TC04848

Appeal number: TC/2012/00994
TC/2012/01020
TC/2012/01683
TC/2012/04882
TC/2012/08108
TC/2012/08651
TC/2012/10728
TC/2012/10855
TC/2012/10870
TC/2012/10871
TC/2012/10872
TC/2012/10966
TC/2013/00091
TC/2014/05140

EXCISE DUTY– seizure of goods –refusal to restore – whether conclusion that appellant had failed to prove ownership of goods unreasonable – no – in cases where decisions were flawed decision not to restore would inevitably be the same if further review directed - appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MALT BEVERAGES BVBA **Appellant**

- and -

(1) DIRECTOR FOR BORDER REVENUE **Respondents**
(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

TRIBUNAL: JUDGE SWAMI RAGHAVAN
ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice on 23, 24, 25 and 26 February 2015
Charlotte Hadfield instructed by Altion Law Limited for the Appellant

Matthew Donmall, instructed by the General Counsel and Solicitor to HM Revenue and Customs and Home Office, for the Respondents

DECISION

Introduction

1. These appeals relate to 14 decisions made by the Respondents (two by HMRC and the remainder by UK Border Force) refusing to restore excise goods (alcohol) which it is suggested were despatched from bonded warehouses in France. In each appeal the Respondents maintain that their decision not to restore the goods should remain in place as they say the appellant has not demonstrated that it owns the goods which were seized. The appellant disagrees and argues in addition that the decisions are flawed in a number of respects including variously that that the appellant's arguments were mischaracterised as impermissible challenges to legality of the seizure, that the decisions did not consider the appellant's innocence in any wrongdoing, that irrelevant matters such as previous seizures were taken into account and that a refusal to restore is not proportionate.

Evidence

2. We heard oral evidence which was cross-examined by the opposing party from Michel Wierinckx, the current director of the appellant on behalf of the appellant. For the reasons explained at [105] onwards below we found his evidence to be of very limited assistance. On behalf of the Respondents we heard evidence from David Harris, Graham Crouch, Louise Bines, Raymond Brenton, Helen Perkins and Deborah Hodge. They were the officers who had given the review decision under appeal or (in the case of Mr Brenton and Ms Hodge they were officers who were adopting the evidence of the original review officers who had given the decisions but who had since retired from the Border Force.) Each had served witness statements in advance with exhibits. We found them all to be credible witnesses of fact.

Disputed decisions and factual background

3. The appellant is a company based in Belgium and is registered by the Belgian authorities to deal with the wholesale and retail sale of beverages.

4. The following description of the administrative arrangements and the ways in which they might be abused for the purposes of fraud (which were helpfully set out by the FTT in *Worx Food & Beverage BV v The Director of Border Revenue* [2014] UKFTT 774) were not in dispute between the parties.

(1) Alcoholic goods can be moved within the European Union (EU) under what are known as "duty suspension" arrangements. No duty is charged on goods moving between specific locations, known as bonded warehouses. It is only when the goods leave a bonded warehouse for a destination other than another bonded warehouse that duty becomes payable.

(2) Since 1 January 2011, UK traders have been required to use the computerised Excise Management Control System ("EMCS") when receiving and dispatching duty suspended excise goods moving within the EU. When

goods are to be moved between warehouses, EMCS issues an Administrative Reference Code ("ARC"). Once issued, an ARC is valid for 4-5 days.

(3) In some cases, the original load (with its ARC number) enters the UK legally, but is followed by a second load, which "borrows" the ARC of the first load. The second load is made up to match as closely as possible that which made up the first load. On cursory inspection the second load may look legitimate, and in reliance on the "borrowed" ARC number, may pass through border control without being seized. Once in the UK the second load is then illegally sold free of duty.

5. The summary table below sets out basic information in relation to each appeal where this was apparent from the documents. The decisions refusing restoration are considered in more detail in a separate section which follows.

Appeal reference TC/2012 (unless otherwise stated)	Disputed decision (No. used in this decision)	Date of seizure	Goods	Excise duty	Officer who gave Evidence in relation to decision
1020	29.11.11 **Decision 1**	10.4.11 (26.5.11)	15,043.5 ltrs Mixed wines	£36,289.44	Harris
994	7.12.11 **Decision 2**	20.5.11 (8.6.11)	23,229.24 ltrs Mixed beers	£23,421.06	Harris
8651	7.8.12 **Decision 3**	15.7.11 (27.7.11)	25,034.99ltrs Mixed beers	£24,782.33	Crouch
4882 (HMRC)	22.3.12 **Decision 4**	24.11.11 (25.11.11)	25,786.56 ltrs Mixed beers		Bines
10855	29.10.12 **Decision 5**	8.6.12	21,880 Mixed beers	£25,253.10	Brenton
8108 (HMRC)	24.7.12 **Decision 6**	12.4.12	23,927.04 Mixed beer		Bines
10871	7.11.12 **Decision 7**	23.5.12	24,692.16 Mixed beers	£29,960.41	Perkins
1683	24.10.12 **Decision 8**	28.3.12	22,871.18 Mixed beers	£22,799.68	Hodge
10870	7.11.12 **Decision 9**	4.5.12	24,348.48 Mixed beers	£26,125.87	Perkins
10872	7.11.12 **Decision 10**	23.5.12	24,991.68 Mixed beer	£28,197.54	Perkins
10728	1.11.12 **Decision 11**	1.6.12	24,137.92 Mixed beer 1,080 cider	£26,314.76 £2,649.46	Brenton
10966	12.11.12 **Decision 12**	8.6.12	24,630.72 Mixed beer	£26,948.72	Brenton

2013/91	30.11.12 **Decision 13**	31.8.12	22,772 Mixed beer	£26,566.61	Brenton
2014/5140	3.7.13 **Decision 14**	15.11.12	25,343.04 Mixed beer	£32,698.38	Rayden

Law

Seizure and forfeiture

6. There is no dispute as to the relevant legal provisions and we gratefully adopt the section of the Respondents' skeleton argument setting this out.

7. The Alcoholic Liquor Duties Act 1979 sections 36 and 54 provides that excise duty is charged upon beer and wine imported into the UK.

8. Under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, made under the Customs and Excise Management Act 1979 ("CEMA"), there is an excise duty point at the time when excise goods are released for consumption in the UK (regulation 5). If the goods have been in a duty suspension arrangement, then that point of release is when they leave that duty suspension arrangement (regulation 6); if they are not in such an arrangement, then excise is chargeable; and if they have already been released for consumption in another Member State and are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held (regulation 13(1)). Regulation 13(3) defines holding for a commercial purpose in paragraph 13(1), and will include every instance where the goods are held by a person other than a private individual.

9. As to liability of alcohol to forfeiture: Section 49(1) of CEMA states:

> "Where-
>
> a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-
>
> (i) unshipped in any port,
>
> those goods shall…be liable to forfeiture."

10. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> "If in relation to any excise goods that are liable to duty that has not been paid there is—
>
> a contravention of any provision of these Regulations, or a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture."

11. Section 139(1) of CEMA provides that something liable to forfeiture may be seized:

> "Anything 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."

12. Section 139(6) of CEMA gives effect to schedule 3 to that Act.

Condemnation proceedings

13. Under paragraph 3 of schedule 3 to CEMA, any person claiming that any thing seized as liable to forfeiture is not so liable must give notice of his claim in writing to HMRC within one month of the date of the notice of seizure.

14. Paragraph 5 of schedule 3 to CEMA provides:

> "If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

15. Paragraph 6 of schedule 3 to CEMA provides:

> "Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

Tribunal's jurisdiction

16. s16(4) Finance Act 1994 ("FA 1994") provides:

> "(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 section 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."

HMRC v Jones and Jones [2011] EWCA Civ 824

17. In *Jones and Jones*, the Court of Appeal clarified the extent of the Tribunal's jurisdiction. Once goods have been condemned as forfeit in the magistrate's court, the Tribunal has no power to overturn that decision, but has to deem the goods to have been legally seized. Mummery LJ, giving the judgment of the court, said at [71(7)] that:

> "…deeming something to be the case carries with it any fact that forms part of the conclusion."

Legal approach if we find decision flawed

18. Mr Donmall for the Respondents argues that even if the tribunal were to conclude contrary to the Respondents' case that the review decision was one which the officer could not reasonably have arrived at the Tribunal is not obliged under s16(4) FA 1994 to direct the decision is remade, rather it has the power to do so. So if for example the tribunal considered that the review officer could not reasonably have arrived at any conclusion other than not to restore there then was no purpose to exercising the power and the decision should stand. This was, he submitted, by analogy with the well established administrative law principles e.g. *R v Broadcasting Complaints Commission ex p Owen* [1985] QB 1153. That case concerned an appeal to a two member panel of the Court of Appeal in relation to a judicial review action. At pg 1177 May LJ with whom Taylor J agreed set out:

> "…the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion."

19. Closer to home in this tribunal we note that a similar principle has been applied in relation to cases where, by virtue of the relevant jurisdictional statute, the tribunal exercises a supervisory rather than an appellate jurisdiction by reference to the Court of Appeal case of *John Dee Ltd v CCE* [1995] STC 941. In that case which concerned an appeal originating in the VAT Tribunal, the tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial information. Neil LJ (with whom the other Lords Justices agreed) held that counsel of the company contesting the security requirement in that case had been right to concede 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."

Decisions refusing restoration of goods

Decision 1: TC/2012/1020

20. The seizure notice set out that there were numerous inconsistencies and indications that the unique ARC number had been used on other occasions prior to interception of the load and that it was believed that had the load not been intercepted it would not have been delivered to the UK destination bond but would have been diverted to avoid payment of UK excise duty. Furthermore it was believed that the intercepted goods had not originated from the consigning warehouse shown on the eAD and therefore there was no evidence that they belonged to the supplier or the consignee shown on the paperwork.

21. Following the seizure UKBF wrote on 14 June 2011 to ask for proof of ownership of the goods. It is necessary to set this out in some detail as the appellant's argument is that no or insufficient regard was had to the evidence that the appellant had produced of ownership of the goods.

22. The letter, which was from the V Marshall of UKBF's National Post Seizure Unit (NPSU) was in the following terms:

> "Before consideration can be given to your restoration request I require proof of ownership of the goods. This should not only include proof that your client has made payment for the goods, but that the goods held by our Queens Warehouse can be physically shown to be those that your client is claiming.
>
> To this end please supply me with details of the system used to identify your clients' goods and the numbers on the particular consignment, i.e. lot numbers, rotation numbers or pallet numbers. These can then be checked against the goods we hold to help confirm ownership.
>
> If your client has any other paperwork relating to the above goods which support the claim for restoration, please forward a copy of these…"

23. The appellant wrote two letters on 25 July 2011 and a further letter with enclosures on 28 July 2011.

24. The letter of 28 July referred to UKBA already being in possession of the appellant's delivery note and sales order together with the original documentation from MT Manut (the consignor bond). The letter went on to state in relation to stock control:

> "Our client has a bond account with MT Manut. It receives stock from its suppliers into its account and sells stock to its customers from its account. It maintains stock at the bond; sometimes many pallets, sometimes few pallets. Clearly this is dependent on the flow of normal commercial activity…Our client does not have rotation, lot or pallet numbers. Stock control is performed at the end of every week when our client checks the bond's records with its own records. Most bonds have systems of lot numbers which help track stock inside the bond

> When the goods leave the bond for the UK, the only record is the eAD which has the new ARC unique number…

25. The letter also enclosed an "exit note" which it was said stated:

> "all the relevant facts and numbers, including a lot number which must refer to the entry of the goods into the bond."

26. The documents enclosed were as follows:

(1) MT Manutention Bordereau de livraison dated 8 April 2011 This set the destination of Seabrook 2 for the account of Castle Trade Service in Canning Town. It had various column headings: Codes/ article e.g. "BLOSSOMHILLWHITE VIN", Designation "BLOSSOM HILL WHITE 6X0,75,13,5 128 cartons de 6", pallet number –(with the exception of one entry which was "2" this was "1", paletisation (this was either 112,118 or 140) "reg" under which "BD" appeared, quantity, and units.

(2) "Facturation des sorties picking et taxes par article" MT Manut dated 8 April 2011. In addition to columns for article, designation, quantity and units it had columns for movement ("SOR"), Date, Alveole ("Malt Beve"), Niveau (this had figures 112,128, 140), pallet numbers (1 or 2) and lot numbers in the format 2010_xxxxxx.

(3) A Malt Beverages Delivery Note dated 8 April 2011 naming Castle Trade Services, the ship to address as Seabrook Warehousing, the transporter as JMD Transport, and stating that collection was to be from MT Manut. It gave a description of goods (e.g. Blossom Hill White 6x74cl and number ordered).

(4) The Sales Order to Castle Trade Services corresponding to the above was attached dated 8 April 2011 setting out a total of £38,503.68

27. The NPSU acknowledged receipt of the letter and referred back to the request for identification numbers on the consignment (lot/rotation numbers). The letter stated:

> "By comparing your client's documentation with the identity numbers on the seized goods I can then confirm that the goods held by us are the goods your client dispatched and not part of a multiple run where, if not detected they would have been diverted."

28. The appellant wrote again on 15 August 2011 pointing out that its explanation of stock control had not been addressed and that the client did not have rotation, lot or palette numbers. The NPSU replied on 23 August 2011 stating that the officer had compared the delivery note and sale order to the goods seized and they did not tally, and also that the lot numbers from the picking list did not match those on the seized goods. The letter stated "In summary you have not been able to confirm that the goods we hold in our Queens Warehouse are the same goods your client despatched". The appellant responded on 25 August 2011 requesting contemporaneous evidence of the discrepancy. On 20 September the officer replied refusing to restore the goods. The appellant requested a review on 3 November 2011 reiterating the points made

previously. At the time of the review the appellant was challenging the legality of the seizure in the Magistrates' court.

29. Mr Harris's letter went through his understanding of the factual background. This noted that:

> "On the 21st April the tally sheet and delivery note for the intercepted load were compared and there were a number of discrepancies found relating to the brands of wine and quantities. Goods intercepted do not match documents produced, therefore can not be the goods shown to be consigned from MT Manutention, owned by Malt Beverages BVBA."

30. The decision noted that the appellant had challenged the legality of the seizure in the Magistrates' Court, that a hearing was awaited, and explained that the officer was making the decision on the assumption that the seizure was lawful and that the goods were held in the UK for a commercial purpose and that the goods would duly be condemned. It went on to say that if however the appellant were to be successful then the things (or their value) would be returned in accordance with paragraph 17 of schedule 3 of CEMA. After noting his awareness of the challenge Mr Harris stated:

> "It is apparent to me that the main issue you seem to be contesting when asking for restoration is the purpose to which these goods were to be put. In other words, whether the goods were being brought in for a legitimate purpose as defined by the legislation. It is not my function as a Review Officer to interfere with the jurisdiction of the Magistrates Court as it is that Court which is the correct forum in which to raise to such arguments as to the correctness or otherwise of the seizure."

31. Mr Harris then referred to [71] of *Jones and Jones* drawing from this that "therefore, according to policy, goods which have been correctly forfeited should not normally be restored." He then referred to an excerpt from the decision of Judge Blewitt in *Clear plc* ([2011] UKFTT 11 (TC)) that the general policy of the Respondents not to restore goods where properly seized was reasonable. He then said "I have not found within your case any exceptional circumstances which would warrant me to deviate from the general policy of non restoration. Non restoration is proportionate and fair under such circumstances."

32. On 8 December 2011 at an uncontested first hearing the goods were condemned by order of the Dover Magistrates' Court.

Decision 2: TC/2012/00994

33. The Border Force corresponded with the appellant in similar terms regarding proof of ownership to that in the appeal above and the appellant responded in similar terms too.

34. In response to the queries on ownership the appellant's solicitor's letter of 26 August 2011 mentioned that his client had e-mailed the bond to ask for its internal records in respect of the goods released and enclosed an e-mail dated 16 August 2011

from the appellant to Wybo Warehouse asking to know what systems they had in relation to stock identification and reporting that UK customs had asked for rotation and lot numbers to identify the load. The consideration part of the decision was given in identical form to the decision above. Wybo replied in an e-mail dated 19 August 2011 with a schedule setting out various details under different columns (date, "in/out" WDR, client (malt beverages), destination (Seabrook Rainham) Camion (W7), DAA "RFDT 355/11") merchandise and number of cartons.

35. The further documentation consisted of:

(1) EMCS form showing date of delivery of 18 May 2011 referring to quantities in litres of various different types of beer.

(2) International consignment note from sender Wybo Transports SARL to consignee Seabrook with date designated for taking over goods 18 May 2011, referring to 26 pallets of mixed beer weighing 23,422 and 2,038 boxes.

(3) Malt Beverages Delivery Notes dated 18 May 2011 (DN1730) –in the name of Damdam North Ltd in London, stating the ship to address was Seabrook Warehousing, that EPI Transport was the transporter and that the goods were to be collected from MT Manut.

(4) An e-mail exchange between Ronny Devos at Wybo and Ray Pearson at Seabrook referring to reference to 3 orders of mixed loads where Mr Devos states "The details of the loads will follow when the truck(s) loaded in the evening".

36. The above documents were provided for three orders DN 1730, 1731 and 1732.

37. Mr Harris' review decision was given identical terms to the one above in Decision 1 above.

38. On 23 April 2011 the appellant withdrew from condemnation proceedings. On 24 April 2011 the goods were condemned by order of Sevenoaks Magistrates' Court.

Decision 3: TC/2012/08651

39. The seizure was challenged by the appellant in the Magistrates' Court but the appellant later withdrew from proceedings. Mr Crouch included the same paragraph and references to *Jones and Jones* and *Clear Plc* that Mr Harris had done in his letter. He then, having expressed the view that he had not been provided with details of exceptional circumstances that would result in the goods being restored, went on to set out the following positive additional reasons for not restoring the goods. Noting the details of the ARC (which had been raised with a dispatch date of 13 July 2011 at 1645) he set out:

> "The genuine load was intercepted at Calais on 14 July 2012 at 23.30 hours and allowed to proceed….The same ARC was then used twice more at 0300 hours on 15 July 2011, this load was also intercepted and again at 0555 hours on 15th July (this seizure). The only reasonable conclusion I can arrive given the facts of this case is that the second

> and third runs using the same ARC are illicit loads. Therefore, if you continue to insist that your client owns the goods on the third run then the only conclusion that I can arrive at is that they are complicit in this illicit movement of alcohol. If this was a genuine load why hasn't your client provided a copy of an ARC to legitimately support this movement?
>
> Furthermore, as I am of the view that your client's goods were in fact moved on 14 July [2011], the genuine load I suspect that your client has already been paid for it by the customer, though I note that your client has failed to provide any commercial records in respect of this load such as sales day books, cash books and bank statements."

40. UKBF had asked for evidence of ownership in similar terms as before in its letters of 9 and 16 September 2011, and the appellant's agent replied in similar terms on 7 October 2011 stating he was enclosing documentation particularising his client's ownership of the goods. As well as an EMCS form with a delivery date of 13 July 2011 at 1845 there was :

(1) An invoice number 225 from "EURL CLOCLWORK DISTRIBUTION", Calais to the appellant dated 13 July 2011 referring to purchase order 789 listing different descriptions of beer, their quantities, alcohol rates, and amount.

(2) A purchase order number 789 from the appellant to Eurl Clockwork Distribution.

(3) A Sales order number DN1791 dated 13 July 2011 from the appellant to Damdam North Ltd, London.

41. On 11 October UKBF replied asking for proof the appellant had paid the invoice. On 2 November 2011 it wrote again noting no response had been received. On 12 December 2011, the appellant replied explaining the appellant had not paid the invoice because of the financial difficulties that seizure of the goods had caused and arguing that payment was irrelevant to title and enclosing a letter from its supplier confirming that its standard business practice was not to include retention of title clauses within its invoices (this was set out in a note from EURL Clockwork Distribution to the appellant dated 12 December 2011).

42. On 9 January 2012 H Govier of UKBF stated the seized goods on its records had been compared to those listed on the e-AAD and the invoice supplied. It stated UKBA seized 25,034.88 litres of mixed beer, the e-AAD showed 24,464.74 and the invoice showed 23,210.48.

43. The appellant's solicitor's reply of 15 March 2012 (wrongly dated 15 March 2011) enclosed an e-mail from the warehouse advising that it did not operate a system of stock control. This was from Ronny Devos, Logistics manager at Wybo Transports SARL and set out the following:

> "About: Rotation and Lot Number
>
> Concerning your request for the identification of the goods that we despatch from your account we must tell you that we do not operate such a system of stock control. On the warehouse floor, each brand and

> style of product is held in a pool regardless of the number of clients that hold that stock. Stock is put in and taken out of the pool so that the oldest stock is always taken first. We have found that this is the best system for us and our clients who always receive fresh stock from our warehouse.
>
> We are sorry we cannot help you to positively identify your stock but hope that this information is satisfactory."

44. UKBF maintained its stance of non-restoration in a letter dated 28 March 2012 and the appellant's solicitor wrote again on 11 May 2012.

Decision 4. TC/2012/04882

45. The Respondents in this case are HMRC. The appellant challenged the legality of the seizure but their Notice of Claim was rejected as invalid and the goods were condemned as forfeit.

46. Ms Bines' decision reported the following: On 24 November 2011 a vehicle SP06BKX loaded with beer was intercepted by HMRC as part of a roadside operation. The trailer pulled by the vehicle had no trailer plate. The driver, Mr Bernard Mountain, produced a three page printed document reference DN1945 and three copies of the CMR. All the documents bore an ARC reference number. HMRC's officers made enquiries of the paperwork details which revealed that the goods had been loaded onto another vehicle with a different trailer number. HMRC officers identified that the goods listed on the paperwork matched the load. The vehicle was different from that which the goods had been loaded onto and there was no delivery date for the goods into the receiving warehouse.

47. The following documents were sent in:

(1) A purchase order from the appellant to Irek Food and Drink dated 23 November 2011 number PO954 in the amount of £10,203.75 for 23 items of mixed beers.

(2) An Irek Food and Drink invoice dated 23 November addressed to the appellant for beers in the same quantities and for the same amount.

(3) A Sales Order number DN1945 from the appellant addressed to Damdam North Ltd dated 23 November 2011 for mixed beer of the same type and quantity as above in the amount of £11,823.25 stating WYBO as the selling bond and a delivery address of Seabrook Warehousing.

(4) A delivery note for the same types and quantities of beers dated 23 November 2011 number DN1945 from the appellant addressed to Damdam North Ltd, with Seabrook Warehousing as the shipping address and EPI Transport as the transporter.

(5) The CMR referring to 28 pallets of mixed beers in 2130 cases stating Wybo as the transport, Seabrook as the consignee dated 23 November 2011 18hr45 min.

(6) Payment receipt on appellant's form stating £40,000 received by Irek dated 9 December 2011 and another dated 14 December 2011 stating £25,000 received.

(7) Bill payment history for Irek showing a debit amount of £10,129.50 in cash from the cash account.

48. Ms Bines set out in the consideration section of her decision her belief that that had the vehicle not been stopped and checked the load would have been diverted with no payment of excise duty. She also disputed the appellant's claim that its goods were booked into Seabrooks prior to the load being intercepted and maintained it was booked in by a telephone call one hour after the load had been intercepted.

49. On 19 March 2012 (3 days earlier) she had written asking specific questions about the goods and transport arrangements (she asked who arranged the transport for the appellant's goods, when the trip was arranged, how much the appellant paid for the transport, and for a copy of the haulage contract between the appellant the haulier). She noted the appellant had not responded to that letter. She set out her belief that the appellant was "not being treated any more harshly or leniently than anyone else in similar circumstances."

Decision 5: TC/2012/10855

50. The review decision was made by Jonathan Aston, an officer who had since retired from Border Force. Mr Brenton's evidence spoke to this decision. He confirmed he had read the case papers and that he was satisfied the decision not to restore was correct and reasonable and that he would have come to the same decision.

51. No challenge was made to the seizure. The appellant takes issue with the fact no notice of seizure was produced.

52. Mr Aston's recitation of the background states the interception took place on 31 August 2012 at 11.50hrs that the ARC the driver had provided was valid but that further checks showed the same vehicle and driver had previously travelled from France to the UK within the lifetime of the ARC on 29/8/12 at 1955hrs with a load manifested as foodstuffs. It was suspected that that the current run was not the first time the ARC was being used.

53. In the consideration section of his decision after setting out that he was not considering the legality or the correctness of the seizure he stated that after having read the appellant's letters he had not been provided with details of exceptional circumstances that would result in the goods being restored. He then stated his further belief had not produced evidence to show it was the owner of the goods. His explanation was as follows:

> "When a physical check was made of the lot numbers shown on the Bon de Livraison BL006622 to the actual goods held in the Queens Warehouse there was **no** match" .

54. Referring to an explanation in an e-mail chain between the appellant and LVDT bond which stated "the rotation numbers stated on our Delivery Note (BL06622) correspond to our internal lot numbers. Therefore they are not printed on the pallets as these references constitute only internal information." Mr Aston stated:

> "However I find this explanation **implausible**. To not have a system which clearly identifies goods belonging to different customers is **not** credible. Separation and identification is normally exercised by recording the lot numbers on the cartons (or internal items), pallet numbers ("marks and numbers"), and also the rotation numbers used by the despatching warehouse and the receiving warehouse – such controls being essential in bonded warehouses. I do **not** find it credible therefore that your client and the despatching warehouse do not have the required information to correlate the goods held in the QW with those they claim to own.
>
> My conclusion is that your client declines to provide the lot numbers because they realise they will **not** match. Accordingly I decline to "restore" the goods to your client because I am **not** satisfied that your client owned the goods, now situated in the Queens Warehouse, on the date of the seizure."

Decision 6: TC/2012/08108

55. In relation to this decision the Respondents accept that the reason for seizure does not say anything about duplicate use of ARC. The reason referred to in the review letter were discrepancies in between the goods on the lorry (1090.56 ltrs of Stella) and on the EMCS (960ltrs of Stella). Also the trailer number was shown on EMCS as TT9 but handwritten on the trailer as TTP.

56. There was no correspondence in relation to ownership of the goods. The following information was provided:

(1) Invoice number 1004-1075 from Irek Food and Drinks dated 10 April to the appellant for 25 items of mixed beers totalling £10,028.90 (Euro 11,031.79).

(2) Delivery note number DN2082 dated 10 April 2012 from the appellant to The Card Centre (London) Ltd shipping to Seabrook Warehousing collecting from WYBO Transport using EPI Transport as the transporter for 25 items of mixed beer.

(3) An e-mail exchange between the appellant and WYBO setting out details of the stock released to the appellant's account for load DN2082 for 25 items of beer.

(4) EMCS form dated 10 April 2012.

57. Ms Bines in her review decision set out her belief that had the vehicle not been stopped and checked the load would have been diverted with no payment of excise duty. This was because 1) this is was one of six occasions where goods from the appellant had been seized for reasons of either more than one use of an ARC reference or inaccuracies in the paperwork supporting the goods 2) the trailer was

incorrectly marked 3) the ARC was accepted on 10 April 2012 at 14.00 to cover a consignment of beer from Wybo to Seabrook, a journey time of two days. The first journey by the driver Mr Howard was on 10 April 2012 at 19.20, the second on 12 April 2012 at 0745. The driver stated he was on route to a fuel station in Purfleet (which was not a bonded site) not Seabrooks. The load was booked in for Seabrooks at 11.00 but the vehicle was stopped at Thurrock at this time.

Decision 7: TC/2012/10871

58. The Notice of seizure simply referred to provisions (regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 in contravention of regulation 53 and/or 68 and 69 and regulation 87 and section 170B of CEMA 1979.

59. In this appeal no challenge was made to the seizure. After setting that out Mrs Perkins' review decision referred to the correspondence that UKBF had made in relation to the issue of ownership (which was made in similar terms to that set out in relation to Decision 1 above). The appellant had enclosed a copy of an invoice and e-mail from Ronny Devos at Wybo of 10 March 2012 (in identical terms to that set out at [44] above). On 13 August 2012 the border force officer refused restoration and stated the appellant had not provided satisfactory proof of payment. The appellant had on 25 September 2012 made similar reference to the law on ownership under the Sale of Goods Act 1979.

60. In her consideration section Mrs Perkins stated she had read the letters carefully but that in her opinion she had not been provided with details of exceptional circumstances that would result in the goods being restored. She then set out a number of "positive additional reasons" for her conclusion that the goods should not be restored. One of these reasons was that she could not be satisfied that the appellants were the legitimate owners of the goods. She set out that on 23 May 2012 at 01.58 hours a vehicle carrying alcoholic beverages had travelled under the same ARC as the one the seized goods which were intercepted later that morning had been and expressed the view there clearly was a second use of the ARC and that the appellant needed to properly demonstrate that their goods were those seized by Border Force rather than those that entered into free circulation without payment of excise duty. In relation to Mr Devos' statement her view was that it appeared "to confirm that even the bonded warehouse "Wybo" who dispatched the stock from their warehouse are unable to "positively identify your stock" as being that which the Border Force seized. This reinforced her view that legal title of the goods could not be established by the appellant. She went on to say:

> "I would also point out that it is essential that duty suspended excise goods consigned to bonded warehouses and made ready for dispatch are identified in some form or another that allows a system of control to be maintained by the warehouse, particularly in terms of security for the individual clients and warehouse; the type of goods, various brands abv's (alcohol by volume/percentage) and quantities. One basic method exercised by warehouses is the recording of lot numbers; pallet numbers or rotation numbers. If as Wybo seem to indicate they have no established procedures that allow your client to positively identify their

> goods once dispatched and paid for then this is a matter between your client and the bond. I would expect at the very least had I bought and paid for goods that documentation would be available that properly corresponds with the items purchased so as to prove title if required…"

61. The invoice number 2205-1140 dated 22 May was from Irek Food and Drinks, Poland. It set out details of various products, the units, the unit cost, VAT and the subtotal. The total was expressed in pounds sterling to be £10,190.20. Mrs Perkins' view was that this did not prove the appellant owned the specific goods that were seized by Border Force and therefore did not prove title.

62. There was no mention of the fact that a duplicate ARC had already used in seizure notice. However the appellant did not appear from its outline of case to be contesting the fact that the goods were stopped and seized on the grounds it was a duplicate load.

Decision 8: Appeal TC/2014/01683

63. The decision under appeal was a decision of Review Officer Brian Rayden. He had since retired from the Border Force and we heard evidence from Ms Hodge, who had read the case papers and who confirmed that had she conducted the statutory review she would have reached the same decision as Mr Rayden.

64. The notice of seizure informed the appellant that the goods were seized because it was believed the ARC had been used for a previous importation on 27 March 2012, that the first load had been diverted within the UK without payment of duty and further it was believed that the seized consignment would have been diverted too if it had not been detected.

65. Mr Rayden's letter recounted the above and went on to record that the appellant had challenged the legality of seizure but had subsequently withdrawn and that the goods were confirmed as improperly imported.

66. The following correspondence which had been received was referred to:

(1) The Card Centre (London) Ltd in Barking wrote to say the beer was due to be deposited in Seabrook warehousing Ltd to their account.

(2) Irek invoice number 2603-1058 to the appellant for 23 items of various beers and ciders for £10,587.45.

(3) Delivery note dated 26 March 2012 from the appellant to The Card Centre for 23 items of beer and cider. (This noted the trailer as TT6).

67. Correspondence ensued in similar terms from UKBF asking for proof of ownership and the appellant replied in similar terms enclosing a copy of the e-mail from Ronny Devos. The appellant's representative as it had done previously referred to the previous responses it had given and stated that unless UKBF were able to refer to a legal requirement the bond had to use a stock identification system based upon lot numbers pallet numbers or rotation numbers then the absence of such a system was

irrelevant. They also referred to the fact that non-one else apart from their client had come forward to claim ownership.

68. Mr Rayden's letter continued to state that in his opinion he had not been provided with details of exceptional circumstances that would result in the goods being restored. He then referred to various additional reasons for that view.

69. In relation to ownership he noted the appellant had argued that marks such as lot numbers, rotation numbers or pallet numbers did not exist because the despatching warehouse operated what he described as an "oldest out first" (also known as "First in First Out abbreviated to FIFO) method not only for the appellant's goods but in common with other customers' goods. Mr Rayden stated he had considerable experience with stock systems not only in bonded warehouses in the UK but for many other revenue and non-revenue regimes. He reported that in his experience FIFO was used only for goods belonging to the same client, of the same type (or brand) and same internal size and that it was never used for different brands or sizes as it would not work because otherwise the wrong type or size would be delivered. Furthermore separation was especially important between goods belonging to different customers. The separation and identification which was normally exercised by recording carton, pallet or rotation numbers were in his view essential and were required in bonded warehouses. Mr Rayden did not find it credible that the appellant and the despatching warehouse did not have the required information to correlate to the seized goods and his conclusion was that the appellant declined to supply the information because they realised it would not match. He accordingly declined to restore the goods.

Decision 9: TC/2012/10870 and Decision 10: TC/2012/10872

70. The seizure notices set out the belief that the ARC number had been used previously with an earlier load having been diverted within the UK without payment of UK excise duty. It also set out the belief that had the load not been intercepted it would not have been delivered but would have been diverted to avoid payment of excise duty. In relation to the first seizure the appellant initially challenged but then withdrew its appeal and the beer was duly condemned. In relation to the second they did not appoint a UK solicitor and the Respondents maintain the beer was also duly condemned as forfeit.

71. Ms Perkins' decision reported the correspondence which took place in relation to ownership enquiries (which was in similar terms to the other appeals) and her views on those were identical to her decision in Decision 7 (TC/2012/10871) above.

72. In terms of the documents the appellant said it provided these consisted of delivery notes, invoices, the EMCS paperwork, loading list and CMRs.

73. The delivery note dated 3 May 2012 was from the appellant to The Card Centre (London) ltd – shipping to Seabrook Warehousing, collecting from Wybo Transport with EPI Transport as the Transporter. It listed 21 items of different types and brands of beer in various quantities. The invoice from Irek Food and Drink was also dated 3

May and listed 21 items of the same brand and type as were on delivery note totalling £9,800.80.

Decision 11: TC/2012/10728

74. The review decision was carried out by Mr Aston. However as above we heard evidence from Mr Brenton who confirmed he had read the case papers, was satisfied the decision was correct and reasonable and that he would have come to the same decision.

75. The Notice of Seizure was sent on 25 June 2012. However the appellant does not appear to take issue that the reasons the officers gave when they seized the goods was that the ARC number had been presented earlier in the evening at Coquelles. No challenge was made to the seizure and the goods were duly condemned.

76. The correspondence on ownership was in similar terms to the previous decisions.

77. An invoice from Irek to the appellant was provided dated 31 May (no year) for assorted beers and cider to the value of £10,328.95 but Mr Aston noted that no evidence had been provided to show the goods had actually been paid for. Mr Aston's decision made the same points as his previous one.

Decision 12: TC/2012/10966

78. This is also a decision of Mr Aston which Mr Brenton adopted in his evidence.

79. We were not referred to the Notice of Seizure but as reported in Mr Aston's review decision the reason for the seizure was an incorrect ARC number. The CMR and Loading list both quoted the ARC number as 12FRG0126000034488198 which upon checking turned out the invalid. The driver later having informed Wybo about the seizure was told the last digit should have been a 3 rather than an 8. This was a valid number which had been accepted onto the system at 15.05 hours on 7 June 2012 with a journey time of two days. However while the number was valid that number specified the vehicle YX05 CNJ with trailer TT3 rather than the vehicle X641XLJ which was the one which had been intercepted. The appellant did not challenge the notice of seizure and the goods were duly condemned as forfeit.

80. Mr Aston's decision recounted the correspondence that had been received which followed the similar terms as before.

81. In this case in an e-mail of 23 July 2012 Wybo accepted responsibility for the error in entering the ARC number onto the CMR.

82. An Irek invoice dated 6 June (no year) number 0606-1165 was supplied with 23 items of mixed beers totalling £9,966.38. Mr Aston noted however no evidence had been provided for how the goods were paid for, and as before that no lot numbers etc.

had been provided. His reasons for non-restoration were put in the same terms as his refusal above.

Decision 13: TC/2013/00091

83. This is another review decision of Mr Aston that has been adopted by Mr Brenton.

84. We were not referred to a notice of seizure but the review decision explained that when the ARC number given by the driver was checked these showed that the same vehicle and driver had previously travelled from France to the UK within the lifetime of the ARC with a load manifested with foodstuffs and that as the vehicle and driver had travelled previously within the lifetime of the ARC it was suspected that the current trip was not the first time the ARC had been used.

85. The correspondence from the appellant sought to confirm that the previous load related to a different identifiable load for which paperwork was available. The appellant enclosed the CMR showing goods received by Plutus (UK) Ltd on 31 August 2012 which showed a different ARC number (12FRG0074000039301940) to that which had been provided by the driver when intercepted (12FRG0074000039399522).

86. The appellant had supplied a bon de livraison no BL006622 dated 29 August 2012 from Les Vins du Tunnel specifying that the appellant had placed an order to be delivered to Dynamic Storage Ltd in Bristol. The document contained columns settting out product details, quantity "Pal." (numbers 55,63,72,80) "Nb Pal." (1-4) and lot numbers (various numbers 1208000xxxxx). The transport was specified as Fingal Logistics.

87. The appellant also supplied (1) an invoice dated 29 August 2012 from ISA Shopping to the appellant with 14 items of mixed beers totalling £8,303.15. (2) A delivery note DN2225 of the appellant dated 29 August 2012 with 14 items of mixed beers (3) a CMR (4) an EMCS document.

88. On 29 October 2012 the respondents wrote to the appellant refusing to restore the goods stating that "the lot numbers provided by your client do not match the lot numbers of the goods held in the Queens Warehouse." The appellant responded on 6 November 2012 attaching an e-mail chain between the appellant and the bond (in this case it was LVDT Bond). This showed that the appellant had e-mailed LVDT bond on 31 October at 1725 attaching a copy of the release note stating "UKBA is claiming that the Lot numbers provided to them on our documentation do match the on the goods that they have seized (sic). We can only assume that UKBA are referring to the existence or not of a label on each pallet quoting a Lot Number". LVDT replied at 17.35 stating:

> "the rotation numbers stated on our Delivery Note (BL006622) correspond to our internal lot numbers. Therefore, they are not printed on the pallets as these references constitute only internal information…"

89. Mr Aston's decision made the same points about failure to challenge legality of seizure and ownership as before. He reported that a physical check was made of the lot numbers shown on the Bon de Livraison BL006622 to the actual goods held in the Queens Warehouse and there was no match. Referring to the e-mail from LVDT and the he went to say that he found the explanation implausible. "To not have a system which clearly identifies goods belonging to different customers is not credible" He then repeated the previous statement about separation and identification by various numbers being essential controls in bonded warehouses. He did not find it credible that the despatching warehouse did not have the required information to correlate the goods and went on to conclude that as the appellant had failed to provide the lot numbers because they realised they would not match.

Decision 14: TC/2014/05140

90. This was another decision of Mr Rayden which was adopted by Ms Hodge.

91. There was no notice of seizure but it appears from the review letter (and a subsequent letter correcting the mistake in timings) that the basis of seizure was that following the issue of the ARC on 13 November at 1725 hours with a four day journey the vehicle made journeys from Calais to Dover on 14 November 2012 at 0240 hours carrying 26 tons of foodstuffs, and travelled from Dover to Calais on 14 November 2012 at 1355 hours empty.

92. No challenge was made to the legality of seizure within the relevant time limit.

93. In response to UKBF's request for proof of ownership the appellant's representative provided:

(1) A copy of an invoice for 15 items of various beers dated 13 November 2012 from ISA Shopping in France to the appellant for £10,210.20 converted to Eur 11,741.73. This was annotated "paid 7/3/13" in manuscript with a signature over a stamp with ISA's shopping's name and address.

(2) A sales order No, DN2291 from the appellant to Edward James Ltd of Ilford, with the sending bond stated as Les Vins du Tunnel, Calais, for delivery to Dynamic Storage in Bristol (showing the same unit quantities as the invoice) in the amount of £11,646.40.

(3) A bon de livraison from Les Vins du Tunnel No BL007542 dated 13 November 2012, ordered by the appellant, giving Edward James as the reference (DN2291) and the delivery address of Dynamic Storage Ltd. This listed 15 items of various beers stating quantities, and lot numbers.

(4) A delivery note from the appellant to Edward James Ltd.

(5) A copy of the CMR showing 15 items of beer totalling 25,343.04 litres (providing lot numbers) consigned by les Vins du Tunnel in Calais to Dynamic Storage Ltd in Bristol (reference: client Edward James Ltd)

94. Mr Rayden's review letter of 3 July 2013 set out in the section dealing with correspondence that:

> "Checks of the marking of 10 of the 15 items of beer in the Queen's Warehouse showed no correlation with the lot numbers on the Les Vins du Tunnel document".

95. He went on to report that on 12 April 2013 an officer had written refusing to restore the excise goods because no satisfactory evidence of ownership had been provided.

96. He set out his view that he had not been provided with details of exceptional circumstances that would result in the goods being restored and went on to list a number additional reasons for why the goods should not be restored one of which was that the appellant had not proved ownership of the seized beer.

97. The appellant responded on 18 July 2013. In relation to ownership Mr Rayden referred back to what he had said on his decision on 24 October 2012 and said the same applied in this case.

Parties' submissions

98. The appellant argues that the Respondents' refusal to restore goods in each of the appeals is unreasonable and/or disproportionate. The appellant highlights that diversion fraud can happen without the owner of the goods being complicit and that honest traders would have no reason if they were told the goods had been sent and received to think anything was awry. It would be unreasonable not to restore as matter of policy if someone, and this was the position the appellant was in, was innocent of wrongdoing. The appellant had no knowledge of wrongdoing, it conducted due diligence on all of those with whom it did business and it had no control over the conduct of third parties. Further in some cases the appellant argues the Respondents' officer has unreasonably characterised the appellant's request as a request to revisit deemed facts.

99. We do not address the parties' arguments on these matters in any detail but will focus on the appellant's arguments that the conclusions reached by the Respondents, that the appellant had not demonstrated that the particular seized goods were owned by the appellant, were unreasonable. We agree with the Respondents and find that it is self-evident that before goods are restored to a person it must be established that the person seeking restoration actually owned those goods. The points on whether the appellant was innocent or blameless, proportionality only become relevant if the appellant did own the goods. (The Border Force's general policy is that seized excise goods should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally. We accept that in relation to innocence and blameworthiness, issues over whether the appellant was complicit in any impropriety and the reasonableness of their checks and due diligence they had in place for the hauliers they used, are relevant considerations in coming to a view on whether exceptionally the excise goods should be restored.)

100. The appellant's case however is that the Respondents have unreasonably concluded that the appellant was not the owner of the goods. We consider the parties'

various arguments on this point in more detail in the discussion section of our decision.

Discussion

101. There are some general points which emerge on the issue of whether the appellant has demonstrated that it owned the seized goods which it will be useful consider before considering the individual decisions.

102. The appellant's argument that it was unreasonable of the Respondents to have concluded the appellant was not the owner of the seized goods the appellant refer in essence to the following points:

(1) The officers took insufficient account that warehousing practices on the continent might be different to the UK. They were wrong to disbelieve what the warehouses had said about their practices. If the officers had concerns with what the warehouses had stated in correspondence they should have followed this up further.

(2) There was no evidence that any other person had come forward to seek to claim the goods. The officers took insufficient account of this fact which supported the case that the appellant owned the seized goods.

(3) There was sufficient other evidence such as CMR, ARC forms, payments, sales and purchase orders, invoices and delivery notes. The officers were unreasonable in insisting on matching lot, or other numbers.

103. The Respondents argue that in relation to seizures involving irregularities in ARCs and a concern over duplicate loads where only one of the loads will be that of an appellant there is a high threshold to surmount in relation to showing ownership and it is incumbent on the appellant to show that the actual load is theirs. The appellant points out that notices of seizure have not been made available in all of the appeals and in the absence of those the facts deemed cannot go beyond the deemed fact that duty had not been paid. There were also a number of seizures that did not concern a suspicion that the ARC had been used twice but some where there had simply been an irregularity in the documentation e.g. through a keying in error by the bond.

Warehouse practice – plausibility of FIFO system for loads of beer

104. The appellant's case is that the bonded warehouses the appellants used on the continent would not provide lot numbers on their paperwork because they operated the system known as First In First Out (FIFO). They do not challenge the fact that where lot numbers did appear on certain documents these did not match with those on the seized goods. They rely on the evidence of Mr Wierinckx and the various e-mails sent by bonded warehouse explaining their system.

105. We are however unable to make any findings of fact to the effect that the bonded warehouses used by the appellant used such a system, what the regulatory requirements were on them and the extent to which they were compliant with any

such requirements. In relation to Mr Wierinckx while he tried as best as he could to answer the questions put to him we found his evidence to be of very limited assistance.

106. He explained his background as follows. He was appointed to the position of director of the company on 1 January 2013. He told the tribunal he had been working for Anheiser Busch Interbrew initially on the machine which filled bottles. He had been working for them for the previous 25-26 years and still worked there weekends. He also brewed beer as a hobby together with a friend. He had known and was friends with Michel Volckaet (a former director of the appellant) for a long time and told us he became a director because he was interested in brewing beer. His evidence was that the company was a wholesale trading company that had been in operation since 2003. He stated that over the years the company had found it most efficient when it operated as a "non-stockholding" company; meaning that whereas the appellant did not buy stock until they had a customer lined up to purchase them. His statement explained that "this removes the risk of being left with stocks that are approaching their expiry date and also of the need to operate a stock control programme." His evidence was that as the company did not hold stock for any length of time it did not require a stock control programme, nor did it need to keep track of its stock in the bonded warehouse. If there was any problem with stock received the appellant would revert back to its supplier as any loads received in were sent straight out to customers.

107. He only became a director after the period relevant to these appeals and he said he prepared his witness statement with the appellant's assistant (Martine Vermeylen) in Belgium who was working before he became a director. His answer to the effect that part of the reason he joined the appellant was because he was interested in brewing beer is difficult to reconcile with his evidence that the appellant was a wholesaler and retailer of beer and that the appellant did not hold stock.

108. He accepted that all the seizures in issue took place before he was appointed and explained his evidence was given having considered the company's documents and correspondence. (It was not however clear to us what correspondence and documents would allow him to give the evidence he had given as to how the business had operated in the past.)

109. Returning to the question of ownership he was not in post at the time of any of the seizures and could tell us no more than what was apparent from looking at the documents which had been supplied to the relevant review officers, and as acknowledged in one part of his witness statement the appellant did not control the bond so he could not tell us what stock control procedures took place there. His evidence made the point in relation to an explanation from LVDT Bond of its stock control system (which UKBF found implausible) that as the bond was not under the control of the appellant he could not comment on the stock control system but earlier his statement set out his views on how all bonds operated. His statement exhibited an e-mail received from the manager of Opale Total Négoce, a bond Mr Wierinckx said the appellant had been using recently. This suggested to us that while products received by clients were, having been given a lot code, bulk stacked by product rather than lot code, the bond's stock control system could track intakes and exits for each

product by lot code and by client. (The e-mail does not suggest that a so called first in first out system was operated such that one client's goods would be used to fulfil another client's order.)

110. We also consider that the e-mails from Wybo, and other bonds can be given little weight; there being no witness who could speak to it or be cross-examined on it. They provide an insufficient basis for us to find that the first in first out system was indeed how the bonds operated.

111. Further we also note, as was confirmed by Mr Wierinckx's answers in cross examination, that beers have expiry dates. The concern about the risk of being left with stock approaching its expiry date is difficult to reconcile with a lack of concern about ownership being identifiable at the bond. If it was correct that there was a FIFO system which did not differentiate between owners in the bonds used, then there was the possibility that having taken the trouble to buy stock which had a long expiry date, what was then sold to a customer was stock with a short expiry date. If the appellant had this concern then it is likely that their customers and suppliers would have it too and that they would not be willing to have a situation where stock with different expiry dates was substituted for the beer they bought or sold.

112. Taking account of the fact that beer will have an expiry date we therefore find it implausible that a warehouse would operate a first in first out system which did not distinguish between the beers which a particular customer owned.

113. The Respondents drew our attention to a similar view expressed by the Tribunal panel (Judge Redston and Shameem Aktar) at [61] in *Worcx Food and Beverage BV v Director for Border Revenue* [2014] UKFTT 774 (TC). The appellant points out that that tribunal's view is not binding on us and that there is no reason to think that a tribunal panel is able to reach conclusions on warehouse procedures. That view, and indeed our view that a system whereby goods of different customers were mingled indistinguishably is not however based on the panel's particular knowledge of warehousing procedures but on the inherent implausibility that such a system could operate in relation to alcohol with an expiry date.

114. We disagree with the appellant's argument that if the officers had concerns about the explanation provided they ought to have explored this further with the bonded warehouse. It was incumbent on the appellant to equip the Respondents with sufficient information. In those cases where the officer found the bond warehouse's account implausible we do not find that in view of our finding above that this was an unreasonable conclusion to reach.

115. Even if it were correct that warehouses did in fact operate a FIFO system whereby goods were co-mingled this would not necessarily demonstrate that goods matching the description of those on paperwork such as invoices were the appellant's goods. The fact that it might be more difficult in the absence of matching numbers to show ownership does not mean that where matching numbers are not present ownership had to be accepted on the basis of the paperwork that was produced. Even if the appellant did not have lot numbers because the bonds were operating as

suggested then it still remained for the appellant to establish the particular goods seized belonged to it.

Sufficient other evidence?

116. The appellant argues that there was sufficient other evidence in the various pieces of documentation that were provided to enable the Respondents to be satisfied that the seized goods were owned by the appellant and that it is significant to note that no-one else came forward apart from the appellant to seek to have the goods restored.

117. We agree with the Respondents that in the absence of identifying numbers on the paperwork which match those on the seized goods, the fact that there may be ARC documentation, sales and purchase orders, delivery notes does not establish that the particular items which were seized were those of the appellant as opposed to a matching load belong to someone else.

118. Further in relation to the evidence that was put forward to show that the goods had been paid for we have difficulty accepting that such significant amounts were paid for in cash on the basis of the documentation that was provided. We saw for instance a payment receipt from Irek for amount of £30,000 cash dated 26 September 2013. The receipt was not signed but had a stamp with Irek's name and address. The print out from bill payment history for Irek showing the amount made up from four bills dating 24 May 2012, 31 May 2012, and two on 4 June 2012.

119. Mr Wierinckx's evidence was that the cash was couriered. He could not say when cross-examined who was entrusted with this crucial task and he could not give a coherent explanation of why the appellant chose to courier cash from Belgium to Poland with the resulting security and timing concerns that would have rather than carry out a bank transfer. He was not able to explain how Irek were content to be paid in September 2013 for bills raised in May and June of 2012.

120. There is also little to be drawn in our view from the absence of anyone else coming forward to claim the loads. In the context of a situation where it was suspected there had been multiple loads it would, as the Respondents point out be unlikely that an owner of a duplicate load would come forward and bring attention to themselves. In any event even in the context of those seizures which were based on an irregularity on the ARC number (e.g. because of a keying in error) the point still remains that it is for the person seeking restoration of goods to show that the goods were owned by them. The fact that the legislation allows for seizures if there is any irregularity in the procedure belies the concern that if it is not strictly adhered to this will create opportunities for duty suspension arrangements to be exploited. It is not unreasonable in context of transfers between bonded warehouses given such a system (irrespective of whether an actual suspicion of diversion fraud is the stated reason for seizure or not) for the Respondents to be just as exacting in scrutinising whether the goods seized belong to the person seeking their return.

121. It was not unreasonable on the basis of the types of documents which had been supplied to the officers in the various decisions to have reached the view that the appellant had not shown ownership of the goods.

122. With the exception of the last decision (Decision 14) we were satisfied having considered the evidence which we were referred, there was nothing which would suggest that the appellant did in fact own the particular goods seized.

Conclusions on decisions

123. We move on in this next section to consider the individual decisions in particular on the issue of how the issue of ownership of the goods was dealt with taking account of our conclusions above.

Decision 1: TC/2012/01020

124. Despite the various exchanges that had taken place prior to the decision on the issue of ownership it is notable that the review decision did not engage with the evidence which the appellant had put forward. To this extent the decision was not one that could we think have reasonably been arrived at.

125. However given our findings above and noting that subsequent to the review decision the goods were condemned in the Magistrates court there is nothing to suggest from the evidence before us that the appellant was in fact the owner of the goods. We consider that if we directed the decision to be re-made the decision would inevitably be to not restore the goods as ownership had not been demonstrated. The appeal is therefore dismissed.

Decision 2: TC/2012/00994

126. Our reasoning in this decision is the same as in respect of Decision 1 above and the appeal is dismissed.

Decision 3: TC/2012/08651

127. As above the decision was not one that could reasonably have been reached as it failed to consider and address the issues on ownership of the goods which were a matter of dispute between the parties. However given our findings on lack of ownership above and the subsequent condemnation of the goods we consider the decision not to restore would inevitably be the same if a further review was re-directed. The appeal is accordingly dismissed.

Decision 4: TC/2012/04882

128. In contrast to the decisions above the question of ownership was not raised in the correspondence between the parties prior to the decision. This issue was however a relevant issue which ought to have been considered. Ms Hadfield for the appellant highlights the following flaws in the officer's decision: (1) that the officer did not

consider whether the appellant was aware or should have been aware that it was involved in wrongdoing, (2) the officer did not consider if there might be an innocent explanation for there being no plate on the trailer, failed to take account the trailer belonged to a third party haulier over whom the appellant had no control, and failed to check whether the trailer had a plate when it came into Dover (3) it was unreasonable to conclude the appellant would have been involved in booking a delivery slot at all given it would be using a third party haulier who was juggling other deliveries for other businesses (4) it was unreasonable to take account of the haulier's other movements as this was outside the appellant's control (5) An e-mail from Seabrook had been overlooked; this confirmed the haulier had originally booked the load in for delivery on Friday 23 November but had then changed the booking.

129. Ms Hadfield also drew our attention to the limited scope of any deemed facts in that this was she argued a case where the notice of seizure did not suggest an impropriety (the trailer was not the trailer set out in the paperwork).

130. We note that the decision did not consider and address what role the appellant was thought to have played and the level of due diligence they had undertaken. The officer had written to the appellant's representative on 19 March 2012 to ask various questions, the answers to which would have been relevant these issues. No deadline for response had been specified. Nevertheless the officer went ahead on 22 March 2012 to make the decision noting that no response had as yet been received to that letter. We consider that the failure to consider the appellant's role in the delivery which had been seized and to proceed with making the decision without affording the appellant sufficient time to respond on potentially relevant issues means the decision is one that could not reasonably have been arrived at. However given our findings on lack of ownership above we consider the decision not to restore would inevitably be the same if a further review was re-directed. The appeal is accordingly dismissed.

Decision 5: TC/2012/10855

131. In this decision the officer did consider the issue of ownership. In our view the officer's explanation went further than it needed to. If the officer accepted that identifying marks on the warehouse's goods which tallied to the seized goods in the Queens Warehouse had not been put forward it was not necessary to say that the appellants had nevertheless received details of such marks but had purposely not supplied them (there was no evidence such numbers had been provided to the appellant and that they had deliberately not provided the numbers). However, the conclusion that ownership was not demonstrated was not an unreasonable one to have reached on the basis of the evidence that had been supplied to the officer for the reasons we have already set out above. The appeal is accordingly dismissed.

Decision 6: TC/2012/08108

132. In relation to this decision the appellant argues 1) as the appellant had contested all seizures and since none of the appeals had been heard it was unreasonable to take them into account in making her decision 2) there was a failure to take account or give

sufficient weight to Wybo's e-mail acknowledging and apologising for the mistake in stock levels 3) there was no or insufficient regard to evidence that despatch notified to Seabrook before the seizure 4) it was unreasonable to conclude the driver was going to a site which was not bonded – he had said he was going to hand over to another driver as he was running short of hours 5) having concluded load would have been diverted, the officer should have gone on to consider whether appellant knew or could reasonably be expected to know the load was involved in diversion fraud 6) no or insufficient regard to fact appellant had used third party haulier of over whom it had no control and the journeys it took for other traders or the delays hauliers encountered when crossing the channel 7) withholding to a trader who did not know or could not be expected to know that he was involved in wrongdoing was not a proportionate response.

133. Our view is that the decision was not one that could reasonably have been reached in that it did not explain why, if the goods would have been diverted, what the appellant's role was in that (in other words there was no consideration of the whether the appellant was innocent or blameless and its levels of due diligence). There is no evidence of consideration being given to this matter and it is certainly not expressed in the letter. However given our findings on lack of ownership above we consider the decision not to restore would inevitably be the same if a further review was re-directed. The appeal is accordingly dismissed.

Decision 7: TC/2012/10871

134. In contrast to the decision above the officer in this decision's position was not that she necessarily disbelieved what the bond had said but that her view was that the information which had been provided was insufficient to show the appellant owned the goods. Making further enquiries (which we do not think as we have stated above would be something which was incumbent on the Respondents to do in any event) would not have altered that position. As we have indicated above, a decision that the ownership of the particular goods seized had not been demonstrated simply by virtue of invoices, orders, CMRs etc. was not an unreasonable decision to reach. The appeal is accordingly dismissed.

Decision 8: TC/2012/01683

The explanation in this decision is the same as in the Mr Aston decision above (Decision 5: TC/2012/10855). Our conclusion is the same too and the appeal is accordingly dismissed.

Decision 9: TC/2012/10870 and 10: TC/2012/10872

135. These decisions are set out on a similar basis as decision 7 above. We uphold the decisions and dismiss the appeals on a similar basis to that decision.

Decision 11: TC/2012/10728, Decision 12: TC/2012/10966 and Decision 13: TC/2013/00091

136. These decisions were given in similar terms to the officer's decision in Decision 5 above and we uphold the decision and dismiss the appeals on a similar basis.

Decision 14: TC/2014/05140

137. We note that this decision recounts that 10 of the 15 items of beer did not correlate with the lot numbers provided. What is not clear however is whether only 10 items were checked or whether 15 items were checked and it was found that 5 did correlate. In relation to the 10 items which did not correlate it was unreasonable to simply refer back to the reasoning of a previous decision in such circumstances where there was an ambiguity over the number of items that had been checked and where there was the possibility that 5 items did correlate or could correlate if checks were made.

138. We have considered however whether even if ownership is established, whether given the other additional reasons stated by the officer, a decision not to restore would inevitably be the same.

139. The other additional reasons were expressed as follows:

- "Your client has not refuted the belief that this was a "double run" of beer using one ARC
- Your client has not shown that the previous run on 13th November 2012 did not use the same ARC as this one;
- The use of the hand-written trailer number – T7 in this case – is a common ruse to match the trailer to the documents falsely;
- The use of a vehicle with a void registration is an attempt to avoid responsibility for the use of the vehicle in smuggling;
- Visima Ltd, the haulier, made no reasonable checks of the consignment or of the driver;
- The following have all been involved in numerous previous seizures of excise goods [The list set out referred to the appellant, the driver, the person named on the O license, the company with the account at the UK warehouse, the haulier, and a company in which the managing director of the appellant's representative was stated to be a shareholder and his son a director.]"

140. Although these were stated to be additional reasons they were in our view deficient because they did not explain what relevance the reasons had to the appellant, its innocence or blameworthiness and its due diligence. As indicated above at [99] issues over whether the appellant was "innocent and blameless" and in particular whether they were complicit in any impropriety and the reasonableness of their due diligence on the hauliers they use are relevant considerations in a restoration decision. The starting point is that excise goods will not normally be restored. In a situation

where the appellant has not demonstrated its innocence, or that in any case it carried out reasonable due diligence on its hauliers, it will in our view be inevitable that the case does not fall to be treated exceptionally as one where the goods should be restored.

141. The appellant's difficulty in this decision is that, as the Respondents point out, even if it were the owner it has brought forward insufficient evidence to enable us to make any finding that it was innocent and blameless in the sense of having performed reasonable due diligence on the haulier Visima Ltd. Mr Wierinckx's evidence did not refer at all to what measures were taken in relation to this particular haulier. His witness statement maintained that it was clear from company records that the appellant always obtained the passport and checked the bona fides of its customers, suppliers and transporters, that some of these documents were obtained by post or fax rather than electronically and that in the course of various office moves and a computer malfunction in April 2013 some of the records could not be located. However, to the extent there remained any such documents no such underlying documents were shown to us and given the loss of documentation it is unclear how Mr Wierinckx, who was not in post at the relevant time could reliably know what due diligence had been performed before his arrival at the appellant.

142. In the absence of findings that the appellant had undertaken reasonable due diligence we think that if we directed the decision to be reviewed again the decision would inevitably be to not restore the goods even if it could be shown the goods belonged to the appellant. We therefore dismiss the appeal.

143. 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.

SWAMI RAGHAVAN

TRIBUNAL JUDGE
RELEASE DATE: 29 JANUARY 2016