for the restoration fee set out in the review conclusion letter would be reasonable in the *Wednesbury* sense. Indeed, it would be, if anything, very generous to the Appellant because an operator who has been complicit in the making of modifications for the purpose of concealing illicit goods from the UK authorities might very well expect restoration to be denied. An offer of restoration for an amount equal to 30% of the original purchase price plus the cost of removing the modifications would therefore be highly beneficial to the Appellant.

24. The above means that the answer in this case ultimately turns on whether I am entitled to make my own findings of fact in relation to the motive of Mr Pusinskas in making the modifications or whether I am estopped from doing so because that issue has already been argued before, and determined by, the First-tier Tribunal in the earlier hearing.

25. The doctrine of issue estoppel is described at some length in the judgment of Lord Keith in *Arnold*. Lord Keith noted as follows:

"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. This form of estoppel seems first to have appeared in *Duchess of Kingston's Case* (1776) 20 St.Tr. 355. A later instance is *Reg. v. Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 E. & B. 780. The name "issue estoppel" was first attributed to it by Higgins J. in the High Court of Australia in *Hoysted v. Federal Commissioner of Taxation* (1921) 29 C.L.R. 537, 561. It was adopted by Diplock L.J. in *Thoday v. Thoday* [1964] P. 181. Having described cause of action estoppel as one form of estoppel per rem judicatam, he said, at p. 198:

"The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate

issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."”

26. Lord Keith went on:

“In *Mills v. Cooper* [1967] 2 Q.B. 459 the question arose whether the respondent, having been found by magistrates not to have been a gypsy on a certain date upon which he had been charged with unlawfully encamping on a highway, had the protection of issue estoppel in relation to a similar charge relating to a later date. It was held that the status of gypsy was not an unalterable one, so that the respondent might well be a gypsy at one time though not at another. Diplock L.J. made the following general observation about issue estoppel, at pp. 468-469:

"That doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

In *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, 541, Lord Diplock said, with the concurrence of the other members of the House, that this passage had been adopted and approved by your Lordships' House in *Reg. v. Humphrys* [1977] A.C 1.”

27. In *Arnold*, the House of Lords held that issue estoppel did not apply because the circumstances of the case fell within the exception for situations where, in the subsequent case, a party was seeking to bring forward further relevant material that he could not by reasonable diligence have adduced in the earlier case.

28. It seems to me that, on the basis of the above description of the doctrine of issue estoppel, and in particular the passage from the judgment of Diplock LJ in *Mills v Cooper* [1967] 2 Q.B.459, it is not open to me at this stage to reach the conclusion that the motive of Mr Pusinskas in making the modifications that he did was anything other than as described in the Original Decision. It is quite clear that the issue of whether Mr Pusinskas was motivated by a desire to conceal illicit goods from the UK authorities or by a desire to conceal unrebated fuel from prospective thieves was something that was addressed in detail at the earlier hearing and, having read that decision and heard the arguments of the parties at the hearing before me and in their submissions following the hearing, I can see no basis for believing that I have been

presented with any new argument in relation to this issue that could not with reasonable due diligence on the part of the Respondent have been ventilated by the Respondent at the earlier hearing. This not a case like *Arnold*, where further relevant material which could not with due diligence have been raised by the Respondent in the original hearing has come to light since the original hearing. I have therefore concluded that I am not permitted at this stage to depart from the conclusion in relation to this issue that was drawn by the First-tier Tribunal in that case.

29. In its submissions following the hearing, the Respondent sought to persuade me that I should not consider myself to be estopped from reaching my own conclusion on this question because:

(a) Lord Keith in *Arnold* referred to the fact that there may be an exception to issue estoppel in certain "special circumstances", where an inflexible application of the doctrine may give rise to injustice and this point was repeated by Lord Sumption in paragraph [22] of his decision in *Virgin Atlantic Airways Ltd v Zodiac Seats U.K. Ltd* [2013] UKSC 46 ("*Virgin*"). The Respondent argues that, in the present case, injustice would be caused if I were to consider myself to be estopped from reaching my own conclusion on the purpose of the Appellant in making the modifications because the direction made at paragraph [49](3) of the Original Decision – to the effect that the Appellant's purpose in making the modifications was not to "[conceal] goods liable to duty and/or tax in, or upon entering into, this country" – followed on from, and was therefore infected by, the direction in paragraph [49](1) to the effect that every fact asserted by the Appellant, including the fact that the modifications were not for the purpose of concealing goods at all (see paragraph [42] of the Original Decision), should be found to be proved. The Respondent says that, as this latter fact was not a fact that the First-tier Tribunal in the Original Decision was entitled to find because it was contrary to a deemed fact that the First-tier Tribunal in the Original Decision was required to find, the subsequent finding to the effect that the Appellant's purpose in making the modifications was to conceal unrebated fuel from prospective thieves was based on a mistake of law and this amounts to "special circumstances" of the nature mentioned by Lord Keith in *Arnold* and Lord Sumption in *Virgin*; and

(b) in any event, the direction made at paragraph [49](3) of the Original Decision is to the effect that "the fuel tank had not been divided, altered or configured for the purpose of concealing goods liable to duty and/or tax in, or upon entering into, this country". The direction therefore does not preclude a finding that the Appellant made the modifications for the purpose of concealing goods which, although not liable to duty or tax in, or upon entering into, the UK, are nevertheless "not legal". Thus, even if I consider myself to be estopped from finding that the purpose of the Appellant in making the modifications was to conceal goods that were liable to duty and/or tax in, or upon entering into, the UK, it is still open to me to reach the conclusion that the purpose of the Appellant in making the

modifications was to conceal goods that were "not legal" for some other reason.

30. I am not persuaded by either of these submissions because I think that they involve focusing on an overly-literal construction of isolated sentences within the Original Decision without taking into account the thrust of the Original Decision as a whole.

31. As regards the first argument, I consider that, when the language used in paragraph [42] of the Original Decision is viewed in the context of the Original Decision as a whole, the paragraph, whilst infelicitously worded, is seeking to say no more than that the purpose of the Appellant in making the modifications was not to conceal rebated fuel from the UK tax authorities. This conclusion is supported by the fact that the First-tier Tribunal, in the Original Decision, clearly accepted that the purpose of the Appellant in making the modifications was to conceal goods - namely to conceal unrebated fuel from prospective thieves. In this regard, see, in particular, paragraphs [32], [36], [39], [40] and [49](1) of the Original Decision.

32. A similar point arises in relation to the second argument. It is true that paragraph [49](3) of the Original Decision merely says that the purpose of the Appellant in making the modifications was not to conceal goods which were liable to duty and/or tax in, or upon entering into, the UK. However, paragraph [49](1) of the Original Decision, when taken together with the other paragraphs of the Original Decision mentioned in paragraph 31 above, makes it clear that this was because the First-tier Tribunal had already accepted the Appellant's explanation of his purpose in making the modifications, which was to conceal unrebated fuel from prospective thieves. So I do not think that I am permitted to construe the language used in paragraph [49](3) in isolation to allow me to find that the purpose of the Appellant in making the modifications was to conceal goods that, although not liable to duty and/or tax in, or upon entering into, the UK, were "not legal" for some other reason.

33. In short, if one reads the Original Decision as a whole, without picking out sentences in isolation, it is apparent that the question as to the purpose of the Appellant in making the modifications was addressed thoroughly before the First-tier Tribunal at the original hearing and that, in answering that question, the First-tier Tribunal at the original hearing accepted the Appellant's explanation that the modifications were made for the purpose of concealing unrebated fuel from prospective thieves.

34. The above means that, notwithstanding the view that I have reached in relation to that issue myself on the basis of the evidence presented at the hearing before me, I consider that I am bound to approach the question of whether or not the decision of Mr Brenton was reasonable in the *Wednesbury* sense by assuming that the motive of Mr Pusinskas in making the modifications was to conceal unrebated fuel from potential thieves.

35. That in turn means that, as I have mentioned at paragraph 21 above, I do not think that the offer made in the review conclusion letter was reasonable in the *Wednesbury* sense.

Conclusion

36. For the above reasons, I uphold this appeal and determine that the conclusions set out in the review letter of 3 April 2017 shall cease to have effect from the date of this decision. I also direct that a further review of the decision in relation to the restoration of the Vehicle to the Appellant be made and that such further review be conducted in accordance with those directions set out in the Original Decision which the First-tier Tribunal was entitled to make – that is to say, those directions to the extent that any fact which those directions require to be taken into account is not inconsistent with a fact that is required by the operation of paragraph 5 of Schedule 3 to the CEMA and the decisions in *Gora*, *Jones* and *EBL* referred to in paragraph 3(d) above to be deemed to be true - and such other matters as are relevant to the review conclusion and are not inconsistent with those directions set out in the Original Decision which the First-tier Tribunal was entitled to make.

37. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 20 June 2018