Neutral Citation: [2024] UKFTT 00593 (TC)

Case Number: TC09232

FIRST-TIER TRIBUNAL
TAX CHAMBER

At Taylor House, London

Appeal references: TC/2019/06754
TC/2020/01578

PROCEDURE – evidence from abroad –- witness based in Slovakia – video hearing precluded – failure to attend – whether to adjourn

CUSTOMS – two seizures – Border Force offered to restore vehicles for a fee – appeal on the basis that the vehicles should be restored free of charge – appeals refused

Heard on 19 and 20 June 2024
Judgment date: 4 July 2024

Before

TRIBUNAL JUDGE ANNE REDSTON
MR MICHAEL BELL

Between

ZOBORTRANS EU s.r.o.

Appellant

and

THE HOME OFFICE

Respondent

Representation:

For the Appellant: Mr Martin Jánský, advocate, of Jánský & Partners s.r.o., advokátska kancelária, instructed by the Appellant

For the Respondents: Mr Rupert Davies of Counsel, instructed by the General Counsel and Solicitor to the Home Office

DECISION

INTRODUCTION AND SUMMARY

1. Zobortrans EU s.r.o. ("the Appellant") is a freight transport company based in Slovakia. The Appellant's vehicles were stopped and seized by the Border Force as follows:

(1) On 7 October 2018, 48 kilos of hand-rolling tobacco ("HRT") were seized along with the vehicle ("the First Seizure"). The vehicle was restored on payment of £10,616.64.

(2) On 28 November 2018, 24 kilos of HRT were seized along with the vehicle ("the Second Seizure"); the vehicle was restored on payment of £5,631.60.

(3) On 5 December 2018, 96 kilos of HRT were seized, along with a tractor unit and trailer ("the Third Seizure"). The Border Force offered to restore the tractor and trailer for £22,464. The Appellant appealed that decision.

(4) On 8 April 2019, 140,000 cigarettes were seized along with a Renault van "the Fourth Seizure"). The Border Force offered to restore the van for £17,623 and the Appellant appealed that decision.

2. The Appellant submitted that the review decisions made by the Border Force Officers in relation to the Third and Fourth Seizures were unreasonable, and that the vehicles involved should be restored free of charge. For the reasons set out in this decision notice, we uphold the review decisions and reject the appeals.

APPLICATIONS FOR POSTPONEMENT AND ADJOURNMENT

3. The hearing was originally listed to be heard by video, with Mr Jánský and the Appellant's director, Mr Seidl, joining the hearing from abroad. However, that hearing was postponed at the last minute because Mr Seidl was unwell.

4. Relisting the hearing on the same basis was precluded by the guidance issued following *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC), as Slovakia has not confirmed that it has no objection to evidence being given by video in a Tribunal hearing.

5. After the position in relation to giving evidence from abroad had been clarified, the parties were provided with a summary of the legal position. In particular, the Tribunal explained that Mr Seidl had to attend the hearing in person in order to give evidence, but that Mr Jánský could attend by video as he was Appellant's legal representative and not a witness.

6. On 8 January 2024, Mr Jánský confirmed that both he and Mr Seidl would attend the hearing in person; he added that Mr Seidl required a Slovakian interpreter. Having taken into account both parties' dates to avoid, the hearing was listed for the two days of 19 and 20 June 2024, with a professional interpreter fluent in Slovakian attending. Those arrangements were communicated to the parties.

7. At 10.05am on the day before the relisted hearing, Mr Jánský emailed the Tribunal to ask for the case to be postponed on the following basis:

> "Today morning I have discovered that my passport expired and there is no more chance to travel to UK only with ID since UK left EU.
>
> I have ordered today morning (after I stood in the line for 2,5 hrs) express issuance of the new passport with extra charge of 150,- EUR but delivery is within next 2 days what might be late.
>
> I have informed Mr. Seidl, and he stated that he will attend alone. But he has very poor knowledge of English. So pleases, for all cases, please manage presence of interpreteur at the hearing, as previously requested."

8. Judge Redston considered the application. As Mr Jánský was the advocate he would not be giving evidence. She confirmed with the Tribunals Service that the case could be converted from face-to-face to hybrid. She then decided it was not in the interests of justice to allow the application, for the following reasons:

(1) The Third Seizure took place on 5 December 2018 and the Fourth Seizure on 8 April 2019. The events in question were thus over five years ago.

(2) The hearing had already been postponed once, also at the last minute.

(3) The Border Force had prepared for both hearings, instructing counsel and filing submissions. Two Border Force Officers were ready to attend the hearing to give evidence. A second postponement would cause the Border Force to waste further time and incur costs.

(4) The Tribunal had twice set aside two days for the hearing, and on both occasions the Tribunal panel had prepared by reading the skeletons and other documents. The Tribunal staff had spent time setting up the hearing and had obtained a professional interpreter. Relisting the hearing would require the Tribunal panel and the staff to spend further time on the Appellant's appeals, and prevent them dealing with those of other appellants who were waiting to have their cases heard.

(5) The hearing could be converted to hybrid so as to allow Mr Jánský to attend by video.

9. Although Judge Redston was surprised that Mr Jánský had only become aware on the day before the hearing that he needed a valid passport to enter the UK, she did not need to clarify this points with Mr Jánský, given the availability of a hybrid hearing and the reasons for rejecting the application set out in the previous paragraph.

10. At 12.26 the same day, Mr Jánský was informed that Judge Redston had refused the postponement application; that the hearing would be on a hybrid basis, and that he would be sent a link and instructions.

11. At 13.15, Mr Jánský replied as follows "I fully understand. That was my fault with the passport. Good to hear that I can attend via videoconferrence. I will go through instructions". However, five minutes later, he emailed again to say:

> "I just called with Mr. Seidl. He said he will not come alone. So please, interpreteur [sic] is not necessary and can be cancelled and he (Mr. Seidl) will not testify as a wittness. Please excuse his absence."

12. When the hearing began the following day, Mr Jánský joined by video from Slovakia. The Tribunal reminded him that, as Mr Seidl was not attending the hearing, the only evidence which could be considered was that in the documents before the Tribunal. In particular, Mr Jánský could not give hearsay evidence provided to him by Mr Seidl. When Mr Jánský expressed some concern at this limitation, the Tribunal said that if Mr Seidl was able to come to the UK the following day to give evidence, the structure of the hearing days would be reconfigured to allow that.

13. Mr Jánský said Mr Seidl was unable to come to the UK the following day because his wife was already booked to work a shift, and Mr Seidl had responsibility for childcare. Mr Jánský applied for the hearing to be adjourned so Mr Seidl could come to the UK on another date.

14. The Tribunal took time for consideration. We decided that it was not in the interests of justice to allow the application, for the reasons set out at §8.(1) to 8.(4) above, and for the additional reason that we did not find it credible that Mr Seidl had ever intended to come to

the hearing. Had that been the position, he would not be prevented from attending on the second day because of his wife's prearranged shift pattern and his consequential childcare responsibilities. We informed the parties that the hearing would continue.

15. It was clear from the assistance already given by the interpreter in relation to Mr Jánský's submissions that it was in the interests of justice for her (or another interpreter also fluent in Slovakian) to remain for the duration of the hearing, and we directed accordingly.

THE LAW

16. In restoration appeals, the Tribunal's jurisdiction is limited. We cannot direct the Border Force to restore a vehicle, or to restore a vehicle without payment, but if we decide the officer in question has made an unreasonable decision, we can direct that the Border Force make a new decision taking into account specific findings of fact.

17. In C*&E Commrs v Corbitt* [1980] 2 WLR 753, Lord Lane said that a decision would not be "reasonable":

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

18. In *John Dee v* C*&E Commrs* [1995] STC 941, Neill LJ gave the only judgment with which Roch and Hutchison LJJ both agreed. He first outlined the principles in a similar fashion to Lord Lane*,* but went on to acknowledge at p 953:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal…I cannot equate a finding 'that it is most likely' with a finding of inevitability."

19. In assessing reasonableness, the Tribunal may also consider evidence that was not before the decision maker, and may reach factual conclusions based on that evidence, see *Gora v C&E Commrs* [2003] EWCA Civ 525.

THE CMR

20. The documents and submissions made reference to the 1956 *Convention relative au contrat de transport international de marchandises par route*, in English the "Convention on the Contract for the International Carriage of Goods by Road", also known as the CMR Convention from its French title, or simply as "the CMR".

21. A standard consignment note was developed based on the CMR Convention; this too is known as a "CMR". In this decision, when we refer to a CMR we are referring to the consignment note; we refer to the CMR Convention by that name, or as "the Convention".

22. Article 8 of the Convention includes the following requirements:

> "1. On taking over the goods, the carrier shall check:
>
> (a) The accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and
>
> (b) The apparent condition of the goods and their packaging.
>
> 2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise

> specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and their packaging. Such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note."

THE DOCUMENTARY EVIDENCE

23. The Tribunal was provided with two Bundles of documents prepared by the Border Force, which included the following:

(1) The Notebooks of Border Force Officers who participated in both seizures.

(2) The correspondence between the parties.

(3) The employment contracts of the drivers involved in the Third and Fourth Seizures.

(4) Various documents relating to the goods which were said to have been legitimately transported at the time of those Seizures.

(5) Information provided by Mr Seidl about the Appellant and about its approach to the transportation of goods to the UK.

24. At 22.25 on the night before the hearing, Mr Jánský filed and served documentary evidence relating to the following:

(1) a restoration decision made by the Border Force on 22 January 2024 referring to two subsequent seizures; and

(2) a penalty decision made by HM Revenue & Customs relating to the Fourth Seizure, and the later withdrawal of that penalty.

25. Those documents were filed and served long after the deadline set in the Tribunal's directions. However, Mr Davies did not object them being admitted into evidence, and the Tribunal gave permission. However, we went on to agree with Mr Davies that the penalty decision was not relevant to these proceedings, and we say no more about it.

26. Mr Davies applied during the hearing to admit a screenprint of a page from the Companies House website. Mr Jánský did not object to that application, and we admitted the document into evidence.

THE WITNESS EVIDENCE

27. The review decision in relation to the Third Seizure was made by Officer Brenton on the basis of the evidence before him. He provided a witness statement, but had retired by the date of the hearing. Officer Ian Cox reviewed the information considered by Officer Brenton together with other information, and came to the same conclusion. He provided a witness statement to that effect.

28. As Judge Redston observed in *Paniec v DBR* [2020] UKFTT 0360 (TC), the issue in restoration appeals is whether the review decision was reasonable, and it is the Tribunal which has to decide that issue. The view of a different Border Force Officer as to reasonableness is not evidence in the appeal. However, an Officer who did not make the review decision can give witness evidence about the Border Force's practice and procedures generally, and can also give evidence about relevant information identified after the review decision was made. Officer Cox was cross-examined by Mr Jánský and re-examined by Mr Davies. We found him to be wholly honest and credible.

29. The review decision in relation to the Fourth Seizure was made by Officer Mark Summers. He provided a witness statement, gave evidence-in-chief led by Mr Davies, was

cross-examined by Mr Jánský, re-examined by Mr Davies and answered questions from the Tribunal. He too was a wholly honest and credible witness.

FINDINGS OF FACT

30. Based on the evidence summarised above, we make the findings of fact in this decision. We first make findings about the Appellant and the First to Fourth Seizures, and then about other matters.

The Appellant

31. The Appellant is a freight transport company based in Slovakia, of which Mr Seidl is the owner and director. At the relevant time, it carried out around 20,000 transport journeys a year, the majority of which were to the UK.

The First Seizure

32. On 7 October 2018, one of the Appellant's vehicles was stopped by the Border Force and 48 kilos of HRT were found in the load. The HRT was seized, together with the vehicle. The Border Force offered to restore the vehicle for a payment of £10,616.64. The Appellant paid that sum to the Border Force and the vehicle was restored.

33. Mr Seidl's evidence, given on 11 June 2019, was that the driver of the vehicle was subsequently retained as an employee until he had repaid the £10,616.64, at which point his contract was terminated. There was no challenge to the first part of that evidence: the Border Force accepted the driver had been retained by the Appellant despite having been found to have smuggled 48 kilos of HRT, and we find that to be a fact.

34. The second part of the evidence was challenged. In deciding whether to accept it, we took into account that:

(1) Mr Seidl did not attend the hearing to give oral evidence, so could not be cross-examined.

(2) There was no supporting evidence, such as a dismissal letter, showing that the Appellant had taken that action.

(3) Although we were not provided with the driver's name or a copy of his employment contract, the driver of the vehicle involved in the Third Seizure was paid €850 per calendar month. The driver involved in the Fourth Seizure was paid €750 per calendar month. Both began their employment in July 2018, before the First Seizure. We accepted Mr Seidl's evidence that when driving to or from the UK, drivers were paid a further £37 a day as a meal allowance, with different amounts being paid for journeys to other destinations.

(4) We make the reasonable inference that the driver involved in the First Seizure was paid a salary of no more than €850 a month, plus meal allowances. From this the driver had to pay his normal living costs, including his food when on a business journey.

(5) The period from the First Seizure to Mr Seidl's statement in June 2019, was eight months, so the driver would have been paid €6,800 plus meal allowances.

35. Given the above, we do not find it credible that, within the eight month period which followed the First Seizure, the driver had paid the Appellant £10,616.64: this would be roughly twice the salary he had earned during that period. Consistently with that finding, we also reject Mr Seidl's evidence that the driver's employment contract was terminated after he had paid that sum to the Appellant.

The Second Seizure

36. On 28 November 2018, one of the Appellant's vehicles was stopped by the Border Force and 24 kilos of HRT were found in the load. The HRT was seized, together with the vehicle. The Border Force offered to restore the vehicle for a payment of £5,631.60. The Appellant paid that sum and the vehicle was restored.

37. Mr Seidl's evidence, also given on 11 June 2019, was that the Appellant was currently deducting sums from the driver's salary and he would be terminated once the amount had been repaid in full.

38. There was no dispute that the driver's employment was not terminated despite him having been found to have smuggled 24 kilos of HRT, and we find that to be a fact. The second part of the evidence was challenged. In deciding whether to accept it, we took into account that:

(1) Mr Seidl did not attend the hearing to give oral evidence and so could not be cross-examined.

(2) There was no supporting evidence, such as copies of wage slips, showing that any deductions were being taken from the driver's wages.

(3) For the same reasons as set out in relation to the First Seizure, we make the reasonable inference that the driver involved was paid no more than €850.

(4) During the period from the First Seizure to Mr Seidl's statement made in June 2019, the driver would have been paid for seven months work. This would totalled €5,950 plus meal allowances. The driver had to pay his normal living costs including his food when on a business journey.

39. Taking into account all the above, we reject Mr Seidl's evidence that the driver was required to pay the Appellant £5,631.60, after which he would be sacked.

The Third Seizure

40. On 5 December 2018, a tractor and trailer unit owned or leased by the Appellant arrived at Dover. It was driven by Mr Moroslav Balint, an employee of the Appellant. According to the accompanying transport documentation, the trailer was carrying car parts, seat belts and compressors.

41. Mr Balint's evidence, given to the Border Force Officers and recorded at the time, was that the trailer was not sealed. Mr Seidl said in subsequent (undated) correspondence that "we undertake to use in our company the locking seals on the load and trailers" and "the company also adopted measure the trailer to be sealed before departure". However:

(1) it was unclear whether these statements related to the time of the Third Seizure or to the date of Mr Seidl's correspondence;

(2) as Mr Seidl did not attend the hearing, this could not be clarified;

(3) if he was referring to the time of the Third Seizure, there was a conflict between his statements and the evidence given by Mr Balint to the Border Force at the time of the seizure. However, Mr Seidl could not be cross-examined on that conflict.

42. We prefer the contemporaneous evidence given by Mr Balint and find as a fact that the trailer involved in the Third Seizure was not sealed.

43. When the vehicle was searched, 96kg of HRT was found, some in the trailer and some in the cab. The duty and VAT which should have been paid on the HRT totalled £22,464. The Border Force seized the HRT and the tractor and trailer unit.

44. Mr Balint was issued with a Seizure Information Notice (form BOR156); a Seizure of Vehicle Notice (form BOR 162) and a Notice 12A, which informed the Appellant of the right to challenge the seizure in the Magistrate's Court. Mr Balint was not arrested and the Appellant did not challenge the seizure.

45. The evidence about what had happened before Mr Balint arrived at Dover included the following:

(1) In answer to questions from BorderForce Officers, Mr Balint initially said he owned the HRT; that he had bought it in the Czech Republic and was planning to take it back with him to Slovakia. However, he could not produce any receipt. In a later conversation with the Border Force, Mr Balint changed his evidence and said he had been paid €800 to bring the HRT to the UK.

(2) After the issuance of the review decision, Mr Seidl sent Officer Brenton a copy of a document which he described as Mr Balint's confession. In answer to the question "for who was the tobacco supposed to be", Mr Balint said "for no-one"; and in answer to the question "did you receive any remuneration for it", he said "no".

(3) Mr Seidl also provided GPS data which showed that Mr Balint had only stopped once on the journey to the UK, and the stop had been in the Czech Republic.

46. Having assessed that evidence, we find the following facts:

(1) Mr Balint made a stop in the Czech Republic, and the HRT was loaded there.

(2) Mr Balint did not purchase the HRT. It is implausible that he would have had the funds to do so, and he had no receipt.

(3) Mr Balint did not intend to take the HRT from the Czech Republic to the UK and then back, via the Czech Republic, to Slovakia. This too was implausible.

(4) Mr Balint was paid €800 to take the HRT to the UK. In making that finding, we prefer the contemporaneous evidence given by Mr Balint on the day of the seizure to that provided later via Mr Seidl. It is also unlikely that Mr Balint would have agreed to carry the HRT without payment.

47. Mr Seidl's evidence was that the Appellant had subsequently terminated Mr Balint's contract and was suing him in the Slovak courts. However, there was no supporting evidence (such as a termination letter and/or court documents), and Mr Seidl did not attend the hearing and so could not be cross-examined. We take into account that the Appellant did not dismiss either of the drivers involved in the First and Second Seizures, and also did not dismiss Mr Loci, who was involved in subsequent seizures (see further §61.ff). On the balance of probabilities, we find as a fact that Mr Balint also was not dismissed as a result of the Third Seizure.

48. The Border Force offered to restore the tractor and trailer for £22,464, equal to 100% of the duty/VAT involved. Mr Seidl said that paying that sum "will cause to Zobortrans huge existence problems". Again, there was no supporting evidence, such as financial statements, to support this statement, and Mr Seidl could not be cross-examined. As this importation was one of over 200,000 journeys made by the Appellant's vehicles in a calendar year, we find that the Appellant is not running a small business, and also find on the balance of probabilities that (given its size) the Appellant would be able to pay the fee without its existence being threatened.

The Fourth Seizure

49. On 3 April 2019, the Appellant received an order which stated that a shipment was being subcontracted to it from a company called Stozek, which in turn was said to be a subcontractor of another company called Rhenus. Both are well known businesses in Slovakia.

50. The delivery documents included a handwritten and largely illegible CMR. This did not contain any statement that the driver had been unable to check the goods and the reasons for this.

51. The documents also included a Delivery Note, which included the following information:

(1) The consignor was Gamers.SK.sro. However, it was Officer Summer's unchallenged evidence that this company's only business related to computer games.

(2) The consignee was Green Trade Efficiency Ltd ("GTEL") at 180 City Road, London.

(3) The goods were described as "Tuti Napolitan Cocoa Pieces".

(4) The delivery address was "Big and Red Storage" in Enfield; it was common ground that this was a genuine business.

(5) The contact at the delivery address was a Mr Gary Cooke, whose phone number was provided.

52. Companies House website gives GTEL's registered address as 160 City Road (rather than 180 City Road), and records that it was incorporated on 27 February 2019, some four weeks before the order in question. It also states that GTEL's business was "non-specialised wholesale of food, beverages and tobacco" and "wholesale of other food, including fish, crustaceans and molluscs".

53. Mr Seidl's evidence on the following points was unchallenged:

(1) The Appellant was "legitimately not interested in the core business and seat [registered office] of the orderer" and was "definitely not at any extent obliged to investigate persons who order the carriage, their seat, premises, etc., even when we are the subcontractor".

(2) Instead, the Appellant only checked the delivery address.

(3) The goods in the load were not checked by the Appellant because "it was [a] customer pallet [so] we trust in good will that goods written on the delivery note are actually also packed on the pallets".

54. In reliance on that evidence we find that when the Appellant received an order, it did not check the *bona fides* of the consignor and/or consignee, and (at least in relation to the Third Seizure) also did not check from the CMR to the goods on the vehicle.

55. On 8 April 2019, a Renault Van owned by the Appellant arrived in Dover accompanied by the documentation summarised above. The driver was Mr Paul Capucha, another of the Appellant's employees. He told Border Force officers that:

(1) he understood English;

(2) a colleague had brought the vehicle to the Appellant's depot, and he had driven it from there; and

(3) there was no seal on the doors of the trailer.

56. In reliance on that evidence, we find the above to be facts.

57. When the vehicle was searched, it was found to contain 140,000 cigarettes cached within the legitimate load, with a duty value of £36,453. The vehicle was seized, the cigarettes confiscated, and Mr Capucha arrested. He was also issued with form BOR156 and BOR 162, together with Notice 12A. The Appellant did not challenge the seizure in the Magistrate's Court.

58. In an email to the Border Force dated 6 August 2019, Mr Seidl said "the company closed the employment with the driver". However, there was no supporting evidence (such as a termination letter), and Mr Seidl did not attend the hearing and so could not be cross-examined. The Appellant did not dismiss any of the drivers involved in the previous three Seizures, and did not dismiss Mr Loci, who was involved in subsequent seizures (see further §61.ff). On the balance of probabilities, we find as a fact that Mr Capucha was not dismissed as a result of the Fourth Seizure.

The employment contract

59. The employment contracts between (a) the Appellant on the one hand, and (b) Mr Balint and Mr Capucha on the other, included the following terms:

> (1) The employee shall "perform the work responsibly and properly" including complying "with the legislation applicable to the work performed".
>
> (2) The employee is "obliged to properly manage the entrusted resources and to guard and protect the entire tangible property of the employer against damage, loss, destruction, misuse. The employee is liable to the employer for damage".
>
> (3) The employee undertakes "not to harm the goodwill of the employer".
>
> (4) Violation of any of the above obligations was a "serious" breach which "shall be a reason for immediate termination of the employment relationship with the Employer".

60. The contracts thus contained no reference to smuggling. Mr Seidl's unchallenged evidence was that there was no requirement under Slovak law for employment contracts to contain such a provision.

Subsequent seizures

61. On 17 July 2022, the Border Force stopped a vehicle belonging to the Appellant and driven by a Mr Jan Loci, an employee of the Appellant. The vehicle was found to contain 8,440 cigarettes, which were seized, as was the vehicle. The Border Force offered restoration for a fee of £3,523. The Appellant accepted, and the vehicle was restored.

62. On 29 May 2023, the Border Force stopped a tractor unit and trailer belonging to the Appellant, also driven by Mr Loci. It was found to contain 503,000 cigarettes with a duty/VAT value of £209,968. These were seized, as was the vehicle. The Border Force offered restoration for a fee of £4,000. The Border Force Officer in question said that "normally in these circumstances the vehicle would not be offered for restoration" but that he had taken into account the steps the Appellant had taken to prevent smuggling, noting that its "recent track record suggests that the measures have made a difference". The Appellant accepted the offer, and the vehicle was restored.

THE BORDER FORCE POLICY

63. The Border Force policy on restoration ("the Policy") provides that the Border Force's approach differs depending on whether:

> A: neither the driver nor the operator are responsible; or

B: the driver but not the operator is responsible; or

C: the operator is responsible (whether or not the driver is responsible).

64. Under Part A, the Policy says:

> "If the operator provides evidence satisfying Border Force that neither the operator nor the driver were responsible for, or complicit in the smuggling attempt then:
>
> (1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.
>
> (2) Otherwise,
>
> a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).
>
> b) On a second or subsequent occasion (within 12 months) the vehicle will not normally be restored."

65. Under Part B, the Policy reads:

> "If the operator provides evidence satisfying Border Force that the driver but not the operator is responsible for or complicit in the smuggling attempt then:
>
> (1) If the operator provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless
>
> a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower) except that
>
> b) If the second or subsequent occasion occurs within 12 months of the first, the vehicle will not normally be restored.
>
> (2) Otherwise
>
> a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower)
>
> b) On a second or subsequent occasion the vehicle will not normally be restored."

66. Under Part C, the Policy reads:

> "If the operator fails to provide evidence satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt then:
>
> (1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).
>
> (2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion, the vehicle will not normally be restored."

67. In *Szymanski v DBR* [2019] UKUT 0343 (TCC) ("*Szymanski*") at [43] and [49], the Upper Tribunal found that the Policy was reasonable. In addition, as both Officer Brenton and Officer Summers said in their review letters, the Policy had been applied "firmly but not rigidly" so as to allow an exercise of discretion on a case-by-case basis.

WHETHER THE DECISION IN RELATION TO THE THIRD SEIZURE WAS REASONABLE

68. We first summarise Officer Brenton's review decision, followed by a discussion of the relevant factors.

Officer Brenton's decision

69. On 5 March 2019, Officer Brenton decided that paragraph B(2)(a) of the policy applied, and offered to restore the vehicle for a sum equal to 100% of the revenue involved in the smuggling attempt. His review decision said that:

> (1) it was clear from the information given to the Border Force at the time of the seizure that the driver was involved in the smuggling;
>
> (2) in the absence of any further evidence from the Appellant, he had concluded that reasonable steps to prevent smuggling had not been taken; and
>
> (3) he had also considered the degree of hardship noting that all vehicle seizures cause inconvenience and cost to the owner, but that there was no evidence of "exceptional hardship" in the Appellant's case.

Factors not taken into account

70. In coming to that decision, Officer Brenton did not take into account further evidence provided by Mr Seidl on 11 March 2019: this was before the deadline given to the Appellant but for some unknown reason this was not forwarded to Officer Brenton before he made the decision. Officer Brenton was also plainly unable to take into account evidence provided subsequently as part of the Appellant's grounds of appeal, and he did not take into account (and was presumably unaware of) the First and Second Seizures. It was thus common ground that the Tribunal needed to consider additional facts in deciding whether the outcome of the review decision was reasonable.

71. The parties submitted that one or more of the following factors were relevant.

The failure to seal the trailer

72. We have found as a fact that he trailer was not sealed. Mr Davies submitted that sealing the trailer was a basic reasonable step to prevent smuggling, as an unsealed trailer made it much easier for a smuggler to hide goods within a legitimate load. We agree.

The failure to dismiss Mr Balint

73. It was common ground that Mr Balint was involved in the smuggling which led to the Third Seizure. Mr Davies submitted the Appellant's failure to dismiss him was the opposite of a "reasonable step", because he could continue to smuggle on future journeys. Again, we agree.

The employment contract

74. Mr Davies also submitted that the Appellant had failed to include, in the employment contract, a specific provision stating that any employee found to be involved in smuggling would be summarily dismissed. Mr Jánský relied on the clauses set out earlier in this decision, see §59., and said that they could be read as having the same effect. He emphasised in particular that failing to protect the Appellant's property was a "serious" breach which "shall be a reason for immediate termination of the employment relationship with the Employer".

75. We agree with Mr Davies that not only are those clauses general in nature, with no reference to smuggling, but also that smuggling did not result in the "immediate termination" of an employment: it was common ground that neither of the drivers involved in the first two Seizures was summarily dismissed, and neither was Mr Loci. We have also found as facts that neither Mr Balint nor Mr Capucha was dismissed.

76. Mr Jánský also relied on Slovak law, saying that there was no requirement to include in employment contracts, a clause stating that an employee found to be involved in smuggling would be summarily dismissed. We have accepted that this is not a legal requirement in Slovakia, but nevertheless agree with Mr Davies that the inclusion of such a clause would have been a reasonable step.

The First and Second Seizures

77. The Policy takes into account earlier seizures. At the time of the Third Seizure, the Appellant's drivers and vehicles had been involved in two previous smuggling attempts within the previous two months. Mr Jánský submitted that little weight should be given to this factor, as the Appellant carried out around 20,000 transport journeys a year, the majority of which were to the UK, so that these earlier seizures represented a tiny fraction of the total journeys.

78. It is true that the Policy takes into account the number of intercepted smuggling attempts irrespective of the size of the business in question, and therefore does not set less demanding criteria for larger businesses which make multiple journeys. However, such companies should be *more* aware of their obligation to prevent smuggling than smaller operators who rarely visit the UK. Moreover, such shading of the Policy would be difficult to evaluate and enforce. We are in no doubt that the First and Second Seizures were relevant factors to be taken into account when deciding on restoration.

Subsequent seizures

79. Mr Jánský submitted that it could be seen from the subsequent seizures that the fee for restoration of the tractor and trailer unit involved in the Third Seizure was too high: following the seizure on 29 May 2023 of 503,000 cigarettes with a duty/VAT value of £209,968, the tractor and trailer unit were restored for only £4,000.

80. We do not agree that this is a relevant factor. The reasonableness of the decision to restore the tractor and trailer involved in the Third Seizure must be considered in the light of the facts relevant to that Seizure, not on the basis of a subsequent decision which included consideration of the Appellant's changed approach.

Hardship

81. Both parties made submissions on hardship. As set out at §48., we have already found that the Appellant can afford to pay the restoration fee, and we further find that Officer Brenton's conclusion in relation to this factor was correct.

The GPS

82. Mr Jánský submitted that the implementation of GPS tracking in the Appellant's vehicles was a reasonable step which would help to deter smuggling. This was not in dispute and we agree.

Overall position

83. Although some of the further factors discussed above were not relevant to the decision about the Third Seizure, others do need to be considered in addition to those taken into account by Officer Brenton.

84. Mr Jánský's position was that, after taking into account those additional factors, Part B(1) of the Policy should be applied, because the driver but not the Appellant was complicit in the smuggling, and the Appellant had taken "reasonable steps" to prevent smuggling. In his submission, the Tribunal should direct the Border Force to make a new decision which would be likely to result in the vehicle being restored free of charge.

85. Mr Davies submitted that in the light of the further factors, the relevant part of the Policy was not B(1) – to restore the vehicle for 100% of the revenue involved – but instead B(2), which states that "on a second or subsequent occasion the vehicle will not normally be restored". However, Mr Davies said the Border Force were not inviting the Tribunal to direct the Border Force to come to a harsher decision, but was instead asking us to confirm that Officer Brenton's decision was reasonable.

The Tribunal's conclusion on the Third Seizure

86. We agree with Mr Davies that the Appellant did not take reasonable steps so as to bring itself within Part B(1) of the Policy because:

(1) the trailer was not sealed, so was easily accessible by smugglers;

(2) employees who smuggled were retained as employees;

(3) the contract did not specify that smuggling would result in immediate termination.

87. The use of GPS was a reasonable step, but this was insufficient on its own to meet the requirement. Instead, the correct part of the Policy is B(2)(b), because there had been two previous seizures within the last two months.

88. Thus, although Officer Brenton's decision did not take into account all relevant factors, if we directed the Border Force to remake the decision taking into account those factors, the new decision would be likely to remove the offer of restoration for a fee. However, as the Border Force invited the Tribunal instead to leave the position unchanged, we have therefore decided to confirm Officer Brenton's decision.

WHETHER THE DECISION IN RELATION TO THE FOURTH SEIZURE WAS REASONABLE

89. We first summarise Officer Summers's review decision, and then discuss the relevant factors.

Officer Summers' decision

90. Officer Summers decided that the Fourth Seizure satisfied the conditions at Part C(2) of the Policy because:

(1) the Appellant was responsible for or complicit in the smuggling; and

(2) there had been more than two seizures within the last twelve months.

91. Application of Part C(2) would have led to the conclusion that the vehicle should not be restored. However, taking into account that the revenue involved was less than £50,000, Officer Summers decided to use his discretion and instead apply Part C(1). He offered restoration for £17,623, being the trade value of the seized vehicle.

92. In coming to that decision, Officer Summers took into account the following factors in addition to the value of the duty/VAT:

(1) The CMR was handwritten and illegible, and on the balance of probabilities had been completed by the driver. It did not contain any statement that the driver had been unable to check the goods and the reasons for this.

(2) The vehicle was loaded with the cigarettes before it left the Appellant's premises.

(3) Given the points above, the driver was complicit in the smuggling.

(4) The Appellant had not checked the CMR or the goods which were in the load. It had thus not complied with the Convention, which requires that it check the CMR and the accuracy of the statements contained in it as regards the number of packages. .

(5) Given points (2) and (4), the Appellant was also complicit in the smuggling.

(6) There had been three previous seizures of the Appellant's vehicles since 7 October 2018; on some of those occasions, the quantity of illicit goods carried on those vehicles was very large.

(7) The Appellant had not taken reasonable steps to prevent smuggling, for the following reasons:

(a) the terms of the employment contract did not state that smuggling would be regarded as an act of gross misconduct leading to automatic dismissal.

(b) The Delivery Note gives the wrong address for GTEL, and "the most basic of checks" would have established that the address was incorrect.

(c) GTEL "allegedly deals in seafood but has no premises on which to store it".

(d) The consignor was Gamers.SK sro, but the only business of that company related to computer games, and this could have been identified following a simple online check.

93. Officer Summers also considered the degree of hardship, noting that all vehicle seizures cause inconvenience and cost to the owner, but decided there was no evidence of "exceptional hardship" in the Appellant's case.

The Border Force position at the hearing

94. By the conclusion of the hearing, the Border Force had accepted that Officer Summers had taken into account some incorrect and/or irrelevant factors, and we agree. We find that:

(1) It does not follow from the facts that (a) the Appellant had failed to check the CMR or the goods and/or (b) the vehicle was loaded with cigarettes before it left the Appellant's premises, that the Appellant was complicit in the smuggling.

(2) Although there was a difference between the address shown on the Delivery Note for GTEL of 160 City Road rather than 180 City Road, that detail would have been easily overlooked.

(3) Although GTEL does sell seafood, it also deals in "non-specialised wholesale of food, beverages and tobacco", see §51.(2), so a diligent operator who had checked the company online would not have had any cause for concern on the basis that the goods declared on the documentation were "Tuti Napolitan Cocoa Pieces".

95. Mr Davies submitted that, even taking those points into account, any new decision would either "inevitably be the same" or harsher than the conclusion reached by Officer Summers. This was because the correct Part of the Policy was B(2)(b): the driver but not the operator was responsible, but the Appellant did not take reasonable steps to prevent smuggling, and there had been three previous seizures in the last twelve months. Part B(2)(b) required that the vehicle would "not normally be restored".

96. In relation to the lack of reasonable steps, Mr Davies relied on the following points:

(1) the Appellant's failure to include, in the employment contract, a specific provision stating that any employee found to be involved in smuggling would be summarily dismissed;

(2) the Appellant's practice of continuing to employ drivers who had been caught smuggling;

(3) when the Appellant received the order, it did not carry out any checks on the *bona fides* of the consignor and/or consignee; and

(4) it did not check the CMR itself, or check from the CMR to the goods, as required by the Convention.

Mr Jánský's submissions

97. Mr Jánský submitted that Part B(1) of the Policy should have applied, because the Appellant did take reasonable steps. He repeated his submissions about the GPS and the employment contract, and added that there was no requirement under the Convention for an operator to check that the consignor and consignee are *bona fide* businesses. He said that the steps taken by the Appellant were entirely reasonable when considered from the perspective of a business operating in Slovakia, and that the Border Force should take that into account.

98. He also submitted that the Border Force had also not acted reasonably, because they should have investigated the smuggling rather than simply confiscating the vehicles. By way of example, he said they could have contacted Mr Cooke, who was named on Delivery Note, and/or followed the vehicles to their destination.

The Tribunal's view

99. In relation to the last of those points, we disagree. It was Officer Summers' responsibility to decide whether or not to restore the seized vehicle, and the Tribunal's jurisdiction is to decide whether he made a reasonable decision. Whether the Border Force as a body could have done more to locate and intercept the smugglers is not a relevant consideration.

100. We also disagree with Mr Jánský's submission that the Border Force should be required, when assessing reasonable steps, to consider what is meant by "reasonable" in other countries. Such an approach would be unfair, as countries with poor compliance would be held to a lower standard than those with stricter rules. It would also be impracticable: the UK imports goods from almost all corners of the globe, so establishing the position in the country of origin and/or the location where the carrier was based would be a huge exercise. Finally, it would undermine one of the purposes for which the Border Force had been established, namely to prevent smuggling. One of the ways the Border Force carry out that key task is to require carriers and importers to adopt "reasonable steps" to minimise the risk of smuggling. It is true that those steps go beyond the requirements placed on carriers by the Convention, but as the UT said in *Szymanski* at [54]:

> "It is readily apparent that, in the different policy context of seeking to prevent smuggling, Border Force would not be unreasonable if they expected checks to be made beyond those set out in a Convention whose purpose was wholly different (the international standardisation of contractual conditions)."

101. We have already found in relation to the Third Seizure that installing GPS was a reasonable step, but that this was insufficient on its own to meet the requirements of the Policy, given the absence of any specific provision in the employment contract and the Appellant's practice of continuing to employ drivers who had been caught smuggling. The Appellant has failed to show that the conclusion should be any different in relation to the

Fourth Seizure. We would thus have confirmed Officer Summer's decision on those grounds alone.

102. That conclusion is further supported by the Appellant's failure to check any of the following:

(1) The CMR itself – given its illegible and hand-written form, even a cursory inspection would have raised concerns.

(2) Whether the goods matched the CMR: instead, the Appellant relied on the "goodwill" of the sender.

(3) The *bona fides* of the consignor or consignee. A simple internet search of the alleged consignor shown on the Delivery Note would have identified that its only business related to computer games, so it would have been very unlikely to be shipping "Tuti Napolitan Cocoa Pieces" to the UK. A check of GTEL would have identified that it had only been incorporated four months earlier, which would have added to the concerns.

103. We therefore find that the Appellant did not take reasonable steps, and so did not fall within Part B(1) of the Policy; instead it came within Part B(2). Officer Summers then used his discretion to offer restoration in accordance with subparagraph (a) of that Part. There was nothing unreasonable in the exercise of that discretion.

104. We therefore agree with Mr Davies that any new Border Force decision which took in the new findings of fact would either have the same outcome, or would be harsher than the conclusion reached by Officer Summers. As with the Third Seizure, the Border Force did not ask the Tribunal to remit the decision back so that it could take the additional factors into account and consider removing the restoration option. We therefore uphold Officer Summers' decision.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

105. For the reasons set out above, the Border Force review decisions in relation to the Third Seizure and the Fourth Seizure are confirmed. The Appellant's appeals are dismissed.

106. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RLEASE DATE: 04th JULY 2024