**[2022] UKFTT 00124**

# TC 08455

***EXCISE DUTY – RESTORATION –*** *Export of Jewellery – "Mixed" items - Reasonableness of decision – appeal allowed*

**Appeal number: TC/2020/01948/V**

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Mrs AMINA OMAR** **Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE** **Respondent**

**TRIBUNAL: JUDGE JOHN MANUELL**
**Mr IAN SHEARER**

**The hearing took place on 18 January 2022 and 30 March 2022. The Tribunal heard Mr Paul Tapsell, Counsel, for the Appellant and Ms Francesca Kolar, Counsel, for the Respondent.**

**With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The Tribunal had decided a remote hearing was appropriate. The documents to which we were referred consisted of the agreed bundle as prepared by the Respondent in electronic form.**

**The hearing was held in public.**

DECISION

*Introduction*

1. On 21 February 2020 the Appellant's gold jewellery was seized at Heathrow Airport on her return from holiday in Dubai. The jewellery was valued at £19,234.00, which is not disputed. Her duty free allowance was £390.00. The Appellant sought restoration of the jewellery on payment of the correct revenue sum, and then a review of the Respondent's decision that restoration should be refused. The review decision dated 5 May 2020 is the subject of the present appeal.

*The issues*

2. The legality of the seizure is being contested separately by the Appellant at the Magistrates' Court. That issue is not before the Tribunal.

3. The only power which the Tribunal has in this appeal is to determine whether or not the review decision dated 5 May 2020 is reasonable and proportionate. If the Tribunal finds that it is not reasonable and proportionate it may direct that (a) the decision should cease to have effect, (b) a further review should be conducted by the Respondent and (c) where a further review would not be an adequate remedy, to declare the decision unreasonable and to give directions to avoid a repetition by the Respondent in comparable situations in future: see Finance Act 1994, sections 14 to 16.

*The law*

4. The relevant legislation includes sections 49(1), 78(1), 139(1), 141(1), 152 and 167(1) of the Customs and Excise Management Act 1979 ("CEMA"). This is set out as an appendix to this decision.

*The Appellant's case*

5. The Appellant's case in summary is that the majority of the gold jewellery seized from her had been purchased by or given to her over many years. She had taken the jewellery to Dubai to be repaired, polished and adjusted. This involved the purchase of 15.67g of "new" gold, worth £3,069.00. On returning to the United Kingdom the Appellant had failed to appreciate that she needed to pay duty on the "new" gold and so went through the "nothing to declare", i.e., Green Channel. The Appellant challenged the proportionality of the decision to forfeit where only a small part of the jewellery was subject to duty or liable to forfeiture. In any event, both the seizure decision and the forfeiture decision were based on the assumption that the Appellant had purchased (and so had to pay duty on) 390.67g of gold (worth £19, 234.00) as opposed to 15.67g of gold (worth £3,069.00). The Appellant accepted that she was liable to pay duty on the new gold. It was contended that the penalisation of the Appellant was disproportionate and unreasonable.

*The Respondent's case*

6. The Respondent contended that the appeal should be dismissed. The review decision was reasonable and proportionate because:

> *(a)* The Review Officer applied the Respondent's general policy for seized goods which is that they should not be restored. They will not be restored where they have been mis-declared, concealed or there has been a deliberate attempt to evade duty. The Appellant's case was considered on its merits as required and consideration was given to whether there might be exceptional circumstances for which discretion might be used to depart from the policy;
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> *(b)* All the circumstances surrounding the seizure had been considered but not the legality which would be dealt with in the Magistrates Court;
>
> *(c)* The Appellant had entered the "Nothing to Declare" Channel indicating that she had no more than £390.00 of excise goods and had failed to make a declaration when required to do so. She had attempted to import gold with a value of £19,234.00, some 49 times over the allowance;
>
> *(d)* Ignorance of the law was no excuse as was well established. The Appellant had been United Kingdom resident and her British passport was issued in 2013. She spoke sufficient English and had given inconsistent answers when interviewed by the Border Force officer;
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> *(e)* The Appellant had not followed the correct procedure when exporting the gold if she had been intending to have work done or if it were to be exchanged for new gold. Her documents did not support her assertions.

*Burden and standard of proof*

7. The burden of proof lies on the Appellant to show that the review decision under appeal was one which no reasonable reviewing officer could have reached. The standard of proof is the normal civil standard, the balance of probabilities. The Tribunal may consider evidence which was not before the decision maker and may reach factual conclusions based on that evidence such that the decision under appeal may be found by the Tribunal to be reasonable or unreasonable as the case may be, as a result: *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525.

*Evidence*

8. The Appellant gave evidence in Somali, interpreted for the Tribunal, in accordance with her witness statement treated as dated 18 January 2022. There in

summary the Appellant said that she had taken her jewellery with her when she travelled to Kenya via Dubai for her brother's wedding. At the Dubai stopover she had purchased a wedding present from Your Welcome jewellers where she had shopped previously. She also left jewellery which no longer fitted her to be remodelled. It would not have been safe to have taken it to Kenya where crime is rife. She also wanted to think about the new design before returning to Dubai a week later.

9. On her return to Dubai the Appellant agreed the price of £3,069.71 for repairs and the new design, and £1,134.60 for making a bracelet. Her "old" gold was taken as cash as shown in three tax receipts and she paid the additional amount on her Monzo card. The Appellant produced a schedule with a breakdown and references to her receipts. The Appellant obtained the extra money she needed to cover the Monzo card payment from her son and a friend, as shown on her Monzo card statement.

10. The Appellant was informed by Your Welcome that she was required to present tax receipts and declare her jewellery on departure from the UAE. Her receipts correctly recorded her transactions in Dubai. She also took a cash advance to cover her hotel, taxi and spa treatment. She subsequently received a UAE VAT refund on her purchases via her Monzo card.

11. On her arrival at Heathrow Airport the Appellant was tired from travelling. She entered the Green Channel, not thinking about her jewellery. She was intercepted. When asked if she had anything to declare she replied "No, but I've travelled with my gold jewellery". Her baggage was searched and the jewellery and receipts were found. The Appellant was questioned further. She said that she had travelled with her old gold. She agreed that she had not declared it on her departure but said she had not known that she was supposed to have done so or how to do so. The Appellant said that her old gold had been refashioned. The Appellant was told that she had to pay £4,000.00 in duty. She tried to explain that she had not paid £19,234.00, but had exchanged her old gold and paid the difference. The Appellant obtained a further receipt from Your Welcome as verification, but she was not believed and was accused of fabrication. She refused to pay £4,000 in duty. The jewellery was seized, together with copies of the receipts. The Appellant left the airport and returned home. She had never been treated like that before, despite having travelled extensively.

12. The original decision of the Respondent had been to restore the jewellery for a fee, based on the value of £19,234.00. In the Appellant's view that supported her view that the outright refusal to restore her jewellery was unreasonable, particularly given its personal and sentimental value to her. The Appellant accepted that the value of the "new" gold used to repair and reconfigure her jewellery plus the cost of the new bracelet, i.e., £3,069.71 and £1,134.60, a total of £4,204.31, should properly be taken into account in determining the appropriate restoration fee. But a decision based on the total value of the jewellery would be unreasonable.

13. Cross examined, the Appellant said that work on jewellery was done very quickly in Dubai. She chose the design and they took the gold. She had declared the gold when leaving Dubai and obtained a 5% VAT refund. The Appellant had not brought gold into the United Kingdom before. She was willing to pay the duty on £4,204.31 but not

£19,234.00 because she had not spent £19,234.00. The Appellant agreed she had bought gold in Dubai in 1996 but that was not the same thing. The Appellant agreed that she had received a UAE VAT refund of £636.35. It was put to her that that sum equated to an expenditure in Dubai of £12,204.00 and that she had gained. The Appellant replied that that calculation did not prove that she had spent £19,234.00. She was not responsible for the receipts issued by the shop and had not made a misdeclaration in Dubai.

14. The Appellant said that she had shown all four receipts to the Border Force officer. She did not accept the version of their conversation as set out in the notebook. She had not been confrontational. She agreed she had not declared the gold on leaving the United Kingdom and said she did not know who she was supposed to ask about it. The Appellant referred to the pawn shop receipts and photographs she had produced as evidence that she had owned the gold she took to Dubai. The Appellant could not have spent £19,234.00. The additional receipt she obtained merely confirmed the other receipts. The Appellant had not checked at the time as the shop was closing. The Appellant did not speak Arabic and she was having trouble with her phone. The receipts were all as issued by the shop. She had needed extra cash for her travel expenses so obtained a cash back. The figures all added up. The Appellant had not been given a chance to explain to the Border Force officer and had been made to appear a smuggler which had made her agitated. The work shown on the receipts had been done and that was in addition to the cost of the gold. The Appellant had had translation help from her son when she gave evidence in the Magistrates court.

15. Re-examined, the Appellant said that no-one had told her that she needed to declare her gold when she left the United Kingdom. She had submitted a VAT reclaim when she left Dubai because she could not leave without a receipt showing she owned the gold. She had done what the shop owner said. She had only her Monzo card for payment which she used because it was better value.

16. The Appellant identified her jewellery in the photographs she produced. The necklace had been too short. She had to think about the design, which had been essentially the same. It took two to three hours to make, the people did it on the spot.

17. Mr John Sanders, Higher Officer of the Border Force, employed as a Review Officer, gave evidence in accordance with his witness statement dated 3 September 2020. There he set out the process he had followed and the documents he had considered. These included a letter from the Appellant's solicitor not available to the original decision-maker. His review decision letter explained why he had decided that the jewellery should not be restored to the Appellant. He had disregarded irrelevant matters. After the Appellant sent a further e-mail on 12 May 2020 disputing the review decision, he had responded on 13 May 2020, further explaining his rationale.

18. Cross examined, Mr Sanders said he had disagreed with the original decision (which was to restore on payment of £4,423.92 duty) because he had further information and evidence. He had not personally been aware of the requirement to declare valuable items being taken out of the United Kingdom but ignorance was not an excuse. There was no evidence available to him to refute the evidence of prior

ownership of the jewellery as worn by the Appellant in the photographs produced. The same applied to the pawn shop receipts which showed the weight of gold, and to the receipts from Dubai. He did not doubt the cash advance taken in Dubai. The Appellant's documents tallied. As to the handwritten receipt, he did not understand how the Appellant had been entitled to recover UAE VAT for the "old" gold.

19. Mr Sanders agreed that a person travelling with jewellery would not necessarily know the weight of their gold. Mr Sanders had not checked the regulations himself, he had no reason to doubt that the intercepting officer would know. He agreed that the rules for taking jewellery abroad were not common knowledge. It should be declared if it was going to be worked on. He did not know the situation where, for example, a clasp broke while someone was away. He believed that UAE VAT was reclaimable on purchases only, not services. The Appellant would need a receipt for a VAT reclaim. He did not accept that his decision was unreasonable. He agreed that the Tribunal had additional documents which he had not seen.

20. Re-examined, Mr Sanders agreed that three credit card receipts had been found. He had considered the legislation. Section 141 of CEMA was relevant as it stated that where items were mixed, i.e., new and old, the whole was subject to forfeiture.

21. Mr Sanders told the Tribunal that he saw discrepancies between the intercepting officer's notebook and the letter written on behalf of Mrs Omar. As far as he could see there had been a lot of new gold purchased. £19,234.00 seemed a lot to pay for polishing and resizing. Restoration was not an option even on payment of the full duty where there had been an attempt to evade and the Appellant had been 49 times over the limit.

*Submissions*

22. Ms Kolar for the Respondent relied on the Statement of Case, which has been summarised above. The review decision was a proper, informed decision based on the facts and was reasonable as well as proportionate. The Appellant had failed to show otherwise. There were inconsistencies and discrepancies in her evidence, such as her attempt to minimise the weight of the gold she had taken with her to Dubai. The Appellant accepted that she had failed to declare the new bracelet she had purchased in Dubai. Where there were mixed goods as here, the "new" gold mixed with the "old" gold, the entire item was subject to forfeiture. The UAE VAT had been misdeclared as VAT was only refundable on new jewellery. The amount of the VAT refund corresponded to a purchase of £12,440.00. There had been a clear attempt at evasion. Ignorance was not a defence. The Appellant had financial motivation to avoid payment of the duty. The appeal should be dismissed.

23. Mr Tapsell for the Appellant relied on the Notice of Appeal grounds. It was indeed the case that ignorance of the law was not a defence but it was relevant to the evaluation of the reasonableness of the forfeiture decision. There was general ignorance about export procedures for valuables. The intercepting officer had not given

evidence so his version of the interview with the Appellant was not tested. The Appellant's position had always been that she was willing to pay for restoration and she had made a reasonable offer. She accepted that there had been a misdeclaration. The correct starting point was £3,069.00, the "new" gold and £1,134.00, the new bracelet. The Appellant had supported her testimony with evidence. It was in effect her family jewellery. The review decision was too harsh. The appeal should be allowed and a further review ordered.

*Discussion*

24. It must be accepted as a matter of strict law that the Appellant was obliged to declare that she was taking valuable gold jewellery out of the United Kingdom when she flew out to Dubai. In practice it seems that such declarations of valuables are seldom made. The Tribunal accepts that the Appellant had no knowledge of that requirement, which might have helped her avoid the problems which followed.

25. There was sufficient evidence to satisfy us, on a balance of probabilities, that (with the exception of the new bracelet purchased in Dubai) the Appellant had owned the jewellery which was seized from her luggage for some considerable time. As well as the photographs of her wearing jewellery taken over the years, from when the Appellant was a young woman, there were the Ilford pawnshop receipts from 2018 where the weight of the gold (described as "yellow metal") in the items was shown. The decision by the Appellant to have her jewellery remodelled seems to have been made to take advantage of travelling via Dubai to her brother's wedding. The fact that the Appellant had to borrow money from her son and from a friend to cover her expenditure suggests that there was also some element of spontaneity in the process, and tends to show that the Appellant had not considered whether there would be import duties to pay on return to the United Kingdom. She had needed a cash advance to cover the balance of her expenses from her stay in Dubai.

26. No doubt flights returning to the United Kingdom from Dubai merit Border Force attention, as Dubai markets itself as a shopping haven with full refunds of its 5% VAT available to tourists. The evidence before the Tribunal indicates that the Appellant's VAT refund in the UAE was especially generous, however, it is obvious that she was not responsible for the preparation of receipts or the refund process. The Tribunal accepts that she was pressed for time as she claimed and probably did not give the receipts close attention.

27. The Appellant said that she entered the Green Channel at Heathrow on her return without thinking. The Tribunal accepts that the Appellant is likely to have been tired from her flight, which would have involved significant waiting periods at either end as well as some 8 hours in the air. She had also been at a family wedding not long before. Her interview with the intercepting officer went badly. Although the Appellant speaks English, it would in the Tribunal's view have been desirable for a Somali interpreter to have been provided for her as the Appellant was being accused of quasi criminal acts and clarity was essential. The explanation she gave then has remained consistent

throughout her testimony. Even at the interception stage the Appellant was willing to pay what she accepted was due on the "new" gold and the bracelet. What she was not willing to do was to pay £4,000 as demanded for the return of her own property, as she saw it. It is hardly surprising that the Appellant became upset when she felt that she was not being understood and was faced with a large and unexpected demand for payment on top of recent significant expenditure.

28. Here it is significant that the Appellant when challenged in the Green Channel after reflection stated that she had jewellery with her. Her jewellery was not concealed in any manner in her baggage and the Appellant had the receipts to hand. Her mind seemed to have been directed to ensuring that she could prove to the Dubai authorities that she was removing her own property when she left, rather than to any questions surrounding importation to the United Kingdom.

29. Higher Officer Sanders's evidence about his review was full and frank. He accepted that he had relied on the intercepting officer. Doubtless the remodelled, repaired and polished gold jewellery looked impressively new and bright, making it hard for the intercepting officer to credit the Appellant's claim that she had owned it for many years. On Higher Officer Sanders's analysis of the evidence placed before him, the Tribunal can see why he reached his decision, in particular his view about the apparently huge excess value of the Appellant's at first undeclared jewellery over and above the duty free allowance.

30. The Tribunal has, however, the advantage of much fuller evidence which shows that the Appellant's explanation given when she was intercepted in the Green Channel, although possibly unusual, was true. (The Appellant's statement that the jewellery was worth around £7,000.00 may have been nearer its value for pledge purposes, rather than just an attempt to minimise the value for duty.) As the Tribunal has found, the jewellery (apart from the new bracelet) was in fact the Appellant's own property. It had personal and sentimental value beyond its intrinsic worth. She had had it remodelled so that she could continue to wear it. There was no question of sale or any profit.

31. In the Tribunal's view these were important additional facts which were not known or accepted by Higher Officer Sanders and so were not taken into account at the review stage. There was no evidence that the Appellant had ever previously breached import duty regulations. The result of that incomplete picture is that the forfeiture proposed of all of the Appellant's jewellery is excessive, rendering the decision dated 5 May 2020 unreasonable and disproportionate. These facts need to be considered in the fresh decision which is now necessary.

32. Section 141(1) of CEMA, which addresses forfeiture of mixed goods, was not invoked in the review decision dated 5 May 2020 as it was not accepted that the Appellant had previously owned the jewellery. In the Tribunal's view the section is not apposite or applicable to the facts of the present appeal.

33. The appeal is accordingly allowed. The Tribunal directs that a fresh decision is taken on the following basis:

(a) The value of the items which the Appellant failed to declare on entry to the United Kingdom was £4,204.31;

(b) Her failure to declare was inadvertent and the explanation she gave to the intercepting officer although truthful was not understood;

(c) The majority of the jewellery she was carrying in her baggage had been hers for many years and has personal and sentimental value for her above its intrinsic worth;

(d) Forfeiture of the whole of the Appellant's jewellery would be disproportionate on the facts found.

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.

**TRIBUNAL JUDGE MANUELL**
**RELEASE DATE: 07 April 2022**

## APPENDIX

### Extracts from CEMA 1979

**49 Forfeiture of goods improperly imported**.

(1)Where—

(a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on or by or under the Taxation (Cross-border Trade) Act 2018, any imported goods, being goods chargeable by reference to their importation with customs or excise duty, are, without payment of that duty—

(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom,

(iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or

unloaded from any other vehicle which has entered the United Kingdom, or

(iv) removed from their place of importation or from any approved wharf, examination station or transit shed temporary storage facility or any place specified by an officer of Revenue and Customs under Part 1 of the Taxation (Cross-border Trade) Act 2018 as a place where the goods are required to be kept; or

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

(c) any goods, being goods chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft or, while in Northern Ireland, in any vehicle any other vehicle; or

(d) any goods are imported concealed in a container holding goods of a different description; or

(e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or

any goods are found, whether before or after being released to or discharged from a Customs procedure, not to correspond with any information provided under Part 1 of the Taxation (Cross-border Trade) Act 2018;

(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,

those goods shall, subject to subsection (2) below, be liable to forfeiture.

**78 Customs and excise control of persons entering or leaving the United Kingdom.**

(1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom; or

(b) being dutiable goods or chargeable taxable goods, he has obtained in the United Kingdom without payment of duty or tax,

and in respect of which he is not entitled to exemption from duty and tax by virtue of provision made by regulations under section 19 of the Taxation (Cross-border Trade)

Act 2018 relating to any relief conferred on persons entering the United Kingdom or any order under section 13 of the M1Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

In this subsection "chargeable goods" means subsection "taxable goods" means goods on the importation of which value added tax is chargeable or goods obtained in the United Kingdom before 1st April 1973 which are chargeable goods within the meaning of the M2Purchase Tax Act 1963; and "tax" means value added tax or purchase tax.

**139 Provisions as to detention, seizure and condemnation of goods, etc.**

(1) 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.

(1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing.

(1B) References in this section and Schedule 2A to a thing detained as liable to forfeiture under the customs and excise Acts include a thing detained under subsection (1A).

**141 Forfeiture of ships, etc. used in connection with goods liable to forfeiture.**

(1)Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the Customs and Excise Acts—

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the thing so liable,

shall also be liable to forfeiture.

**152 Powers of Commissioners to mitigate penalties, etc.**

The Commissioners may, as they see fit—

(a) compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the Customs and Excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or

(c) after judgment, mitigate or remit any pecuniary penalty imposed under those Acts; or

(d) order any person who has been imprisoned to be discharged before the expiration of his term of imprisonment, being a person imprisoned for any offence under those Acts or in respect of the non-payment of a penalty or other sum adjudged to be paid or awarded in relation to such an offence or in respect of the default of a sufficient distress to satisfy such a sum;

but paragraph (a) above shall not apply to proceedings on indictment in Scotland.

**167 Untrue declarations, etc.**

(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

(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 made shall be liable to forfeiture.