[2015] UKFTT 0217 (TC)

TC04409

Appeal number: TC/2014/04219

EXCISE DUTY – Seizure of 6,360 litres of mixed vodka – Whether the decisions not to restore goods proportionate and reasonably made – No – Whether exceptional hardship – Yes – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALCO TRADE LIMITED	**Appellant**
- and -	
DIRECTOR OF BORDER REVENUE	**Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
SONIA GABLE

Sitting in public at the Royal Courts of Justice, London, on 8 April 2015

Dr Anton van Dellen, counsel, for the Appellant

Michael Newbold, counsel, instructed by the Director of Border Revenue, for the Respondents

© CROWN COPYRIGHT 2015

DECISION

1. Alco Trade Limited ("ATL") appeals a decision of the United Kingdom Border Force ("UKBF"), contained in a letter dated 21 July 2014 (the "Decision Letter"), in which it was notified that, after conducting a review, 6,360 litres of mixed vodka seized at Dover on 29 January 2014 would not be restored.

2. Dr Anton van Dallen appeared for ATL and the Director of Border Revenue was represented by Mr Michael Newbold.

3. Although in its Notice of Appeal, dated 31 July 2014, ATL has requested "return of the goods" it is clear from the legislation and authorities, to which we shall subsequently refer, that the Tribunal does not have the jurisdiction to make such an order. The jurisdiction of the Tribunal in an appeal such as this is limited and, as such, the issue for us to determine is whether, having regard to our findings of fact, the decision taken by the Border Force not to restore the vodka to ATL is proportionate and one that could reasonably have been reached. It is not sufficient that we might ourselves have reached a different conclusion neither is it open to us to consider any challenge to the basis or legality of the seizure or the underlying facts necessary to the conclusion that the goods are condemned as forfeited.

Evidence

4. We were provided with two witness statements from Mr Maciej Romanowski, the director of ATL, and a statement from its company secretary Mr Patryk Przepiorkowski. Both gave sworn oral evidence, Mr Romanowski in Polish via an interpreter, and were cross-examined by Mr Newbold. We also heard from David Harris, the UKBF officer who carried out the review and issued the Decision Letter. He too had made a witness statement which he confirmed under oath. He was cross-examined by Dr van Dallen.

5. In addition to the oral evidence there was a bundle of documents that included the witness statements, ATL's Notice of Appeal and the Director of Border Revenue's Statement of Case. It also included all of the material that was before Mr Harris when carrying out his review.

6. On the basis of this evidence we make the following findings of fact.

Facts

7. Having identified a lack of original Polish alcohol for sale in the UK and the potential business opportunity of supplying the Polish community here, ATL was incorporated on 25 July 2012 and commenced trading importing alcohol from Poland for resale. As an importer of alcohol ATL was registered as a "Temporary Registered Consignee" with HM Revenue and Customs ("HMRC") under s 100G Customs and Excise Management Act 1979 ("CEMA") and the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (the "Regulations") on 6 December 2012.

8. Under this registration ATL was only approved to have one Temporary Consignment Authorisation active at any one time. To obtain such authorisation ATL was required to complete a request to import duty paid goods from another EU member state, in this case alcohol from Poland, and submit this on a Form HM4 to HMRC. The completed HM4 would include the name of the supplier, the haulier's details including the registration number of the vehicle to be used, the intended date of dispatch of the goods, their intended date of arrival in the United Kingdom and intended date of arrival at the purchaser's business address. It also included the type and quantity of alcohol to be imported and would also state the amount of duty payable which had to be paid when the HM4 was sent to HMRC. In ATL's case payment of the duty would be made by way of a transfer to HMRC as ATL had a running account with HMRC for this purpose.

9. The import process began with ATL sending a purchase order, by way of an email, to its sole supplier Anpah Janiak SP J ("Anpah") in Poland setting out the type and quantity of alcohol required. Anpah would pack this onto pallets and mark them as ready for collection by an independent haulier to be arranged by ATL. At this stage ATL would send the HM4 to HMRC and pay the appropriate duty. On receiving the money transfer from ATL HMRC would, by way of a letter to ATL, confirm payment of the duty and post Duty Stamps corresponding to the value in the HM4. The letter from HMRC would also contain the reference number to be inserted onto the Simplified Accounting Administrative Document ("SAAD") necessary for the transportation of the alcohol in the EU. The SAAD reference number would be sent to Anpah for enclosure with the goods. At this stage ATL would receive an invoice from Anpah and instruct a haulier to collect the goods from Poland.

10. Due to cash flow limitations, as it was financed through commercial loans from Polish banks, ATL's practice was to make frequent imports of small quantities of alcohol. This amounted to approximately one shipment a month being made with an HM4 being completed and sent to HMRC each time. Where the order was not sufficient for a full lorry load the haulier would transport goods for a different customer in addition to ATL's goods.

11. Although ATL's purchase order specified the alcohol required Anpah would often pack more alcohol onto pallets than had been requested and add the cost of this extra alcohol to the invoice it sent ATL. When this happened ATL would accept and pay for the extra alcohol not only as a matter of commercial expediency, as it would cost more to return the goods than pay for them but, as Mr Maciej Romanowski ATL's director, who had visited Anpah as part of ATL's due diligence process, explained, to avoid jeopardising its working relationship with Anpah which he described as "the largest and most reputable alcohol trader in Poland" which had a turnover of €25 million and which employed "a lot of people".

12. Under the Regulations ATL must inform HMRC when it has received the alcohol and if there is any difference between what was ordered and the actual amount received. It is also required to pay any duty that is due as a result of any over supply which, in practice, is done through a correction to the amount held on its account with HMRC.

13. Mr Romanowski explained that ATL, which had been inspected several times by HMRC, had not encountered any problems in regard to its alcohol imports with either HMRC or UKBF. However, this changed on 29 January 2014 when the mixed

vodka, with which this appeal is concerned, was found on a vehicle at the Port of Dover by UKBF officers.

14. As the Decision Letter explains:

> The load [of the vehicle carrying the goods] was manifested as being "empty cartons" but found to be alcohol as shown above. The documentation accompanying the load was forwarded to a specialist team called the Revenue Fraud Detection Team to investigate. Subsequent to these further enquiries the unit, trailer and goods were seized. The accompanying paperwork showed there should have been 6,323.2 litres of alcohol however, a tally of the goods showed that there were in fact 6,360 litres.

15. Despite a request being made to UKBF for a copy of the manifest by Dr van Dallen in August 2014 this was not provided until the morning of the hearing. Although this does indeed refer to "empty cartons" and the registration number of the vehicle carrying ATL's shipment of vodka there is no mention of ATL on the document which only refers to one load. It was suggested by Mr Romanowski that the empty cartons made up only half of the load carried with ATL's goods making up the other half and the manifest for this had not been provided. However, Mr David Harris, who had carried out the UKBF review, said that the manifest recording the empty cartons was all he had received from DFDS Seaways following his request for the provision of this information.

16. Following the seizure of the vodka by UKBF HMRC's HM4 office refused to process any further imports of alcohol by ATL from Poland. As a result ATL was unable to trade despite either having the funds or being able to raise sufficient finance to continue trading. Although ATL did not challenge the legality of the seizure, in a letter, received by UKBF on 14 February 2014, ATL's secretary, Mr Przepiorkowski, requested restoration of the vodka.

17. The letter explained that ATL had been trading regularly for the previous eighteen months establishing a good working relationship with their clients, suppliers and HMRC. The letter continued:

> The current situation is a result of a misunderstanding, but was in no way designed to mislead anyone in any way. We order the goods for three deliveries in advance to be sure the goods will be available from our suppliers on time. It has come to light that a clerical error was responsible for sending the wrong delivery to the UK and the goods that we requested in UCI 14/01/014. We have attached the confirmed UCI paperwork as well as the paperwork we had already prepared for the subsequent delivery. The goods for the UCI with paid duty (UCI 14/01/014) are still in Poland due to this error, we have attached a confirmation of that fact from our supplier – Anpah Janic in Poland with this letter.

In essence Anpah had sent ATL its February order as opposed to the alcohol it had ordered for January which remained in Poland. ATL's February order was for 6,088 litres whereas in January 907 litres of alcohol had been ordered for ATL.

18. A translation of the letter, to which Mr Przepiorkowski referred in his letter to UKBF, from Pawal Wieslaw Janiek, an "authorised representative and partner" in Anpah, confirms Anpah's turnover as being approximately €25 million and its trade

as the sale of alcoholic and non-alcoholic drinks. Also that although it is one of the largest wholesalers of alcohol in Poland it did not have experience of sending goods to the UK and its employees do not speak English. That letter continues:

> In relation to our error concerning the size of the order, the last delivery to the UK for ALCO TRADE LIMITED which is documented by invoices FW 680004/14 and FW 680005/14 was made as a larger one than on the purchase order. This was singular and an accident. There was no intent to benefit through it. This was a genuine human error made by our employee. This took place without ill will but only because our company rarely deals with such activities. In any case, we would not have benefitted due to the aforementioned error. Please contact us in case of any questions.

19. UKBF acknowledged receipt of Mr Przepiorkowski's letter on 14 February 2014 and in a letter dated 28 April 2014 to ATL UKBF refused restoration of the vodka.

20. The letter of 28 April 2014 from UKBF summarised its general policy on the restoration of excise goods in that:

> … seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

It went on to conclude (with emphasis as stated in the letter):

> … that there are no exceptional circumstances that would justify a departure from the Commissioners' policy as you have failed to provide sufficient or compelling evidence to contradict this. None of the paperwork accompanying the goods, submitted after seizure or recorded with HMRC re HM4/Movement Authorisations correlates to the goods seized. As such I can confirm that on this occasion **the goods will not be restored.**

21. On 10 June 2014 the solicitors then acting for ATL, Imran Khan & Partners, wrote to UKBF requesting a review of the decision not to restore the vodka to ATL. After setting out the background the letter referred to the following change in circumstances arising as a result of the seizure.

> Our client is currently not operating his business due to your seizure. His only employee Mr … is not receiving wages via PAYE. Our client's bank loans are not being paid and he is facing bankruptcy. The January Chattels [ie the alcohol] are with the seller and may not be sold. Persons involved with Alco Trade [and another company] are no longer operating their business due to your seizure. Mr Maciej Romanowski is unemployed with a non-working partner and a 1 year old child.

The letter continued stating that those previously involved with ATL were working as a night watch man, an engineer, painting lamp posts, selling lottery tickets and as a maintenance man.

22. The review of the decision not to restore the vodka was undertaken by Mr David Harris who on 21 July 2014 wrote the Decision Letter to ATL's solicitors. In

the letter, after setting out the background Mr Harris summarised the UKBF restoration policy for seized excise goods (as stated in paragraph 20, above).

23. The letter continued:

> It is for me to determine whether or not the contested decision should be confirmed, varied or cancelled. The policy should be applied firmly, but not rigidly, so as to allow an exercise of discretion on a case by case basis, and to endure that my decision is not fettered by it.
>
> I have considered the decision afresh, including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the Border Force both before and after the time of the decision.
>
> Your client was invited to provide any further information in support of your request for a review but as nothing has been received I have to make my decision based on the evidence that I already have.
>
> …
>
> I have read your letters carefully to see whether a case for departing from the Border Force policy of non-restoration have (sic) been presented. The onus of making your case rests firmly with your client: it is not for Border Force to make the contrary case.

Mr Harris then refers to the Tribunal decision in *McGeowan International Ltd v HMRC* [2011] UKFTT 407 (TC) in which Judge Huddleston, at [46], said that the burden of proof, "very firmly rests with the Appellant" before continuing:

> In your review request you state that the orders had been mixed up and mistakes made. The February order of 6,088 litres of alcohol had been dispatched instead of the correct order for January which was 907 litres for Alco trade and 3,000 litres for Inter Alcohols. However I note that the goods when tallied at the time of seizure amounted to 6,360 litres of alcohol. This would appear not to agree with your client's explanation and casts doubt on the credibility of your client's attempt to clarify the errors/mistakes found in this case. In addition, you assert that there would have been no gain to your client even if the goods had not been detected at import. I would question this as that assertion pays no heed to the UK illicit market which is open to those who would choose to use it.

After concluding that he is satisfied that no breach of Human Rights Act 1998 has occurred Mr Harris continues (with emphasis as stated in the letter):

> I have also paid particular attention to the degree of **hardship** caused by the loss of the goods. I sympathise with your client's difficulties in carrying on the business. One must expect considerable inconvenience as a result of having goods seized by the Border Force. Hardship is a natural consequence of having a vehicle seized and it would have to be *exceptional* hardship for me to restore the goods under this part of the policy. I do not regard either the inconvenience or expense caused by the loss of a vehicle in this case as *exceptional* hardship over and above what one should expect. In the circumstances I do not consider your client has suffered *exceptional* hardship.

24. When cross-examined on this part of the letter Mr Harris described the reference to a "vehicle" (although it was goods that had been seized in this case) as a "typo" and although it would seem that a "pro-forma" letter had been used Mr Harris said that he had not closed his mind to the issue of hardship. However, he confirmed that as a UKBF officer he could not deal with the reconciliation of discrepancies on the HM4. He also confirmed that he had not made any enquiries in relation to whether there was exceptional hardship in this case.

25. As the decision to refuse restoration of the alcohol had been upheld by the review on 31 July 2014 ATL appealed to the Tribunal.

Law

26. Under the Alcoholic Liquor Duties Act 1979 excise duty is charged on spirits, wines and beer imported into the United Kingdom.

27. Regulation 88 of the Regulations provides that excise goods which are liable to duty which has not been paid are liable to forfeiture. In addition any imported goods on which excise duty has not been paid which are "unshipped in any port" or found "not to correspond with the entry made thereof" are liable to forfeiture under s 49(1)(a) and (e) CEMA.

28. If a person "knowingly or recklessly" makes or signs or causes to be made or signed any declaration notice, certificate or other document which is untrue s 167(1) CEMA provides that he shall:

> … be guilty of an offence …; and any goods in relation to which the document or statement was made shall be liable to forfeiture.

29. Section 139(1) CEMA provides:

> 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.

30. Any challenge to a seizure on the grounds that the item seized is not liable to forfeiture must, by virtue s 139(6) and schedule 5 to CEMA, be notified to HMRC within one month of the date of the seizure. Where notice is given condemnation proceedings shall be commenced by HMRC in the Magistrates' Court to determine whether the item seized was liable to forfeiture (see paragraph 6, schedule 5 CEMA). However, if HMRC are not notified of a challenge within one month the item seized "shall be deemed to have been duly condemned as forfeited" (see paragraph 5, schedule 5 CEMA).

31. It is clear from the decision of the Court of Appeal in *HMRC v Jones & Jones* [2012] Ch 414 that the Tribunal does not have the jurisdiction to consider the lawfulness of a seizure on the grounds that it was not liable to forfeiture irrespective of whether such a finding was made by a Magistrates' Court or deemed to have been made by virtue of the legislation.

32. However, under s 152 CEMA:

> The Commissioners may, as they see fit –

> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.

33. Section 14(2) of the Finance Act 1994 provides:

> Any person who is –
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to whom, or on whose application, such a decision has been made, or
>
> (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
>
> may by notice in writing to the Commissioners require them to review that decision.

34. Section 15(1) of the Finance Act 1994 states:

> Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –
>
> (a) confirm the decision; or
>
> (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

35. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

> (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this sections shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
>
> (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 further review of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.
>
> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal;
>
> (6) On an appeal under this section the burden of proof as to –

> (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;
>
> (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
>
> (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).
>
> shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established

36. Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) provides that an "ancillary matter" is:

> … any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored.

37. As regards whether a decision is one that could reasonably have been reached, Lord Phillips MR (as he then was) giving the leading judgment in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 said, at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters"

He continued, at [52], in relation to proportionality:

> "The commissioners' policy involves the deprivation of people's possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *Air Canada v United Kingdom* (1995) 20 EHRR 150, para 36). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

Discussion and Conclusion

38. As we have previously noted (at paragraph 3, above) the jurisdiction of the Tribunal in an appeal such as this is limited. The issue for us to determine is not whether the goods should be restored to ATL but whether, having regard to our findings of fact, the decision taken not to restore them is one that could reasonably have been reached and is proportionate having regard to all the circumstances.

39. Dr van Dallen contends that we should adopt the approach of the Tribunal (Judge Rankin and Mr Hennessey) in *Gerald Carlin v HMRC* [2014] UKFTT 782 (TC) in relation to the failure of Mr Harris to undertake enquiries to ascertain if the seizure resulted in exceptional hardship. In that case the Tribunal allowed an appeal against an excise duty assessment having found, at [30] that:

> "HMRC failed to carry out the most basic checks. They were supplied by Mr Carlin with a mobile telephone number for Mr Woods which they did not ring. They could easily have checked the Lorry's registration number to ascertain the name and address of the registered owner." As the seizure notice was addressed to Mr Woods care of Mr Carlin it is possible Mr Woods was never notified of his right to appeal to the Magistrates Court.

However, as Mr Newbold correctly submits, *Carlin* is an excise duty assessment case and therefore distinguishable from a restoration case such as the present.

40. Also, as any evidence that exceptional hardship has been caused by a seizure will be readily available to the person seeking restoration a UKBF reviewing officer cannot be required to carry out an investigation but to fairly consider the material before him. Although Mr Harris did obtain the manifest from DFDS Seaways this was after it had been requested by Dr van Dallen and, as such, not an part of an investigation undertaken by Mr Harris.

41. In relation to how we should approach the discrepancies we were referred by Dr van Dallen to *Adrena SP ZO OK v Director of Border Revenue* [2013] UKFTT 735 (TC). In that case, an appeal against a decision not to restore over 17,000 litres of beer and lager, there was a discrepancy between a physical load being of mixed beers and the details declared on the electronic administrative document. This had arisen arose because instead of 180 cases of Tennents Super lager on two pallets (total 2,160 litres) there were found to be 160 cases of Super Kestrel lager on two pallets (total 1,920 litres). Because of the discrepancy the tractor, trailer and beer were seized by UKBF officers.

42. In that case the Tribunal (Judge Poole and Mr Stafford) having considered, at [41]:

> "… that in a discretionary matter such as restoration, it is legitimate (indeed necessary) to investigate beyond the bare facts that gave rise to the forfeiture. That investigation might include matters unrelated to the seizure (such as the personal circumstances of the claimant), but it can equally clearly include the circumstances surrounding the seizure itself, as long as it does not seek to contradict the facts upon which the seizure was based."

It concluded, at [45] that:

> "In the absence of any other explanation, it seems to us self-evident that the inclusion of 160 cases of Super Kestrel in place of 180 cases of Tennents Super was an error from which no discernible advantage could accrue to the appellant. To insist on production of evidence that the error took place by mistake displays a somewhat unrealistic view of the world. In such situations, where no possible advantage for the appellant can be discerned from the discrepancy, it is appropriate to

> presume that it occurred by reason of a simple mistake unless and until some other reason for it can be credibly asserted."

43. Mr Newbold urged caution in applying *Adrena* to the present case and reminded us that while it may have been appropriate to presume that the error had occurred as a result of a mistake in that case, as a decision of the First-tier Tribunal it is not binding and moreover was fact specific and should not be followed.

44. The final case to which we were referred by Dr van Dallen was *Pio-Mar-Trans v UK Border Agency* [2012] UKFTT 54 (TC). This was another restoration case in which the Tribunal (Judge Manuell and Mr Buffery) considered the knowledge of the owner of a vehicle that had been seized which had, unbeknown to the owner, been used by its driver to smuggle cigarettes into the UK not only on the occasion of its vehicle's seizure in August 2010 but also previously.

45. At [23] of its decision the Tribunal referred to:

> "The one area of disputed fact, or unclear fact, is the state of the Appellant's knowledge of the embarrassing conduct of its drivers during 2010 and earlier. … The difficulty is that there was insufficient evidence before the Tribunal to show that the Appellant had actual notice of the previous recent illegal smuggling history of its drivers."

It went on to conclude, at [24]:

> "Taking all of the available evidence into account, the Tribunal finds that Appellant had not received actual notice and had no means of knowing of the relevant recent smuggling incidents by its drivers prior to the vehicle seizures the subject of the present appeal. The actions of the drivers in question plainly had no connection with the Appellant and were not readily detectable, given that the drivers had so much time with the vehicles in question, away from the Appellant's premises. The drivers had to be trusted and the recruitment procedures and anti smuggling declarations were reasonable steps on which the Appellant placed reliance."

Dr van Dallen submits that *Pio-Mar-Trans* is illustrative of the limit on a trader's knowledge and what action could be taken. In the present case he reminds us that ATL was not aware of the quantity of alcohol involved until after it was seized as it had not been responsible for loading the vehicle.

46. However, as with the other decisions to which we were referred, Mr Newbold submits *Pio-Mar-Trans* is fact specific and different from the present case. In the present case Mr Newbold contends that ATL has not shown the decision of UKBF to be flawed given that there were discrepancies between the paperwork and the alcohol found, in particular the manifest did not show any alcohol was being carried. As such he submits that the decision is within the reasonable margins open to Mr Harris who is required to have regard to UKBF's restoration policy in relation to seized goods even though he is not constrained by it.

47. Mr Newbold also contends that insufficient evidence of error has been adduced by ATL and argues that the explanation of the discrepancies advanced by Mr Romanowski and Mr Przepiorkowski should not be accepted as it is not credible that ATL would accept more goods from Anpah than had been ordered and also pay for these without question.

48. However, we disagree. Having seen and heard Mr Romanowski and Mr Przepiorkowski we found them and their evidence to be credible. Given the respective status of Anpah, the pre-eminent alcohol wholesaler in Poland, and ATL, a relatively newly established importer of original Polish alcohol into the UK, we fully accept that ATL would not wish to jeopardise any business relationship it had with Anpah and would therefore purchase any excess alcohol it received and resolve any issues arising out of the discrepancy with HMRC. We also accept Mr Romanowski's evidence that the difference between ATL's February order of 6,088 litres and the amount seized, 6,360 litres, is within the range of discrepancies "routinely ironed out" with HMRC.

49. We also accept Mr Romanowski's evidence, corroborated by the letter from Anpah, that the ATL's February order had been loaded as a result of a genuine error by an employee of Anpah when it should have loaded ATL's January order.

50. It is apparent from the Decision Letter and his evidence that Mr Harris did not take account of the process ATL had with HMRC for reconciling such discrepancies neither, because of the existence of the discrepancy, did he accept that the February order had been erroneously supplied instead of the January one. In our view, these are clearly relevant matters as is ATL's previous record of importing alcohol from Poland something that also does not appear to have been considered by Mr Harris.

51. It therefore follows that by failing to take account of these relevant matters Mr Harris cannot reasonably have arrived at the decision to confirm the non-restoration of the alcohol to ATL.

52. Also, having regard to the circumstances in which ATL found itself following the seizure of the goods, we find there to be exceptional hardship which arose as a result of the seizure. We do not accept the submission of Mr Newbold that if there was exceptional hardship it was not caused by the seizure but as the result of HMRC's HM4 office refusing to process any further imports of alcohol by ATL from Poland as if there had not been a seizure we consider it extremely unlikely that HMRC would have taken such action.

53. We therefore allow the appeal and direct, in accordance with s 16(4) of the Finance Act 1994 that there should be a further review of the original decision taking account of our findings of fact in particular:

(1) That Anpah frequently provides ATL with more alcohol than it has ordered;

(2) That there is a process by which ATL reconciles any such discrepancies with HMRC;

(3) The discrepancy between the quantity of alcohol seized on 29 January 2014 and that requested by ATL in its January 2014 purchase order and shown on the HM4 arose as the result of a genuine mistake by Anpah which loaded the quantities requested in ATL's February 2014 purchase order;

(4) ATL's previous record of importing alcohol from Poland; and

(5) That the effect if the seizure resulted in exceptional hardship for ATL in that it was unable to trade.

Right to apply for Permission to Appeal

54. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE:13 May 2015