[2016] UKFTT 844 (TC)

TC05569

Appeal number: TC/2015/06845

Customs and excise- hydrocarbon duty- trailer seizure- appeal against refusal of restoration- goods described as lubricant oil- whether carrier should have been alerted to fact that was transporting diesel subject to duty- decision to require further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEFARIA TRANS EDYTA SOWA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SARAH FALK
JOHN ROBINSON

Sitting in public at the Royal Courts of Justice, The Strand, London WC2A 2LL on 1 December 2016

Michael Wiencek of Euro Lex Partners LLP, for the Appellant

Michael Paulin, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant is an individual, Edyta Sowa, who is in business as a carrier under the trading name Nefaria Trans. This is an appeal under s 16 Finance Act 1994 ("FA 1994") against a review of a decision not to restore a tanker trailer ("trailer") seized under s 139 Customs and Excise Management Act 1979 ("CEMA"). The trailer was seized, along with the vehicle hauling it (a Renault Magnum tractor unit), because it was found to be carrying diesel fuel on which duty had not been paid. The appeal initially related to both items. However, the tractor unit has since been restored on the basis that it was owned by a third party lessor. HMRC had continued to refuse to restore the trailer, which is owned by the appellant.

2. We have concluded that the review decision should cease to have effect and that a further review should be conducted in accordance with our directions.

Legal and procedural background

3. Diesel fuel is subject to excise duty as "gas oil" under the Hydrocarbon Oil Duties Act 1979 ("HODA"). Sections 1, 3 and 6 of that Act relevantly provide:

> "1. (1) The following provisions define the various descriptions of oil referred to in this Act.
>
> …
>
> (4) "Heavy oil" means hydrocarbon oil other than light oil.
>
> (5) "Gas oil" means heavy oil of which not more than 50 per cent by volume distils at a temperature not exceeding 240°C and of which more than 50 per cent by volume distils at a temperature not exceeding 340°C.
>
> …
>
> 3. Where imported goods contain hydrocarbon oil as a part or ingredient thereof, the oil shall be disregarded in the application to the goods of section 126 of the Management Act (charge of duty on manufactured or composite imported articles) unless in the opinion of the Commissioners the goods should, according to their use, be classed with hydrocarbon oil.
>
> …
>
> 6. (1) There shall be charged on hydrocarbon oil—
>
> (a) imported into the United Kingdom; …
>
> a duty of excise at the rates specified in subsection (1A) below.
>
> (1A) The rates are—
>
> …
>
> (c) £0.5795 a litre in the case of heavy oil.
>
> …"

(Section 126 CEMA, referred to in s 3 above, provides for duty to be charged on imported goods containing ingredients chargeable to duty according to the quantity of those ingredients included or, where necessary for the protection of the revenue, by reference to the full value of the goods.)

4. The effect of s 49(1) CEMA is that where goods chargeable to duty are unshipped at a port without payment of the duty, they are liable to forfeiture. 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."

5. Section 141(1) CEMA provides:

> "(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture…
>
> shall also be liable to forfeiture."

6. The effect of paragraph 5 of Schedule 3 to CEMA is that, unless a notice of claim that the item seized was not liable to forfeiture is lodged within one month, the seizure is treated as valid and it is not possible to claim subsequently that it was not duly condemned as forfeited: see *HMRC v Jones and another* [2011] STC 2206 ("*Jones*"). No such claim was lodged in this case.

7. However, there is power to grant restoration under s 152 CEMA:

> "The Commissioners may, as they see fit … (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts."

8. Following a request by the appellant HMRC decided on 7 August 2015 not to restore the trailer or tractor unit. A review was requested under s 14 FA 1994, and on 27 October 2015 the decision was upheld on review. The appellant appealed to the Tribunal against the review decision under s 16(1) FA 1994. The appeal was in time. The Tribunal's powers are set out in s 16(4), which 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 review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

9. The effect of s 16(8) is that the decision not to restore was a decision in relation to an "ancillary matter". In addition, s 16(6) has the effect that the burden of proof is on the appellant: see *Golobiewska v Commissioners of Customs & Excise* [2005] EWCA Civ 607, which also makes it clear that the civil standard applies, that is the balance of probabilities.

10. The Tribunal's powers under s 16(4) are limited. As noted by Mummery LJ in *Jones* at [71(9)] they are confined to the application of principles of judicial review. This includes questions of reasonableness and, because Article 1 of Protocol 1 to the European Convention on Human Rights is potentially engaged (peaceful enjoyment of possessions), proportionality. The general test of reasonableness in this context is whether the decision was so unreasonable as to be irrational or perverse, such that no reasonable authority could have reached that decision (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). Grounds for review would include failing to take account of relevant considerations or taking account of irrelevant considerations.

Evidence

11. We heard oral evidence from the appellant (through a Polish interpreter) and from Mr Allan Donnachie, the officer who made the review decision. Both supplied witness statements. Documentary evidence included correspondence between the parties, documentation relating to the import of the goods, test results in respect of samples of the oil, limited extracts from HMRC's internal guidance and (although we were not specifically referred to them at the hearing) relevant extracts from customs officers' notebooks.

12. We accept Mr Donnachie's evidence as to matters of fact. We also accept the appellant's evidence in relation to matters of fact. There was some lack of clarity in cross-examination of the appellant about the extent of a carrier's obligations in relation to loads carried, but as discussed below we think this was explicable.

Findings of fact

13. The appellant is a Polish resident individual who has carried on a transport business since 2012. The business provides international road transport of goods.

14. The goods in question were uploaded in Ghent, Belgium on 22 June 2015 by a driver working for the appellant. The appellant's client was the purchaser of the

goods, a Czech entity called Vybigon SRO. The seller of the goods was a Cypriot entity, Kayla Limited, apparently based in Nicosia. The instruction was to take the goods to an address in West London. The CMR document (essentially the consignment note, and agreed by both parties to be a key document) described the goods in the following terms:

> "LOK 24,040 KG 28,929 [m^3]
>
> UN 3082 ENVIRONMENTALLY HAZARDOUS SUBSTANCE, LIQUID, N.O.S (fuel diesel, number 2) MARINE POLUTANT, 9, III (E)"

LOK stands for "Lubricant Oil Kayla" (Kayla being the supplier's name).

15. The accompanying dangerous goods form described the goods as follows:

> "BULK LUBRICANT OIL- LOK 1B 24040 KG 28,929 [m^3]
>
> UN 3082 environmentally hazardous substance, liquid N.O.S (FUEL DIESEL, NUMBER) 9, III, (E)"

16. The printed "Material Safety Data Sheet" which (according to the application for restoration) also accompanied the load is stated to relate to "Kayla 'LOK' Lubricant Oil". This document indicates that the mixture contains 75-95% "No.2 fuel oil- Diesel engine fuels", 5-25% "heavy, paraffin distillates processed with hydrogen (petroleum), base oil" and 2-3% "refined rape oil". It also contains detailed safety and handling instructions. In addition the documentary evidence included analytical reports, apparently prepared for Kayla Limited by a third party in April 2015, which appear to have formed another part of the paperwork accompanying the load. These showed that the percentage volume recovered at 250°C and 350°C was 37% and 82.5% respectively. We note that, apart from modest temperature differences used in the test, this appears to correlate to the definition of gas oil in s 1(5) of HODA, referred to above. This is perhaps not surprising given the proportion of diesel stated to be included.

17. The appellant had carried loads for the same client on previous occasions. We saw CMR documents for two of them from April and May 2015 in respect of transfers from Belgium to addresses in Coventry and Liverpool respectively, the first referring to LOK in similar terms to the above and the other with the description "Lubricant Oil Hantlom" and also referring to "(fuel diesel, number 2)". A list of invoices for jobs undertaken using the same vehicle showed a total of nine previous jobs for Vybigon, with prices of between 2,200 and 2,400 euros (the latter apparently being for the Liverpool trip). We were not told the price for the delivery in question.

18. The vehicle was stopped at Dover docks. Both the Border Force notes and the appellant's evidence indicate that this was the first time that the vehicle had been intercepted at UK Customs. The Border Force suspected the oil to be consistent with diesel fuel and detained the vehicle and contents. Notes from one of the officers indicate that the product "was a green coloured liquid that smelt like diesel". Notes from another officer also indicate that the driver gave an affirmative answer to the question whether the product was diesel (although further notes also indicate a

possible language issue). The "Notice of Goods Detained", issued to the driver, also refers to the condition of the tractor unit and trailer as being "fair".

19. Road side testing was carried out the next day, with samples being taken from the five separate containers in the trailer. The specific gravity shown by the road side test indicated that the product was diesel. 28,500 litres of fuel were subsequently removed from the vehicle. Formal notification of the seizure, which also explained the need for any claim that the goods were not liable to forfeiture to be made within one month and referred to Notice 12A (the public notice about what can be done following a seizure), was sent by letter dated 3 July 2015 but this was wrongly addressed and was never received by the appellant.

20. Laboratory testing was later undertaken of the five samples, along with samples from the two tanks used to fuel the vehicle (the running tanks). Six of the seven samples appear to have produced the same result, with the sample from one running tank showing a slightly different result. The lab reports for the six samples (dated 16 July 2015) note that "Sample contains mixture of gas oil/derv, lubricating oil fraction and vegetable oil". The seventh sample also refers to biodiesel. Percentages are given for vegetable oil and esters of 3% each for six samples and, for the seventh 1% vegetable oil, 3% bio-diesel (fames) and 4% esters. No percentages are shown for "gas oil/derv" and "lubricating oil fraction". HMRC concluded that given that all the results were similar, and in fact appeared to be the same for one of the running tanks as for the load carried, this strongly indicated that all the oil was diesel fuel on which duty should have been paid. Mr Donnachie also noted in his evidence that there was no indication that the oil had been marked as red diesel, or that it had been "laundered" to remove any such marking.

21. The appellant's representative applied on 14 July 2015 for restoration of the trailer and tractor unit, claiming that the oil was classified as "metal-working compounds, mould release oils, anti-corrosion oils" under the Common Customs Tariff and was not subject to fuel duty on that basis. The application also maintained that the oil had been transported in compliance with rules governing carriage of dangerous goods, that the units were vital business assets and that no wrongdoing had been committed since the load was legitimate. The application was refused on the basis that the oil met the distillation requirements for diesel and payment of duty was therefore required. Vybigon made an application in similar terms for the restoration of the fuel.

22. The appellant's request for review made similar points about the product, maintaining that gas oil was classified differently under the Common Customs Tariff, under sub heading 27101941, whereas the product in question was classifiable under sub-heading 27101991 (as metal-working compounds, mould release oils, anti-corrosion oils). The letter also stated that the lubricant oil in question was a composite product with irretrievably mixed components, was not 100% hydrocarbon and would not meet the distillation specifications for gas oil. It also said that the classification had not been questioned by any other EU customs authority. (Given the points raised in the application to restore and the fact that the application was made within one month of seizure it is not clear why this was not expressed as a notice of claim

challenging the legality of the seizure, rather than as an application for restoration. However, neither party appears to have treated it as such and of course such claims are not within the jurisdiction of this Tribunal.)

23. Mr Donnachie conducted the review. He considered the correspondence from the appellant's representative, the information received from the Border Force and HMRC, the relevant legislation and internal guidance to officers regarding restoration.

24. HMRC's internal guidance in relation to oils offences (which we saw in a heavily redacted form) refers to the fact that vehicle seizure causes significant disruption to fraudsters and has an important part to play in making oil frauds unattractive and in sending a strong deterrent message to others who are or may become involved in oils fraud. Under the heading "Smuggling" it says:

> "Where a vehicle is detected smuggling road fuel then, other than in the (sic) exceptional circumstances that vehicle is to be seized and not restored unless it is owned by a finance company. Seizure and non-restoration in these cases reflect not only the revenue loss but also the health and safety dangers which smuggling of road fuels poses to other maritime or road traffic, to the environment and to the travelling public."

The guidance also refers to the need to consider "issues of proportionality and human rights".

25. The review decision was made on 27 October 2015. It confirmed that Mr Donnachie had considered the correspondence, information from colleagues, the legislation and HMRC's restoration policy. The language used in the letter to describe the restoration policy is very similar to the extract quoted immediately above. Mr Donnachie went on to say that having examined the information available to him he could not find "any exceptional circumstance or reasonable excuse" which would result in restoration.

26. As previously mentioned, the tractor unit has since been restored on the grounds that it is owned by a finance company. The trailer, estimated by the appellant to have a value of £22,000, remains subject to the review decision and so has not been restored.

27. The appellant took out a loan to pay for the trailer, repayable in instalments of about £300 per month. The appellant has also had to continue to pay road tax of about £300 per annum. She estimated her additional losses from being deprived of use of the trailer to be around £400 per week.

The appellant's knowledge and understanding of her duties

28. The appellant's evidence was that she understood that the oil contained diesel as a component, but that it was lubricant oil and classified as such under UN code 3082, (as referred to on the CMR) rather than as dutiable diesel, which had a different UN classification code. The CMR and other documents in the driver's possession were

provided by the organisation operating the site where the goods were uploaded. In this case this was a substantial business in Belgium. Her understanding was that, as the carrier, she did not have an obligation to check whether the goods were liable to excise duty or not and whether the relevant Customs formalities were complied with, and that she had no means or expertise to check those points. The driver did not carry a laboratory kit and could not check the load. Her duty was to "transport the goods safely in accordance with the relevant law and business practice". The documents she had been provided with described the goods as lubricant oil, as had similar orders in the past, and she had no reason to believe that this load differed. She was not aware and had no reason to be aware that the goods were dutiable.

29. In our view Counsel for HMRC did not successfully challenge the appellant's evidence, and we therefore find as a fact that her understanding was that she was not carrying dutiable goods, on the basis that while the oil included diesel as a component it was not classified as such but instead as a lubricant oil. In addition, we accept the appellant's unchallenged evidence that the business where the goods were uploaded and the source of the papers was in the appellant's understanding a significant operation, rather than a site that might suggest that there was something suspicious. Counsel for HMRC also did not successfully challenge the appellant's evidence that the driver could not be expected to test the content of the load to see if it matched the description given, and that he had no means to do so. In response to a question from the Tribunal Mr Donnachie agreed that the driver could not be expected to test the load. We therefore also find that the driver did not have the means to test the load, and that (at least in the ordinary course) there would be no reasonable expectation that he should.

30. The appellant's responses were somewhat less clear to Counsel's questions about the extent of the appellant's obligations as carrier. Counsel referred to the appellant's acceptance that her obligation was to transport the goods in accordance with the relevant law and business practice and effectively sought to get the appellant to accept that this included ensuring that the goods complied with duty requirements. Our view of the appellant's evidence is that she was referring to carriers' obligations regarding the carriage of goods, such as local driving laws and the 1956 Convention on the Contract for the International Carriage of Goods by Road (the "CMR Convention"). The CMR Convention is discussed further below.

31. Counsel pointed out that the CMR in this case referred to the product as being hazardous and also referred to "fuel diesel". The appellant accepted that the fact that the load was marked as hazardous would put a reasonable carrier on notice to ensure that related rules were complied with. Special equipment was used for hazardous loads. However, she did not accept that the reference to diesel required her to ensure that duty related obligations were complied with. We accept the appellant's evidence that she did not believe the oil to be classified as diesel, that she had carried goods subject to duty in the past and that in such cases the documentation (including the CMR) and the procedures would be different. We accept that she did not believe that it was the carrier's obligation to look beyond the CMR and (for example) contact HMRC to check the duty position.

Mr Donnachie's evidence

32. Mr Donnachie's evidence was consistent with the terms of the review decision. The documents he had examined included the CMR, the officers' notebooks and lab results. He confirmed that he had taken account of the fact that the appellant's vehicle had not been intercepted before. He believed it was clear from the CMR that the product was diesel, or that a proportion was, and that most of the laboratory tests had confirmed that the proportion was 93% or 94%. (Whilst we accept that this was Mr Donnachie's view, we would comment that he appears to have disregarded the fact that the test results refer to "lubricating oil fraction" as well as diesel, and show no percentages in respect of that.) While Mr Donnachie did not expect a carrier to know the technical breakdown of everything carried he believed that a carrier should have been alerted by the reference to diesel on the CMR.

33. Mr Donnachie said he had not accused the appellant of being "a smuggler" but that his view was that if dutiable goods were not declared then they were in fact smuggled goods. He had also taken the view that the terms of the request for review were all about an argument that the goods were not dutiable, which was not a relevant consideration. In his view the request contained no submission that was relevant to the question whether there was a "reasonable excuse" or anything else that suggested a different level of responsibility that could provide an exception to the normal principle that restoration was not made in cases of smuggled fuel.

34. In response to questions from the Tribunal Mr Donnachie explained that HMRC did not use UN codes to classify goods, but instead used EU tariff code classifications. Certain classifications gave rise to "trigger points" as far as HMRC were concerned, and oils had a number of such trigger points. We understood this to mean that HMRC used the codes to alert them to items potentially subject to hydrocarbon duty. Mr Donnachie appeared to accept that there was a potential difficulty with lubrication oil, which it was known could include an element of hydrocarbon, but was unable to confirm from his knowledge and experience whether that meant that duty definitely had to be paid or whether it was in fact possible for lubrication oil containing diesel not to be subject to duty. In this case he had relied on his understanding of the lab results, and in particular on the fact that the results for one of the running tanks appeared to be the same as the five samples taken from the load.

Submissions

The appellant's submissions

35. The appellant's representative submitted that, despite requests, HMRC had not disclosed their full restoration policy. A heavily redacted version had only recently been received. The driver had only received a notice of detention and the appellant had not received the seizure notice. No reasons were given in the refusal of restoration other than that duty had not been paid on the goods, and the appellant had been unable to understand why her property had been taken when she believed she had done nothing wrong.

36. The Tribunal had full fact finding power and could decide on reasonableness in light of those findings (*Balbir Singh Gora and others v Commissioners of Customs and Excise* [2003] EWCA Civ 525 ("*Gora*")). This included the reasonableness of HMRC's policy- although because that had not been properly disclosed that could not be decided. The appellant believed that the goods were as described on the CMR and had no means of checking or requirement to check whether they were subject to duty. Nothing on the face of the documents put the carrier on enquiry and therefore no steps could reasonably be expected of the appellant to check the position. The appellant was an innocent agent (*Martin Glen Perfect v HM Revenue & Customs* [2015] UKFTT 639 (TC); *Taylor and Wood v R* [2013] EWCA Crim 1151). No allegation of deliberate fault or of negligence had been made. She had hidden nothing. The CMR Convention made it clear that as between the carrier and customer the carrier was not responsible for the accuracy of documents. HMRC had failed to take account of relevant matters, including the appellant's innocence and the fact that she was not the owner of the goods. The *Gora* case and also *D&SMB UK Limited v Commissioners of Customs and Excise* LON/2003/8056 showed that a policy that failed to take into account the existence or extent of blameworthiness was unreasonable. HMRC should also have publicised any general policy it had not to restore vehicles in this situation, so carriers had adequate notice (*Desmond Rogers t/a LJR Transport v Commissioners of Customs and Excise* LON/2003/8095). The decision lacked transparency and the requisite degree of detail, and was arbitrary and irrational because punishing hauliers who are not at fault does not deter others. It was not proportionate in ECHR terms.

HMRC's submissions

37. Counsel for HMRC reminded the Tribunal that the burden of proof was on the appellant and that its powers under s 16(4) FA 1994 are limited to determining whether no reasonable authority could have reached the decision, although he accepted that the review extended to the question whether HMRC had "taken into account some irrelevant matter or disregarded something to which they should have given weight" (citing *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at 239 per Lord Lane).

38. None of the authorities relied on by the appellant assisted her case. *Martin Glen Perfect* related to points of interpretation in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 which were not relevant here. *Taylor and Wood* was a criminal case about fraudulent evasion of duty and confiscation orders and was again not relevant: the review decision was not reached on the basis of any concept of guilt. *Desmond Morris* and *D&SMB* were about the reasonableness of restoration fees and were again not relevant. In *Gora* the question of blameworthiness was hypothetical and in any event blameworthiness was not key to the present case which was based on lack of exceptional circumstances or reasonable excuse. The case of *Lindsay v Commissioners of Customs & Excise* [2002] EWCA Civ 267, [2002] STC 588 ("*Lindsay*"), on which the appellant also relied, also drew a distinction between private individuals and commercial operators which was unhelpful to the appellant's case. A commercial operator could always plead "exceptional circumstances". The statutory scheme was human rights compliant.

39. The CMR document referred on its face both to the hazardous nature of the product and to diesel fuel. These were "red flags". In those circumstances there could be no reasonable possibility of allowing restoration on the basis of lack of blameworthiness. The appellant had prevaricated in evidence as to the extent of her responsibilities as a carrier, but the contents of the CMR document clearly placed a responsibility on her.

The relevant legal principles: discussion

40. Counsel for HMRC referred us to the following passage from the judgment of Lord Phillips MR in *Lindsay* at [40]:

> "…the principal issue before the tribunal, was whether the commissioners' decision not to restore Mr Lindsay's car to him was one that they 'could not reasonably have arrived at'—within the meaning of those words in s 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998, there can be no doubt that if the commissioners are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention). Quite apart from this, 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—see *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at 239, [1981] AC 22 at 60 per Lord Lane."

41. The Master of the Rolls explained the human rights and proportionality aspects further at [52] to [54]:

> "**Human rights**
>
> [52] 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.
>
> **European Community law**
>
> [53] It does not seem to me that the doctrine of proportionality that is a well established feature of European Community law has anything significant to add to that which has been developed in the Strasbourg jurisprudence. There is, however, a passage in *Paraskevas Louloudakis v Elliniko Dimisio* (Case C-262/99) (2001) Transcript 12 July, which is

helpful in the present context in that it is of general application. I quote from para 67:

'Subject to those observations, it must be borne in mind that, in the absence of harmonisation of the Community legislation in the field of the penalties applicable where conditions laid down by arrangements under such legislation are not observed, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality.'

[54] There are then references to Strasbourg authority. The judgment continues:

'The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty.'"

42. The judgment also refers at [58] to the following comments by the European Court of Human Rights in *Allgemeine Gold-und Silverscheideanstalt v United Kingdom* (1986) 9 EHRR 1 at paragraph 54:

'It is first to be observed that although there is a trend in the practice of the Contracting States that the behaviour of the owner of the goods and in particular the use of due care on his part should be taken into account in deciding whether or not to restore smuggled goods—assuming that the goods are not dangerous—different standards are applied and no common practice can be said to exist. For forfeiture to be justified under the terms of the second paragraph of Article 1, it is enough that the explicit requirements of this paragraph are met and that the State has struck a fair balance between the interests of the State and those of the individual. The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account.'"

43. The Master of the Rolls concluded that the refusal to restore in that case had failed to take account of all relevant factors. This included in particular that no regard appeared to have been paid to whether the goods were for family and friends or whether the importation was pursuant to a commercial venture. The Commissioners' policy had not taken account of all relevant factors, including, where the importation was "not for the purpose of making a profit,…the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture" ([64]).

44. We do not agree with Counsel for HMRC that this case does not assist the appellant because the appellant was running a commercial operation. The general principles explained by the Master of the Rolls, with whom both other members of the Court of Appeal agreed, are clearly highly relevant. We also consider that the distinction drawn by the Court of Appeal between private individuals and commercial operators, on which Counsel for HMRC relied, was principally a distinction drawn

between private individuals and those who are deliberately smuggling for profit. This can be seen in the reference at [61] to those who "deliberately use their cars to further fraudulent commercial ventures" and the reference in Judge LJ's judgment at [72] to "those who are trading in smuggled goods". An innocent carrier does not fit these descriptions.

45. It is clear from *Lindsay* that, in exercising its powers, HMRC must take account of all relevant factors, disregard irrelevant ones and that its action must strike a fair balance: it must not be disproportionate. The degree of fault is relevant and the result must be fair.

46. In our view it is clear that "blameworthiness" is indeed a relevant factor to take into account. Ignoring it, as apparently suggested by Counsel for HMRC, seems to us to be unfair as a matter of principle. If additional support were needed for this it is clearly provided by *Gora*. The relevant comments may be obiter but we disagree that they should be disregarded as "hypothetical": they are authoritative and were agreed by all three members of the Court of Appeal. They also reflected Customs' own written submissions in that case, which are also important because they cover the Tribunal's fact finding role and its impact on any further review decision. Those submissions are set out in Pill LJ's judgment at [38] and include the following:

> "(c) The Appellants contend that the policy is 'unreasonable' in the above sense because it fails to take account of the alleged 'blameworthiness' of the Appellants. The Commissioners entirely accept that the Appellants are free to raise that contention in the Tribunal. If that contention were successful, the Tribunal would remit the matter to the Commissioners and impose such directions, requirements or declarations as it thought fit pursuant to s 16(4)(a)-(c) of the 1994 Act.
>
> (d) The Commissioners would then retake the decision, in compliance with the Tribunal's ruling. If in any subsequent appeal against a further decision, an issue arose as to whether the Appellants were 'blameworthy', subject to the proviso referred to below, the Tribunal's role would be as the Tribunal held in *Gora* :
>
> '[The Tribunal] satisfies itself that the primary facts upon which the Commissioners have based their decision are correct. The rules of the tribunal and procedures are designed to enable it to make a comprehensive fact-finding exercise in all appeals.'
>
> (e) Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

47. Pill LJ commented on this at [39] as follows:

> "I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph."

48. Counsel for HMRC also accepted in this case that the Tribunal had full fact finding powers, and we did not understand there to be any disagreement with the approach set out at [39] in *Gora*. We have proceeded on that basis.

49. We also do not agree with Counsel for HMRC that *Taylor and Wood* is irrelevant. It contains some illuminating comments about the role of innocent carriers used by smugglers. One of the arguments was that the appellants were not liable to pay duty because it was the carriers rather than the appellants that were "holding" the goods. Reading the judgment of the Court, Kenneth Parker J commented at [31] that seeking to impose liability on the carriers, who had actual possession of the cigarettes in question but were innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Similar comments were made at [39] and [40] in relation to the relevant Directive. A clear, principled, distinction was drawn between innocent carriers and (deliberate) smugglers.

50. *Martin Glen Perfect* is also not a case on restoration, but it does consider the role of a carrier of goods in some detail. As well as considering *Taylor and Wood* it helpfully refers to a number of other authorities. These included *R v May* [2008] UKHL 28 where the House of Lords drew a distinction (in the context of confiscation powers) between a person owning or controlling property evading liability to which he is subject and "mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale" ([48]).

51. In *Martin Glen Perfect* the carrier knew he was carrying goods potentially subject to duty but the documentation indicated that duty was suspended, and there was nothing on the face of the documents to put him on enquiry. The Tribunal noted at [62] that "it does not appear to us to be reasonable to expect a lorry driver to make enquiries of HMRC himself as to the genuineness of the CMR…".

52. In our view these cases are all relevant. They illustrate what should in any event be obvious: in making restoration decisions HMRC are required to take all relevant factors into account, and if the owner of the property is in fact an innocent carrier rather than trading in smuggled goods then that must be a relevant factor. It must also be recognised that there are limitations on what a carrier might reasonably be expected to check.

53. The final two cases referred to by the appellant's representative, *Desmond Morris* and *D&SMB*, were restoration cases decided by the VAT and Duties Tribunal. Again Counsel for HMRC wrongly suggested that they were irrelevant. The fact that

they related to restoration fees charged to hauliers does not matter: the statutory test is the same one as we have to consider. In *Desmond Morris* the appellant owned a haulage firm and was not knowingly involved in the fact that goods were being smuggled, but was negligent. Customs had charged restoration fees on the basis that the hauliers had failed to conduct "basic reasonable checks", including checking the bona fides of their customers, failing to question a change in the nature of the load and failing to react to previous loads being diverted from the original destination. The Commissioners relied on a notice that had previously been circulated warning carriers about tobacco and alcohol smuggling and the risk of losing their vehicles, and advising them to make "reasonable physical checks" of whether collection and delivery points were "sensible", whether they were the same on the paperwork, and saying that Customs should be contacted if anything else looked suspicious.

54. The Tribunal found that the appellant had not received adequate notice of this policy and that this was a relevant factor. There was also no concealment. Insufficient regard was paid to hardship. The fees charged were the "economic equivalent (or near-equivalent) of non-restoration" and were disproportionate. This was despite the fact that there was negligence.

55. *D&SMB* also related to a restoration fee charged on the basis that the haulier had failed to carry out reasonable checks. The policy was found to be unreasonable in taking no or insufficient account of the degree of blameworthiness, and it was held to be unreasonable to charge a restoration fee to a wholly innocent and non-negligent haulier. The Tribunal commented at [59] that "some degree of blameworthiness would have to have occurred before any refusal to restore could be a reasonable decision" and that the "restoration conditions imposed should take account of the degree of blameworthiness". We agree. The same principles must apply both to decisions whether to restore and decisions about the fees or other conditions to impose.

Hydrocarbon duty on goods containing diesel

56. HMRC's case laid significant stress on the reference to diesel fuel in the CMR. Having failed to establish that the appellant knew that dutiable fuel was being transported it appeared that their position was that, if the question of blame was relevant at all, then the reference to diesel on the CMR meant that the appellant should not have proceeded without specifically checking the duty position. Neither Counsel for HMRC nor Mr Donnachie was however able to assist the Tribunal in explaining what the correct treatment was of goods containing diesel as an ingredient. Whilst the point is not relevant to determining whether these particular goods were liable to duty (since it is not now possible to claim that they were not duly condemned as forfeited: *Jones*), it is relevant to the question of what checks it would be reasonable to expect a haulier to carry out. HMRC's argument would lose much of its force if a reference to diesel in the description of goods labelled as lubrication oil was unsurprising and did not obviously mean that the goods were subject to duty.

57. The Tribunal's own researches indicate that HODA makes specific provision for products that include hydrocarbons as ingredients. The effect of s 3 HODA and s

126 CEMA (see [3] above) is that the hydrocarbon ingredient is ignored unless HMRC consider that goods should, "according to their use", be classed with hydrocarbon oil. This approach is reflected in published practice. Section 10 of the guidance entitled "UK Trade Tariff: excise duties, reliefs, drawbacks and allowances" (published 1 January 2009) is headed "Imported composite goods containing mineral oils" and states:

> "Goods containing mineral oils as a part or ingredient of them are not liable to Excise Duty unless they are intended for use as substitutes for road fuels or as additives to road fuels or road fuel substitutes. Any articles imported for these purposes are chargeable with UK Excise Duty on 100% of their volume. (not only on the percentage of mineral oil, if any, contained within them). The tax type codes and Excise Duty rates to be applied are the same as for the type of mineral oil which the product is intended to substitute for or is to be added to.
>
> Lubricating oils will not be charged with UK Excise Duty unless they are to be added to an additives package, in which case Excise Duty will be charged on the whole package."

58. It is clear from this that it is accepted that composite goods imported may include mineral oil and that, apparently even if it is a high proportion of the composition, no duty will be chargeable unless it is intended for use as road fuel or as an additive to road fuel. Lubricating oils are specifically stated not to be chargeable unless they are to be part of an additives package, which given the preceding paragraph appears to refer to additives to road fuel. In our view this significantly undermines HMRC's contention that the reference to diesel in the CMR demonstrated that the appellant was in some way blameworthy.

The CMR Convention

59. It is also pertinent to consider briefly what carriers' duties are under the general rules governing carriage of goods. The CMR Convention governs the position as between the carrier and customer and so cannot of itself be determinative of a carrier's tax related obligations, but it is clearly of some relevance, particularly bearing in mind that HMRC's case laid emphasis on the appellant's legal duties as carrier and effectively criticised the appellant for not taken her own steps to check the duty position.

60. Article 8 of the CMR Convention provides (as between the carrier and customer) that the carrier is responsible for checking the accuracy of statements about "the number of packages and their marks or numbers" and the "apparent condition of the goods and their packaging". It does not go further. Article 11(2) states that the carrier "shall not be under any duty to enquire into either the accuracy or adequacy" of any necessary documents for Customs purposes, which have to be provided by the sender to the carrier under Article 11(1). This is also consistent with Article 7 which provides that the sender is responsible for all losses sustained by inaccuracies or inadequacies in a CMR form, including as regards requisite instructions for Customs.

61. In the light of these provisions the appellant's understanding that she was not required to check the Customs position is understandable, and indeed appears reasonable.

Discussion and conclusion

62. We have concluded that the review decision should cease to have effect on the basis that we are satisfied that it did not properly take into account all relevant factors, and appears to have taken into account an irrelevant factor, such that the decision could not properly have been arrived at.

The restoration policy

63. It is not clear to us that HMRC's internal guidance is entirely reasonable (in a *Wednesbury* sense) or, despite the reference to proportionality, proportionate. It is not possible to reach a definitive view on this since we only saw a heavily redacted version. However, if and to the extent that it makes no distinction between a carrier who was aware of the fact that he or she was involved in smuggling and one who is entirely innocent, that seems to us at least capable of being unreasonable and unfair. If that is the effect of the guidance we would urge HMRC to review it.

64. We note that the opening paragraph of the section which includes the paragraph on smuggling referred to at [24] above notes that vehicle seizure causes significant disruption to fraudsters and has an important part to play in making oil frauds unattractive and in sending a strong deterrent message to others who are or may become involved in oils fraud. Although Mr Donnachie's approach was that the section which follows on "smuggling" was relevant on the basis that the trailer was actually carrying goods that should have been subjected to duty, such that smuggling had in fact occurred, this appears not to take account of the opening paragraph and the focus on fraudsters. It is certainly possible, if not probable, that the author of the guidance had in mind a situation where the vehicle is owned by someone (knowingly) involved in smuggling. The exception for vehicles owned by finance companies is certainly explicable on that basis.

The review decision in this case

65. Due to its redacted nature we have not been able to confirm definitively that Mr Donnachie did follow the internal guidance, although we accept that he believed he had. We are also somewhat concerned about his repeated references in evidence to whether there was a "reasonable excuse" or "special circumstances". That is not the test. HMRC's decision as to whether to restore (and if so on what conditions) is one that must be arrived at reasonably, must take account of all relevant matters and disregard irrelevant ones. It must also be proportionate. Glosses such as "reasonable excuse" and "special circumstances", which appear elsewhere in tax legislation, at best risk confusion and at worst result in the wrong approach being adopted.

66. We are satisfied that the review decision did not take account of all relevant matters, and appears to have taken account of at least one irrelevant matter. The

matters not taken into account include considerations relating to the degree of blameworthiness, and specifically that in this case the appellant was a carrier, was not aware that the load was subject to duty and that it is by no means clear that she should have been prompted to conduct further enquiries. In more detail:

(1) We have found that the appellant believed that the product carried was lubricant oil of which diesel was only a component, that it had a different classification code and that it was not subject to duty on that basis. This point was effectively ignored by Mr Donnachie in reaching his review decision, who regarded the appellant's submissions on this subject as relevant only to whether the goods were dutiable (which was not relevant to the restoration decision). Mr Donnachie appeared not to consider that the appellant's *understanding* of the position and lack of *knowledge* that the goods were dutiable was highly relevant to the restoration request.

(2) The review decision did not appear to take account of the fact that appellant was a carrier, presumably rewarded at most by a modest fee- in the words of the House of Lords a "modest contributor"- rather than a smuggler making a profit directly from duty evasion. There was no suggestion that the appellant was paid anything other than a normal carrier rate to carry the product in question (if indeed she was paid at all on this occasion). The maximum amount paid by Vybigon on previous journeys was 2,400 euros, and that appears to have covered a journey to Liverpool rather than (as in this case) London. There was no indication that the appellant would have benefited from a share of any profit made from smuggling the goods. So even if the appellant should have been prompted to make further checks (as to which see below) it would not follow that non-restoration was proportionate. As the cases discussed above illustrate there is a distinction in principle between someone who profits from duty evasion and a carrier who, although conducting a commercial business, is unaware that an illicit load is being carried and makes only the modest return that a haulier might be expected to make.

(3) The terms of the CMR Convention (discussed above) are of some relevance. As noted there the appellant's understanding that she was not required to check the Customs position is understandable and appears reasonable in the light of the terms of that Convention. If HMRC expect carriers to take a different approach then, at the least, it should be clearly flagged to carriers entering the UK. There was however no suggestion that HMRC had clearly publicised its approach to carriers and it appears that, at least until the review decision was issued, the appellant was not informed of it.

(4) More generally (and disregarding any protection afforded to the carrier by the CMR Convention), it is far from clear to us that the reference to diesel fuel on the CMR meant that the appellant should have carried out further checks, even by any standards set by HMRC. It appears, based on HMRC's own published guidance, that lubrication oil may well contain hydrocarbons without being liable to duty. Although Mr Donnachie rightly accepted that a carrier is not to be expected to carry out checks on the chemical composition of a load, he clearly placed significant reliance on the reference to diesel in the CMR. In our

view he should not have done this without also taking proper account of the legislation and practice that govern the duty position of composite products, discussed at [56] to [58] above. Effectively Mr Donnachie appears to have concluded that the reference to diesel meant that the carrier should have picked up that the goods would be subject to duty. However, it is clear from the legislation and practice that this is not the case and furthermore that HMRC practice specifically states that, except where intended for an additives package, lubricating oils are not chargeable.

(5) There also appears to have been nothing other than the reference to diesel fuel on the CMR that might have alerted the appellant to make further checks. The collection point was a substantial business, and the driver was not (for example) diverted elsewhere. The paperwork appeared properly to reflect the fact that a hazardous substance was being dealt with and included detailed safety and handling instructions. The load was not concealed in any way and the CMR made clear on its face that the product contained diesel fuel. If there was a deliberate attempt to evade duty (by anyone) then it seems unlikely that that description would have been included.

(6) There was also no suggestion that the product was being carried in an unsafe manner or otherwise than in accordance with relevant regulations. HMRC's guidance specifically refers to health and safety issues arising from smuggling. Those considerations will clearly be relevant when fuel is concealed or carried in an unconventional manner but in this case the detention report refers to both the tractor unit and trailer being in a fair condition, suggesting that nothing was untoward and also suggesting that one of the rationales behind the guidance is not in fact relevant in this case. Essentially, the guidance (and therefore by following it Mr Donnachie) appears to have taken account of a factor that is not relevant in this case.

(7) Mr Donnachie was clearly right to take account of the fact that the lab test for one of the running tanks appeared to produce the same result as the five samples from the storage tanks holding the goods. However, the lab results do not appear to us to provide full information, and in particular do not show the proportions of "gas oil/DERV" and "lubricating oil fraction". Mr Donnachie appears to have concluded that all the tests showed that 93% or 94% was diesel, but that is not what the results actually state. Any possibility that the proportions of diesel and lubricating oil varied between the samples taken from the load and the sample from the running tank appears to have been disregarded.

(8) There is no indication that the value of the trailer or the impact of its loss on the appellant's business (see [26] and [27] above), or the fact that this was the first time that the appellant had had a vehicle intercepted, were taken into account in determining whether non-restoration was proportionate.

Decision

67. The review decision shall cease to have effect from the date of release of this decision.

68. We require HMRC to conduct a further review of the decision within six weeks of the date of release of this decision. The further review shall be conducted in accordance with the following directions:

(1) It shall be conducted by an officer who has not previously been involved in this case.

(2) The appellant may within 10 business days of the date of the release of the decision provide to HMRC additional information regarding the price charged by her for transporting the load in question.

(3) The further review shall take full account of the facts found and conclusions reached by the Tribunal, and in particular the points set out at [65] and [66] above.

69. The appellant should be aware that, if she disagrees with the further review decision, she will have the ability to appeal to the Tribunal who will have the same powers as the Tribunal has in relation to this appeal.

Closing remarks

70. We wish to make some additional remarks about the way that this case was handled, aspects of which have caused us not only inconvenience but some concern.

71. First, HMRC were responsible for compiling the bundles in this case. The bundles were defective in a number of important respects. This affected preparation for the hearing and made the hearing itself less efficient. Much of the difficulty appeared to stem from the fact that there had been an earlier hearing that was adjourned unheard on HMRC's request because the appellant had raised new arguments, but the bundles were not then properly updated to pick up papers handed up at that hearing or other papers relating to those arguments. The papers missing included the appellant's entire authorities bundle, her witness statement, parts of the restoration correspondence and the redacted HMRC guidance that had been the subject of a specific disclosure direction at the previous hearing. Although the appellant's representative should probably have done more to ensure that all necessary documents were included in the bundles, we were informed that he had only received HMRC's bundles one day before the hearing before us.

72. Secondly, we have some concerns about the way HMRC's case was handled. The Tribunal rules make it clear that parties have a duty to help the Tribunal further the overriding objective of dealing with cases fairly and justly. In our view it was neither fair nor just to place significant reliance on a reference to "diesel fuel" without drawing the Tribunal's attention to what the rules, and in particular HMRC's own published guidance, say about dutiable oil included in lubricant oil.

73. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 20 DECEMBER 2016