[2019] UKFTT 301 (TC)
TC07129

CUSTOMS – import of animal products – Trade in Animal and Related Product Regulations 2011 – imported outside a designated border inspect point – without a Common Veterinary Entry Document – decision not to restore seized and forfeit goods (s16 Finance Act 1994) – jurisdiction of tribunal to consider application of regulation 20 TARP – implication on decision not to restore – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00730

BETWEEN

DRUGSRUS LTD **Appellant**

-and-

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE AMANDA BROWN
REBECCA NEWNS

Sitting in public at 88 Rosebery Avenue, London on 4 April 2019

Mr V Shah, director of the Appellant, for the Appellant

Mr J Jackson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. This appeal concerns the refusal of Border Force ("**BF**") to restore 1000kg of Nestle Modulen IBD 4006 Powder (the "**Goods**") seized on 14 July 2016 at Dover. The decision was initially reviewed and upheld by letter dated 14 November 2016. That decision was itself the subject of a re-review the conclusion of which, to uphold the decision to refuse restoration, was communicated on 27 November 2017 (the "**Decision**"). This appeal is an appeal against that latter decision.

2. BF seized the Goods on the basis that they were animal related products which, pursuant to the Trade in Animals and Related Products Regulations 2011 ("**TARP Regulations**") were required to have been imported into the EU through a designated border inspection post ("**BIP**") following the appropriate procedures provided for under TARP. Drugsrus Ltd (the "**Appellant**") contends that the Goods should have been redispatched to the place from which they were imported (in this case Turkey) under the TARP provisions and BFs failure to recognise and apply the provisions was a relevant factor in connection with the decision to restore.

FACTUAL BACKGROUND

3. The Appellant is engaged in the wholesaling of medical products. The Goods are a milk based protein power for used as a sole source of nutrition during the active phase of Crohn's disease and as nutritional support during the remission phase. The product is sold in sealed and tamper proof tins which have a shelf life of approximately 2 years.

4. The Appellant had historically bought and sold the Goods purchasing directly from the manufacturer in the Netherlands. However, certain products may be marketed for sale in a number of jurisdictions at different prices. In a process known as parallel imports a wholesaler may purchase suitably packaged and labelled product from a lower priced jurisdiction and resell them in a higher priced jurisdiction. The Appellant identified that the Modulen IBD manufactured for Turkey was appropriately labelled for sale in the UK but at a lower price.

5. There is no dispute that the Goods are milk based products and are therefore products which are subject to the TARP Regulations.

6. On 1 July 2016 the Appellant purchased 1000kg of the Goods from a supplier in Turkey and arranged for them to be shipped to the UK. The Goods were transited by land and, it is understood, entered the EU at the Turkish/Bulgarian border. No import procedures appear to have been undertaken at that border or at any intra community border.

7. On 14 July 2016 the Goods arrived at Dover. The shipment was unloaded, detailed and inspected.

8. The Appellant was notified on 18 July 2016 of the seizure. The Notice of Seizure informed the Appellant that the Goods had been seized as liable to forfeiture under section 49(1)(b) Customs and Excise Management Act 1979 on the grounds that they had been imported contrary to the prohibition and procedures imposed under the TARP Regulations. The Notice also informed the Appellant that if they wanted to contest the seizure they had one month in which to do so. The Appellant was warned that failing to make a claim contesting forfeiture would result in the goods being condemned as forfeit. Notice 12A "what you can do if things are seized" accompanied the notification of seizure.

9. BF were clear, at the hearing of this matter, that there was no allegation that the Appellant had attempted to import the Goods deliberately seeking to circumvent import procedures.

10. Following receipt of the notice of seizure and accompanying documentation, on 21 July 2016, the Appellant telephoned BF and followed up with an email providing high level information on the basis of establishing compliance with the provisions of the EU regulations giving rise to the TARP Regulations and requesting release of the Goods.

11. This email was forwarded, by BF, to the Animal and Plant Health Agency ("**APHA**") referencing a communication between BF and APHA on 14 July 2016 (the date the Goods had arrived at Dover). BF requested that APHA communicate directly with the Appellant and explain why the Goods could not be released.

12. BF produced the email chain between themselves and APHA. The chain was not copied to the Appellant and it does not appear that APHA, certainly at that point, or in connection with that chain of correspondence, to have contacted the Appellant as requested by BF. The chain reveals a certain level of miscommunication between BF and APHA, for instance APHA initially considered that the authorities at Dover should have undertaken the required TARP procedures as the designated BIP failing to recognise that Dover is not, in fact, a BIP. Somewhat oddly given that BF are seeking guidance on the application of the TARP Regulations from APHA, it is BF which explains to APHA what the rules are.

13. The email chain acknowledges:

> "If the Products of Animal Origin arrive at Dover from outside the EU without having been inspected at a BIP then they are liable to seizure under the prohibition imposed by the Trade in Animals and Related Products Regulations (TARP) 2011. This is what we have done in this case. There are few options left to us but to destroy the goods. In the past DEFRA have exceptionally allowed re-export back to the country of origin (in this case I assume it would be Turkey not the Netherlands) under similar transit procedure that they arrived in Dover but this is commonly disallowed if the goods do not remain on the same vehicle that they arrived on. In this case they have been offloaded and are on our secure cage."

14. The response of the same date from APHA states: "I would not recommend exporting them back … Therefore you are well within your rights to destroy the product in question".

15. Based on that response BF respond to the Appellant on 22 July 2016 stating:

> "I have discussed this with Mr Kirkpatrick of the Animal and Plant Health Agency (APHA) and there is really nothing further that can be done to resolve this problem apart from the production of an acceptable CVED obtained at the Turkish border when they arrived in the EU. This cannot be obtained retrospectively and the goods cannot travel any further without one. If this cannot be produced the goods will be destroyed."

16. The Goods were destroyed on 4 August 2016. As set out below the fact of destruction was not notified to the Appellant at the time but was confirmed to them on 14 November 2016.

17. On 16 August 2016 the Appellant wrote to BF. The Appellant claimed that the aim of the TARP Regulations was to prevent the importation of goods unsafe for human consumption and that the Goods were clearly not such products. The Appellant drew BF's attention to the provisions of regulation 20 of the TARP Regulations inviting BF to return the Goods to the country of dispatch i.e. Turkey. As at the date of the letter the Appellant was however, concerned to establish whether the Goods had already been destroyed and therefore, in the event that they had, requested payment of £33,388.02 by way of compensation based on the trade price of the Goods.

18. Notice of Claim challenging the legality of seizure was also served on 16 August 2016.

19. Also on 16 August 2016 the Appellant contacted the APHA. The Appellant asked for confirmation as to whether the Goods could be sent back to Turkey in accordance with the TARP Regulations.

20. On 17 August 2017, the same officer as had corresponded with BF responded to the Appellant confirming "yes the product can be sent back to issuing country of origin as I have confirmed".

21. By letter dated 6 September 2016 BF notified the Appellant that the BF policy was not to restore prohibited or restricted items but that each case was looked at on its merits to consider whether there were any exceptional circumstances that would warrant departure from the policy. On the basis of the circumstances of seizure the officer did not consider there were any exceptional circumstances. The Notice of Claim was acknowledged.

22. The commencement of the condemnation proceedings was notified on 8 September 2016.

23. By letter dated 17 October 2016 the Appellant notified BF that they had received written confirmation that the Goods could have been redispatched back to Turkey and requested return of the Goods or compensation. A review of the refusal to restore was requested.

24. The first review decision was issued on 14 November 2016. That decision confirmed that:

(1) BF policy was not to restore goods seized but indicated that the policy was nevertheless applied on a case by case basis by reference to individual facts

(2) the legality of seizure was assumed for the purposes of the decision on restoration

(3) as the Goods had not been declared as products of animal origin and no notice of importation had been given to a BIP with no adequate explanation for the failure there were no exceptional circumstances justifying restoration.

25. The review decision also challenged that the Appellant had failed to identify the legislation which it was contended supported the redispatch of the Goods to the country of origin.

26. That decision was the subject of an appeal to the Tribunal on 13 December 2016. The appeal was acknowledged under reference TC/2017/126.

27. The Tribunal was provided a copy of a letter from the Home Office to the Appellant dated 22 March 2017 in which the Appellant was notified that the condemnation proceedings in respect of the Goods had been listed at Canterbury Magistrates' Court on 4 April 2017. Included with the letter was the formal court summons dated 15 February 2016. The letter states:

> "The purpose of the hearing is simply for you to indicate whether or not you wish to proceed with your claim. If you indicate that you do want to proceed, the court will fix another date for a fully contested hearing. …
>
> If you fail to give an indication one way or the other, the Home Office will ask the Magistrates to condemn the goods in your absence and may also seek costs to be awarded against you.
>
> Should you wish to continue with your appeal but would rather not attend court on the first hearing date, you should write to the Chief Clerk of the Magistrates' Court asking for your attendance to be excused. You must make it clear that you want the case set down for a contested hearing and include any dates to avoid."

28. The Appellant contends that it never received this notification and was unaware of the listed hearing. Given the detailed attention given to the matter by the Appellant throughout the

period from seizure to the date of the hearing, the Tribunal, so far as it is relevant, accepts that the summons was not received by the Appellant.

29. On 4 April 2017, with no attendance of the Appellant at the condemnation proceedings, the Goods were condemned on the basis that the goods were liable to forfeiture on the grounds that they were imported contrary to the prohibitions/restrictions contained in regulations 13 – 15 and 19 of the TARP Regulations. It not apparent from the documentation available that when the judgment of the Magistrate was communicated that the Appellant was notified of its rights of appeal by way of case stated.

30. The Tribunal was shown a copy of an email prepared by a DEFRA lawyer dated 6 September 2017 and sent to an officer of the Home Office. The Tribunal was provided with no information as to what precisely prompted the request by the Home Office however, the papers available would appear to indicate it followed a request from the Appellant that they be provided with communications between the APHA and BF at the time of seizure referenced in the first review officer's witness statement. The email prepared by the DEFRA lawyer considers the TARP Regulations and provides the explanation for the advice provided by APHA to BF in July 2016. The recommendation that redispatch was not possible and that BF were within their right to destroy the Goods was explained as follows:

> "The products did not come into the UK through a BIP and it was not clear whether they had come through any BIP on their journey from Turkey (i.e. one on the Turkish/EU border). However, even if they had and redispatch from the Turkish/EU BIP was possible, it would not have been possible to allow the transit of a non-compliant consignment over the territories of multiple member states without obtaining the permission of each member state.
>
> Further, although this was not expressly considered by the APHA at the time, given that the products had been unloaded (apparently at the importer's agent's request) and stored in another area, it would also not have been possible to use the same means of transport for dispatch, if this is taken to mean the exact same means of transport."

31. On 2 October 2017 this email was provided to the Appellant and, at the same time, of its own volition, BF determined to re-review the decision to refuse restoration.

32. The Appellant provided a restatement of its position regarding the fitness of the Goods for consumption, and an expansive recitation of its position on the application of the TARP Regulations, in particular the requirement in Regulations 19 and 20 that where goods are seized in circumstances in which goods are bought into England other than through a BIP, BF must first require the Goods to be redispatched and only if that is impossible should they be destroyed.

33. The offer of a re-review bought to an end the tribunal proceedings TC/2017/126.

34. The decision on re-review was issued on 27 November 2017. That decision confirmed the refusal to restore on the basis that:

(1) Dover is not a BIP and as such the Goods could never have been legally imported through Dover;

(2) Un-knowing non-compliance with UK customs procedures in relation to the Goods could not constitute a reasonable excuse for failure to comply with the relevant procedures;

(3) Having failed to attend the condemnation proceedings liability to forfeiture could no longer be contested;

(4) The policy of destroying food products as quickly as possible had been notified to the Appellant at the time of seizure;

(5) There was no exceptional circumstances that would justify non-adherence to the policy of non-restoration; and

(6) "It is not BF practice to re-export goods in these circumstances"

35. The present appeal is an appeal against the re-reviewed decision.

RELEVANT LEGISLATIVE PROVISIONS

Trade in Animal and Related Products Regulations 2011

36. Pursuant to regulation 13 of the TARP Regulations no animal related product (as specified in Commission Decision 2007/275/EC) may be brought into England from a country outside the EU other than at a BIP designated for that animal or product. Regulation 11 defines BIP by reference to ports and airports approved as such by the European Commission.

37. The person responsible for a consignment of animal products must give advance notification of the arrival of the consignment by completion and submission of Part 1 of the Common Veterinary Entry Document ("**CVED**") (as specified in Commission Regulation EC No 136/2004) (regulation 14) in accordance with the procedure set out in regulation 15.

38. Regulations 19 and 20 provide:

> **19 Unchecked consignments**
>
> The enforcement authority must seize any consignment:
>
> (a) bought into England other than through a border inspection post approved for that animal or product
>
> (b) removed from a border inspection post without a CVED or the authority of the official veterinary surgeon at the border inspection post; or
>
> (c) transported from the border inspection post to a destination other than that specified in the CVED
>
> **20 Action following failure of checks or seizure – products**
>
> (1) …
>
> (b) where heath conditions permit, require the person in charge of the consignment to redispatch the product outside the European Union from the same border inspection post to a destination agreed with the person responsible for the consignment, using the same means of transport, within a maximum time limit of 60 days; or
>
> (c) if the person responsible for the consignment gives immediate agreement, redispatch is impossible or the 60 day time limit has elapsed, destroy the products.
>
> (2) Pending redispatch … the person responsible for the consignment must store the consignment under the supervision of the enforcement agency at the expense of the person responsible for the consignment.
>
> (3) If a consignment is seized outside a border inspection post under regulation 19 the enforcement agency must …
>
> (b) act in accordance with sub-paragraph (b) or (c) of paragraph (1) of this regulation.

39. There is a right of appeal in respect of decisions taken by the enforcement authority under regulation 20 by way of a complaint to the Magistrates' Court within one month of the decision.

Customs & Excise Management Act 1979 ("CEMA")

40. Section 49 provides that any goods imported, landed or unloaded contrary to a prohibition or restriction shall be liable to forfeiture.

41. Pursuant to section 139 anything liable to forfeiture may be seized by an officer.

42. By virtue of s152 CEMA goods liable to seizure or forfeiture may be restored, in this case, by BF, as they see fit.

43. The owner of goods is provided a right to challenge the legality of seizure only through a claim made to the Magistrates' Court under paragraph 3 Schedule 3 of CEMA.

Finance Act 1994

44. The procedure for challenging decisions refusing or placing restrictions on restoration is prescribed in the Finance Act 1994. All decisions are initially required to be subject to review by, in this case, BF. The review decision is then subject to appeal to the Tribunal.

45. Decisions taken on restoration are categorised as "ancillary matters" by virtue of section 16(8) and Schedule 5 paragraph 2(1)(r). The jurisdiction of Tribunal in relation to appeals in relation to ancillary matters is limited:

> (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 and 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 have arrived at it, to do one or more of the following, that is to say:
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedies by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable situations arise in the future

NOTICE 12A

46. So far as is relevant Notice 12A provides:

> "**1.3 More Help**
>
> If you need general advice … you should phone the HMRC helpline …
>
> **2 What to do if you have had something seized**
>
> **2.1 Your options if you disagree with the seizure**
>
> If you have had something seized by HMRC or Border Force and you don't accept there was a legal right to seize it and you want them to consider returning it, you have 3 options. You can:
>
> (a) challenge the legality of the seizure by sending a notice of claim to HMRC or Border Force (see section 3 below)

(b) write to HMRC or Border Force asking for the thing to be returned to you been if you accept it was ceased legally. This is called restoration. (See section 4 below)

(c) do both of the above …

3 How to challenge HMRC or Border Force's legal right to seize something

3.1 Circumstances when you can challenge a seizure

If you believe something should not have been seized, you can challenge the legality of the seizure. That will lead to a court hearing where HMRC or Border Force had to prove the seizure is lawful. The burden is on the claimant to prove the goods are duty paid.

You may believe that HMRC or Border Force had no legal right to seize something because, for example … goods were not prohibited or restricted.

…

3.3 How to challenge the seizure

You can challenge the seizure by sending a note of claim to HMRC or Border Force, depending on who made the seizure, setting out the reason for your challenge. …

In legal terms, by making a notice of claim you are asking HMRC or Border Force to start court action known as condemnation proceedings …

3.4 Time limit for challenging the seizure

HMRC or Border Force must receive your notice of claim within one calendar month of the date of seizure shown on the seizure information notice or the date of the notice of seizure. If HMRC or Border Force doesn't receive a notice of claim within the time limit, you will not be able to challenge the legality of seizure.

…

3.7 What happens when HMRC or Border Force receives a notice of claim

When HMRC or Border Force receives a notice of claim, they apply to the appropriate court for condemnation proceedings, which is a process for dealing with a claim against seizure. HMRC or Border Force will apply to the court as soon as possible, in most cases within 6 months… The court then sends you details of when and where the hearing will take place. The type of court and the document you receive with details of the hearing varies depending on where in the UK the goods were seized. Condemnation proceedings for things seized in: England and Wales are usually held in a magistrates' court and you will receive a summons …

3.8 What happens at the court hearing

You'll be asked to confirm on oath that you owned the thing at the time it was seized. HMRC or Border Force will present their evidence showing why they think the thing was seized and you will be able to tell the court why you disagree. The magistrate then decides whether HMRC or Border Force was right to make the seizure.…

3.12 What happens if you are successful in the condemnation proceedings

If the court decides in your favour, the seized thing will be returned to you. If HMRC or Border Force has already disposed of the seized thing, the owner has a right to ask for compensation …

3.14 You change your mind during the process

…

If you withdraw your challenge, you are accepting the seizure was lawful and the seized things will be condemned.

4 If you want HMRC or Border Force to return the seized things

4.1 HMRC or Border Force policy to return seized things

HMRC and Border Force's general policy us not to return seized excise goods (such as alcohol or tobacco products), vehicles used for commercial smuggling or anything that is prohibited (such as illegal drugs, offensive weapons or endangered plant and animal species). However, they will consider all requests for the return of seized things and take all relevant facts into account.

…

If you want goods returned because you believe they should not have been seized in the first place, perhaps because you claim excise goods for your 'own use', the only avenue open to you is to challenge the legality if the seizure by sending a notice of claim (section 3). You can't use the restoration process for this.

4.6 When seized things are disposed of

HMRC or Border Force will dispose of perishable goods (including tobacco, beer and all food products) as quickly as possible. …

If the seized thing has been destroyed, HMRC or Border Force can't restore it to you but they will usually offer you an appropriate payment instead.

SUBMISSIONS

47. In summary, the Appellant contends:

(1) Regulation 20 of the TARP Regulations requires that unless health conditions prevent redispatch the goods are required to be redispatched and only where redispatch is impossible or where the owner of the goods consents should the Goods be destroyed.

(2) The decision to destroy was disproportionate as the Goods themselves were not immediately perishable and the cost of storing them pending redispatch was minimal.

(3) The review was biased seeking to support the decision to destroy on the basis that the TARP Regulations provided for re-export in preference to destruction.

48. BF contend:

(1) The Goods had been legally seized and as a consequence of the judgment in *HMRC v Jones* [2011] EWCA Civ 824 the legality of seizure cannot be challenged in an appeal concerning restoration.

(2) Redispatch of the Goods was impossible as they could not be redispatched from the BIP of import (as Dover was not a BIP) and the same means of transport could not be used as a consequence of the Goods having been unloaded.

(3) The decision on restoration had been taken by reference to the individual circumstances of the Appellant and not by reference only to the general policy.

(4) The Appellant's ignorance of the correct import procedures did not represent either a reasonable excuse or an exceptional circumstance justifying departure from the general policy of non-restoration. BF also relied on the guidance given to them by APHA.

(5) The decision of BF was proportionate given the potential risk to health associated with the importation of goods for human consumption.

DISCUSSION

Tribunal's jurisdiction

49. The Appellant's rights of challenge in relation to the seizure, refusal of redispatch and refusal to restore lie independently of one another.

50. The right to challenge seizure is by way of claim made to BF which then requires BF to begin condemnation proceedings in the Magistrates' Court under paragraph 3 Schedule 3 CEMA.

51. The Appellant made such a claim and condemnation proceedings were bought before Canterbury Magistrates on 4 April 2017. The Appellant did not attend those proceedings, though as stated in paragraph 28 it is said, and accepted by this Tribunal, that was because they did not receive the notice informing them of the hearing. However, their non-attendance came about it is clear from the case of *Jones* that this Tribunal has no jurisdiction to consider the legality of the seizure. This Tribunal must proceed on the assumption that the Goods were legally seized and condemned.

52. By virtue of regulation 24 of the TARP Regulations it is again the Magistrates' Court that has jurisdiction to consider the legality of BF's actions in connection with the decision under regulation 20(3) and in particular whether the Goods could or should have been redispatched or destroyed. It appears to this Tribunal that an appeal under regulation 24 is free standing and independent of the notice of claim provided for under paragraph 3 Schedule 3 CEMA the two procedures requiring separate and distinct actions by a complainant both within one month but by reference to different start points.

53. Under regulation 24 the Appellant had one month from the decision complained of to bring its complaint before the Magistrates' Court. It is not entirely clear when that month ran from. Most logically it ran from the date on which the Goods were destroyed but as their destruction was not confirmed to the Appellant until 14 November 2016 it is conceivable that the time limit did not run against the Appellant before that date. However, to a degree such rumination is of little import as, by analogy with *Jones*, the Appellant may not challenge the decision to destroy in this appeal.

54. The jurisdiction of this Tribunal is limited to considering the basis on which it was determined that restoration would be refused. Under s16(4) Finance Act 1994, the Tribunal can only disturb BF's decision if the Tribunal is satisfied that the person making the decision could not reasonably have arrived at it.

55. The test to be applied in determining whether the decision is one that was reasonably (or rather unreasonably) made is to ask whether the decision is one which no reasonable decision maker could have arrived at, or whether the decision maker failed to have regard to all relevant considerations or took into account irrelevant considerations.

Evgeny Tkachenko

56. There is a single previous decision of the First-tier Tribunal and no higher authority on the application of the TARP Regulations.

57. Like the present case, *Evgeny Tkachenko* [2017] UKFTT 0701 concerned the importation of milk based food supplements through a port of entry that was not designated as a BIP. In that case there was no notice of claim.

58. Paragraph 35 sets out a summary of the evidence given in that case:

> "Officer Perkins said in her evidence … The Respondent's policy on restoration had not been placed before the Tribunal. The Respondent's practice is only ever to provide a summary of the policy. Animal products and foodstuffs may contain diseases or otherwise be hazardous. Under the correct importation procedure, an importer would give pre-notification to the Respondent of the arrival of the goods at an appropriate designated airport. On arrival, the Respondents may decide to subject the goods to tests before deciding whether or not the goods are safe to be imported. Officer Perkins was not certain who paid for the cost of tests when goods are tested on arrival by the Respondents, but understood that the importer paid for storage and tests. She accepted that this was a case in which the importer had not attempted surreptitiously to circumvent the import procedures. It is possible for the Respondents to restore seized goods unconditionally or upon payment for a fee. The Respondent is able to grant an import permit retrospectively. The Respondent could also restore the goods on condition that they be re-exported from the UK, although this was not the Respondent's general policy."

59. The Tribunal in *Evgeny Tkachenko* considered BF's application of general policy as follows:

> "39. In making a decision of this kind, the decision maker is entitled to have regard to any applicable policy of the Respondent dealing with the manner in which the restoration power is normally to be exercised. Indeed, it may be unreasonable for a decision maker to fail to have regard to any such policy.
>
> 40. Where the Respondent has such a policy, and where the decision maker takes it into account in making the decision, the decision may also be one that could not reasonably have been arrived at in circumstances where the decision is based on an incorrect understanding of the terms of the policy.
>
> 41. Where the Respondent has such a policy, the decision maker, while taking the policy into account, must still look at each case on its own merits. The 12 May 2016 and 20 June 2016 decisions of the Respondent recognised that this is the case.
>
> 42. The decision maker has a range of possible responses to a request for restoration. The Respondent could refuse restoration at all, or could restore upon payment of an amount representing a small part of the value of the seized goods, or upon payment representing a large part or whole of the value of the seized goods. The Respondent therefore has the ability to exercise the restoration power in a flexible way to treat more serious cases more severely, and less serious cases less severely.
>
> 43. Officer Perkins acknowledged that the Respondent is able to grant an import permit retrospectively, and may restore goods on condition that they be re-exported from the UK. This adds additional flexibility to the range of the Respondent's possible responses to a request for restoration.…

> 45. In the present case, in deciding whether or not to grant restoration, the Tribunal considers that the matters referred to in the previous three paragraphs … were clearly relevant considerations. If the Respondent's policy expressly dealt with all such circumstances, then it may have been sufficient for the decision maker to apply the policy, and to note that the present case presents no particular circumstances that take it outside the terms of the general policy. However, the Respondent has not produced its policy in these proceedings, and the very short summary of the policy set out in the challenged decisions does not indicate that the policy itself does address all of these types of considerations. In the circumstances, the decision itself should by its own wording show that all of these circumstances have been considered and taken into account."

60. Again, as in the present case, BF had determined only that no exceptional circumstances existed justifying departure from the general policy of non-restoration. Similarly BF were not prepared to accept that a lack of knowledge of the relevant importation procedures represented a reasonable excuse for failure to comply with them.

61. Mr Tkachenko was able to establish to the satisfaction of the Tribunal that the goods in question in that case were goods which had been traded freely within the EU.

62. Interestingly, in the context of the present appeal, despite having been seized on 12 May 2016 the goods imported by Mr Tkachenko were not destroyed and were still in existence in September 2017 when the matter was heard before the Tribunal.

63. The Tribunal accepted that ignorance of the relevant customs procedures did not provide a basis on which to challenge the restoration decision. However, the Tribunal directed that the review decision cease to have effect and a further review was ordered taking account of all the relevant circumstances, in particular: that the goods of the type ceased were in free circulation in the EU, that Mr Tkachenko had indicated that a satisfactory outcome was for the goods to be restored on the basis that they be re-exported to Germany (the goods having been imported from Japan) and that the appropriate import procedures would be followed on importation into Germany. The Tribunal "noted that that appeared to be a pragmatic solution. However, the new decision will be a matter for the Respondent".

Analysis

64. This matter is a complex one to unravel. There is no question that when the Goods arrived at Dover in circumstances where their arrival had not been notified and without completion of part 1 of the CVED the importation procedures provided for under the TARP Regulations had been breached and the goods were liable to seizure. BF could have also seized the vehicle on which the Goods were transported but they did not. The Goods were unloaded and put into storage.

65. The similarities between the underlying facts of Mr Tkachenko's case and that of the Appellant are striking:

(1) Both cases concern milk based food supplements

(2) The goods of the type in question were in free circulation in other member states (in the case of the Appellant the goods were otherwise in free circulation in the UK)

(3) Neither place of entry was a designated BIP

(4) BF's general policy is to refuse restoration of foodstuffs.

66. However, there are some very striking and material differences:

Evgeny Tkachenko	Drugsrus
Acceptance by BF that an import permit may be granted retrospectively	A clear statement that to retrospection is permissible
The milk based food products were not destroyed but were stored for a period in excess of 12 months	An apparent policy that foodstuffs (even those with a 2 year shelf life) must be destroyed as soon as possible
Acceptance by BF that restoration may be made on the basis of re-export	A conclusion that redispatch was "impossible"

67. As was the case in *Evgeny Tkachenko* there is limited evidence of BF policy on both destruction and restoration. The policy as notified in Notice 12A is limited to two lines to the effect that perishable goods and foodstuff will be destroyed as soon as possible and are not normally the subject of a positive restoration decision.

68. The decisions vis a vis the Goods in the present case appear to have been taken on the basis that there was no option but to destroy the Goods and destruction took place three weeks after seizure and well within the one month during which seizure could be challenged and despite the fact that the Goods were labelled as goods for the UK market, identical to goods in free circulation in the UK and with a shelf life in excess of two years. These latter facts having been communicated to BF by the Appellant within days of seizure and before destruction.

69. As is apparent from the excepts of Notice 12A set out in paragraph 46 above importers of seized items are given clear and unambiguous information as to how to challenge the legality of seizure and how to seek restoration. The Notice is however, silent as to rights of appeal against a decision to destroy or to refuse redispatch of animal related products under the TARP Regulations. Guidance, found by the Tribunal, and issued to those responsible for inspection and control, including BF, states that when issuing a notice of seizure under regulation 19 or a decision to destroy under regulations 20 or 21 "the enforcement officer should provide the importer with details of why the consignment has been seized, who to complain to and what the rights of appeal are". That best practice was clearly not followed by BF when deciding to destroy the Goods. No notification was given to the Appellant of its rights of appeal under regulation 24 and destruction took place within 60 days of arrival in circumstances where there was no official veterinary evidence that the Goods posed a risk to health and in which there was positive evidence that the Goods were of a type which were unlikely to pose such a risk.

70. BF, having sought confirmation of their own view as to the rights and obligations under regulation 20(3) of the TARP Regulations, considered that redispatch was impossible. However, the same officer at APHA had also provided confirmation to the Appellant that redispatch was possible. This conflict in advice was available to both the original reviewing officer and the officer responsible for the re-review but is not addressed in either the review or re-reviewed decisions. The conflict in advice does not also appear to have been bought to the attention of the DEFRA lawyer either.

71. This Tribunal has no jurisdiction to determine whether redispatch was impossible. The Tribunal may, however, take note that in *Evgeny Tkachenko* Mr Tkachenko was advised by BF that re-export was a basis on which restoration could be made.

72. This appeal is against the re-review communicated on 27 November 2017. As set out at paragraph 34 above the decision on review to refuse restoration states that it took account of

all the circumstances. The decision notes rejects the explanation that it was the Appellant's first importation made from Turkey, as a justification for permitting restoration. The basis for that rejection is stated to be by reference to the Tribunal's judgment in *Evgeny Tkachenko*.

73. It is apparent therefore that BF were fully aware of the *Evgeny Tkachenko* judgment but they have not, on the face of the re-review decision, taken account of the clear view taken by that Tribunal that restoration for the purposes of redispatch/re-export was considered to represent a "pragmatic solution" in circumstances where the goods seized were perishable milk based food supplements, imported into a port which was not a BIP on a plane which, presumably, would not necessarily be the means of transport by reference to which the export would be effected.

74. Whilst, in light of the destruction of the Goods, it is the case that re-export or redispatch is a practical impossibility in the present case that does not, in the Tribunal's view, permit BF to exclude it as a possible basis for restoration on which an appropriate compensation payment be determined.

75. The Tribunal therefore directs, pursuant to section 16(4) of the Finance Act 1994 that the review decision cease to have effect from the date of this judgment and that BF conduct a further review. That review specifically to take account of the following factors:

(1) When the decision to destroy the goods was taken guidance was not followed and the Appellant was not informed of their right of appeal to the Magistrates' Court under regulation 24 of the TARP Regulations the only means by which the Appellant could test the legality of the decision to destroy rather than redispatch.

(2) That the officer for BF accepted in *Evgeny Tkachenko* that the import could be retrospectively permitted but at no point was it indicated to the Appellant that belated notification of arrival could be made such that the failure could be remedied.

(3) Prior to destruction the Appellant had produced material to BF establishing the provenance of the Goods and that the Goods were of a type already in free circulation in the UK and in which the Appellant had previously traded such that it was almost inconceivable that health conditions prevented the redispatch or re-export of the goods.

(4) In the case of very similar milk based food supplements imported through a port other than a BIP and without the ability to redispatch or re-export on the same means of transport BF expressly accepted that restoration on the basis of re-export was not an impossibility but within the range of possible alternative courses of action.

DECISION

76. For the reasons stated in paragraphs 64 to 75 above the appeal is allowed.

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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 08 MAY 2019