[2018] UKFTT 0248 (TC)

TC06480

Appeal number: TC/2017/05448

Customs and Excise – seizure of tractor unit and trailer – appeal against refusal of restoration – consideration of scope of jurisdiction – decision to require further review based on facts found

FIRST-TIER TRIBUNAL
TAX CHAMBER

IESA LOGISTICS A.S. **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 18 April 2018, with further written submissions on 25 and 26 April 2018

Dominic Howells for the Appellant

Sophie Murray for the Respondent

DECISION

1. This is an appeal by the appellant haulage company ("IESA") under s 16 Finance Act 1994 ("FA 1994") against a refusal by the Border Force to restore a Volvo tractor unit and refrigerated trailer unit seized at the port of Dover on 18 January 2017. The vehicle and its cargo were seized under s 139 Customs and Excise Management Act 1979 ("CEMA"). The vehicle, which was being driven by an employee of IESA, was intercepted following a journey from the Czech Republic. On inspection 676,800 cigarettes, attracting excise duty of £186,539.62, were discovered concealed within the cargo.

2. IESA first contacted the Border Force to seek restoration by email on the following day, 19 January. The Border Force wrote back on 25 January requesting further information in the form of a list of questions, and IESA responded on 14 February and again on 27 February following a request for the relevant lease agreement. Restoration was refused by a letter dated 27 March 2017. IESA instructed a firm of solicitors, Anthony Seddon LLP, who wrote on its behalf on 10 May requesting that the decision be reviewed and providing some additional information. This letter was acknowledged by a letter dated 11 May, which stated that the deadline for the review would be 25 June 2017. The 11 May letter also invited the provision of any further evidence or information that the appellant wished to provide, and stated that this was the last opportunity to provide such information. On Friday 9 June the review officer, David Harris, contacted the solicitors to ask some additional questions about the consignor. The relevant solicitor was on holiday at the time and no further information was provided before the review decision was issued on the following working day, Monday 12 June, upholding the original decision not to restore the vehicle. IESA appealed to the Tribunal on 11 July 2017.

3. I have concluded that the review decision should cease to have effect and that a further review should be conducted in accordance with my directions.

Legal background

4. Regulation 88 of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states:

> "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…, those goods shall be liable to forfeiture."

Regulation 20 of the same regulations contains a general requirement that duty must be paid at or before an excise duty point. In addition, 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.

5. 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."

6. 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."

7. 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, and in any event there was no dispute about the fact that the load being carried did include cigarettes subject to excise duty.

8. 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."

9. The Tribunal's powers are set out in s 16(4) FA 1994, 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."

10. 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.

11. 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 (the "Convention") 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. As explained by Lord Phillips MR in *Lindsay v Commissioners of Customs & Excise* [2002] EWCA Civ 267, [2002] STC 588 ("*Lindsay*") at [40]:

> "…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."

Evidence

12. Four witnesses provided oral evidence and supplied short witness statements. The three witnesses for IESA, who all gave evidence through a Czech interpreter, were Jan Brazda, the managing director of IESA, Petr Cech, its warehouse keeper, and Frantisek Marecek, the driver of the vehicle. The sole witness for the respondent was David Harris, the officer who took the review decision.

13. I found the evidence of Mr Brazda and Mr Cech to be clear and straightforward, and I accept their evidence as to matters of fact. Mr Marecek's evidence was less clear, but in my view this was largely due to a lack of specific recollection of some of the details of what happened at the time of interception (confused further by a disparity between his evidence and what is recorded in the relevant officer's notebook, discussed further below) and to some extent a lack of sophistication or any familiarity with proceedings of this nature. Mr Harris's evidence was also clear and I accept it as regards matters of fact, although as also recorded below I have some concerns about information volunteered during oral evidence which may have been taken into account in the review decision but is not reflected in the correspondence.

14. Documentary evidence included correspondence between the parties, documentation produced by IESA including in relation to Mr Marecek's employment and IESA's prior dealings with the consignor, and documentation produced by the Border Force including extracts of notebooks of the relevant Customs officers. English translations were provided where required.

Findings of fact

Background and events leading to the seizure

15. IESA is a company incorporated in the Czech Republic and based in Humpolec, a town to the south east of Prague. It was established in 2011 as a subsidiary of another company which has provided transport services since 1997. IESA provides road haulage services throughout Europe, although mainly from the Czech Republic to Italy, and with only a limited number of trips to the UK. Mr Brazda, IESA's managing director, has worked in the road haulage business for around 20 years and with IESA for around seven years (since around the time of its formation).

16. IESA is a member of Cesmad Bohemia, the Czech Republic's Association of Road Transport Operators. Cesmad Bohemia provided a written confirmation that IESA is a "very reliable and active member of our Association with very high reputation in the road transport industry since 2012", and that Mr Brazda has been an active member of its Auditing Commission for several years. The same document also confirmed that IESA has held a substantial number of "TIR Carnets", which Mr Brazda explained were special permits vouching for customs duties when transporting goods outside the EU. Mr Brazda also confirmed that IESA had never previously experienced problems with smuggling.

17. The consignor of the intercepted load was another company incorporated in the Czech Republic, H&P Fish s.r.o ("HPF"). HPF first made contact with IESA by a telephone call from its representative and director Haim Auster. Mr Brazda thought that HPF had found IESA's details on the internet, and had possibly also received a recommendation. Mr Brazda agreed to meet Mr Auster at IESA's premises in Humpolec on 12 May 2016. Mr Brazda prepared a written note of the meeting which I infer was shared with Mr Auster as a record of what was agreed. The note explains that HPF was interested in organising the transport of frozen fish, disposable grills, charcoal and other wood products from Russia and the Czech Republic to countries in the EU. It was agreed that shipping charges for each shipment would be paid on the delivery date, with orders sent seven days before the loading date. HPF would be responsible for the correct completion of the documents and would guarantee the "quantity, quality and safe nature of the load". The dispatcher (the term used for an employee of IESA who is responsible for organising the logistics of the shipping) would keep HPF informed about the course of the transport and possible delays, to a telephone number which HPF provided.

18. The note also explains that the agreement that shipping charges would be paid on the delivery date was based on IESA's verification of HPF on the "CERS surveillance system", which had provided a category B rating for HPF, namely an

"average stable entity with individual potential risk elements". Mr Brazda explained that CERS is a system used in the Czech Republic which enables checks to be made on potential new customers. It provides access to State databases, confirming information such as whether the company exists, whether it is registered for tax and whether it pays the sorts of taxes that might be expected from a business of that nature. In the case of HPF the system duly confirmed that it existed, was registered for all relevant taxes and complied with legal requirements. The system can also evaluate the risk of customer default, and this is what gave rise to the category B classification.

19. Prior to the shipment in question IESA undertook 10 or 11 earlier shipments for HPF including the transport of frozen fish from Russia to France, a one-off transport of grills and a number of transports of charcoal. The documentary evidence included examples showing a previous transfer of 32 pallets of grills to the UK, 33 pallets of charcoal to Belgium, and two loads of 33 pallets of charcoal to the UK. In the examples provided the previous UK deliveries were all to the same delivery address and consignee, which was different from the delivery address and consignee for the intercepted load. Mr Brazda confirmed that HPF usually paid IESA in cash.

20. Mr Marecek joined IESA as a driver in 2015. IESA's HR department interviewed him and took a reference from his previous employer. A personal questionnaire, completed during his interview process, contains a note of the conversation with the previous employer on 23 July 2015. This records that the previous employment finished when the international truck transport business carried on by the previous employer was terminated. Mr Marecek was recommended as a reliable driver who followed the rules, had no problems with Customs, police or smuggling, did not steal diesel oil and took care of his vehicle. He was described as the previous employer's "right hand" who cooperated, helped, organised his work and work for others. Mr Brazda's own impression was that Mr Marecek was a responsible and reliable driver.

21. Mr Marecek has a detailed written employment contract with IESA. In addition, IESA issued detailed work instructions to Mr Marecek for his role as an international truck driver, which drivers are expected to sign when they are taken on. Among other instructions this document includes specific text about visually checking the identity and quantity of loaded goods against the CMR document, and regular checks of the load to prevent smuggling. The document specifically instructs the driver to carry out simple checks which could reveal illegal goods, and to check whether the stated place of collection, delivery and description of the goods corresponds to the reality. In the event of any suspicion, the driver is instructed to stop at a safe place and contact his superior. The document informs the driver that a breach of the duty to control the load to prevent smuggling is considered as an act of gross breach of duty that leads automatically to dismissal or other sanction, including notification to police and other state authorities. Mr Brazda confirmed that IESA would not hire any driver that it thought had been involved in smuggling.

22. The CMR document for the intercepted load describes a consignment of 33 pallets of charcoal weighing 11,550 kg. The consignee is stated to be "Faversham

Limited Company" with an address at an industrial estate in the West Midlands. The delivery address is given as the same road and town in the West Midlands as the consignee's address, but omits any reference to the precise location on the road and the postcode. The consignor is listed as HPF at an address in Prague, but the location of loading is stated to be Humpolec, where IESA is based. The loading date is stated to be 13 January 2017.

23. In fact what happened at Humpolec was largely a "transloading". HPF had requested IESA to arrange a transport of charcoal from Slovakia to the UK. IESA subcontracted the first leg of the journey, from Slovakia to the Czech Republic, to a third party haulier. There was a separate CMR document for this part of the journey. Mr Brazda explained that the reason for the subcontracting was because IESA's vehicles do not normally travel to Slovakia, so spare capacity of a Slovakian haulier was used instead. His explanation for not using a Slovakian carrier for the entire journey was that customs needed to be cleared which IESA was arranging. He was not aware whether IESA had used the particular Slovakian carrier before: matters of that sort would dealt be with by IESA's dispatchers. He was also not aware who had witnessed the loading in Slovakia, but thought it was most likely the Slovakian driver. He could however confirm that the Slovakian driver had not reported anything unusual to IESA, and that whilst there had been no check on the particular driver IESA had chosen the Slovakian haulier using a central database of trusted hauliers.

24. 30 pallets arrived from Slovakia and were transloaded to the (subsequently seized) trailer at IESA's warehouse in Humpolec. A refrigerated trailer with used in accordance with IESA's policy of always using that form of trailer to travel to the UK, because it minimised the risk of intrusion during the journey. The transloading was supervised by Mr Cech, whose responsibilities as warehouse keeper included loading and unloading, and carrying out a physical check of the cargo, its wrapping and the number of pallets. The Slovakian driver was present for the unloading. Also present were Mr Auster and (for the loading) another employee of IESA called Vladimir Sumek, who at that time was the intended driver of the load to the UK. A further three pallets were added from stock already held on behalf of HPF in IESA's warehouse. Mr Brazda was unclear how long these additional pallets had been in storage, but thought it was roughly a month and that these goods had probably also originated from Slovakia.

25. Based on Mr Cech's visual check the cargo appeared to contain charcoal. He confirmed in evidence that each pallet and the bags on it were wrapped in transparent film (which he said was used in around 90% of loads to prevent damage in transit). He could see bags of charcoal through the film. The packaging appeared undamaged. In accordance with standard practice, designed to protect IESA as haulier, he took some photos of the completed load which were included in the documentary evidence. The photos clearly confirm the way in which the pallets were wrapped, but it is not possible from the quality of the copies available to see further detail. Mr Cech also said that he would not have been able to undertake a further inspection without damaging the packaging.

26. Mr Cech confirmed that Mr Auster directly managed the cargo loading and decided the exact position of each pallet, and that Mr Auster had been present at every previous transloading that Mr Cech could recall attending for HPF. He did not know whether Mr Auster had been present at any earlier loading of these particular goods, and did not ask. Mr Brazda similarly confirmed Mr Auster's presence at the transloading at IESA's premises, that Mr Auster was always present during loading of HPF's cargo into IESA's lorries, and that he was also in contact with the dispatcher during each journey to monitor progress. Although I found the extent of Mr Auster's involvement in the loading somewhat surprising I accept Mr Brazda's evidence, which was not challenged in cross-examination, that whilst the reason for Mr Auster's extent of involvement in this case was not explained to him it was very often the case that the customer insists on being present at loading and decides the order of the loading, for example to avoid an unbalanced load. Mr Brazda therefore did not find Mr Auster's involvement surprising. Effectively, my understanding of his evidence is that in Mr Brazda's experience it is not unusual for consignors to be present at, and involved in, loading in this way. He also confirmed that it was standard procedure for the customer to remain in contact with the dispatcher during the journey to check progress. All of IESA's vehicles are tracked on a GPS system so that up to date information can be provided to its customers, including via an online service.

27. The shipment order between HPF and IESA, dated 6 January 2017, describes the address of loading in Slovakia, details of the consignee in the UK and a "price of services directly related to the import of the goods" of €3,272. This document refers to 33 pallets of charcoal in bags, with a gross weight of 11,550 kg. The invoice breaks this overall price down into €2,230 for the transfer to the UK from the Czech Republic, €750 from Slovakia to the Czech Republic and €292 for customs procedures, loading and unloading.

28. Mr Marecek was assigned the job of driving the load to the UK on the morning of Monday, 16 January 2017. The original intention had been that Mr Sumek would leave with the load on Saturday 14 January, but he was unable to take on the job for personal reasons. The trailer had obviously already been loaded. Mr Marecek opened the trailer doors and carried out a visual check of the goods, checking that they appeared undamaged. He was informed by Mr Cech that the goods were charcoal. Mr Cech also assured him that he had been present at the loading, that the cargo was intact, properly loaded and secured to prevent movement inside the trailer or damage to the cargo. Mr Marecek was unaware of other details, such as the fact that 30 of the pallets had arrived from Slovakia. The truck that Mr Marecek normally drove was attached to a different trailer, so he disconnected that trailer and attached the truck to the trailer containing the load, and then left for the UK without delay since the departure was already two days delayed and Mr Auster was pressing for it to go ahead. He had not travelled to the UK for around 10 years prior to this trip.

The seizure

29. On arrival at Dover the vehicle was stopped by the Border Force. The description in the Customs officer's notebook of what happened next is as follows. Mr Marecek was asked if he spoke English and replied "No, small". He confirmed that

the trailer was loaded in the Czech Republic, that there was no seal on the load and he indicated the delivery address on the CMR. He confirmed the name of his company, was asked how large it was and indicated using his fingers that it had 27 lorries. Mr Marecek was then asked whether he had any cigarettes or tobacco, and produced three packets of cigarettes. He was also asked about alcohol and drugs, which he confirmed he did not have, and about cash. He was then asked whether he had loaded at the address shown in box 1 of the CMR (which contained HPF's Prague address). The response recorded in the notes to this was "No. Change trailer", and on being asked where this happened that he replied "Czech". He was also asked whether he loaded or whether a colleague did it, and the notes record that he said it was a colleague.

30. Mr Marecek's oral evidence differed from this account. He said he had made it clear that he did not speak English, and that he did not follow most of what he was being asked. He had no recollection of confirming the number of lorries (a number which he said he did not know). He did not recall the question about where the goods were loaded and did not believe that he had said that the trailer had been changed.

31. I accept that Mr Marecek's English is very limited and that the notebook records should be used with caution because there was clearly a significant risk of misunderstanding. However, the notebook records are broadly reconcilable with the fact that Mr Marecek was not present at the loading of the goods, and also that he attached his truck to the trailer, after detaching another trailer, once he had been allocated the job. The reference to "change trailer" is clearly explicable in that context. In any event he was correct to confirm that loading had not occurred in Prague.

32. The search of the trailer was conducted by a different Customs officer. That officer's notebook records entering the trailer and seeing a load three pallets wide containing sacks of charcoal. On further investigation, while examining a pallet six deep from the rear doors, the officer opened a bag of charcoal three deep in the pallet. Once he had cut into the bag it revealed a green hessian sack. He cut into the sack, which in turn revealed lump wood charcoal as the packaging suggested. On moving the charcoal about the officer detected a black shrink-wrapped package which, when cut into, revealed 1200 cigarettes with Polish tax stamps. Further pallets were removed from the trailer and samples of bags opened, showing pallets containing cigarettes starting five rows from the rear doors, with all sacks except the top layer containing cigarettes. The notes record that the bags containing cigarettes were branded differently to three pallets by the rear doors which did not contain cigarettes, the former being branded Resto-Grill and the latter Densons Charcoal. I infer that these were the three pallets added from stock at IESA's warehouse.

The effect of the seizure and failure to restore

33. Mr Brazda confirmed that both the truck and trailer were leased. The cost of the truck new was around €68,000, and the trailer around €53,000. The annual leasing cost including insurance, road tax and servicing was €26,700 for the truck and around €13,800 for the trailer. However, if the truck was not returned to the lessor this year IESA would not only have to pay out rent up to month nine of €18,500, but an

additional amount of €43,000. If the trailer was not returned IESA would have to pay around €25,000.

34. IESA's annual turnover is around 60 million Czech Koruna (at current exchange rates this equates to around €2.5 million). Its margins are thin, with an annual profit of around 2 to 3% of its turnover. Mr Brazda's evidence was that non-return of the truck and trailer would be catastrophic for the business because it would be unable to cover the amounts it would be required to pay the lessor. It would most likely result in bankruptcy or winding up. This evidence was not successfully challenged and I accept it.

Border Force restoration policy

35. Mr Harris's review decision summarises the Border Force restoration policy for seized commercial vehicles. A vehicle adapted for smuggling will not normally be restored. Otherwise the policy depends on responsibility for the smuggling attempt, and whether A: neither the operator nor the driver are responsible, B: the driver but not the operator is responsible, or C: the operator is responsible.

36. Category A can apply if the operator provides evidence satisfying the Border Force that neither the operator nor the driver were responsible for or complicit in the smuggling attempt. If it does, and also provides evidence satisfying the Border Force that both the operator and driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and detect any illicit load, the vehicle will normally be restored free of charge. Otherwise, a different approach applies and normally either a fee is charged or the vehicle is not restored, depending on the circumstances.

37. Category B applies if the operator provides evidence satisfying the Border Force that the driver but not the operator was responsible for or complicit in the smuggling attempt. If the operator also provides evidence satisfying the Border Force that the operator took reasonable steps to prevent drivers smuggling, then the vehicle will normally be restored free of charge unless the same driver is involved on a subsequent occasion, in which case either a fee is charged or, depending on the circumstances, the vehicle is not restored.

38. Category C applies if the operator fails to provide evidence satisfying the Border Force that the operator was neither responsible for nor complicit in the smuggling attempt. If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved, or the trade value of the vehicle if less. However, if the revenue is £50,000 or more or this is a second or subsequent occasion within 12 months, the vehicle will not normally be restored.

The review decision

39. In reaching his review decision Mr Harris considered the correspondence between the parties, the relevant entries in the Customs officers' notebooks and the

associated seizure paperwork. He also considered the restoration policy outlined above, which is set out in detail in the letter. Mr Harris clearly understood that the policy is not supposed to be rigid, and is intended to allow the exercise of discretion on a case by case basis.

40. The review decision letter, which is addressed to IESA's then solicitors Anthony Seddon, refers to three particular aspects of the case on which Mr Harris clearly relied in reaching his decision. First, he referred to the notes from the Customs officer's notebook about what was said about the place of loading, changing the trailer, where it was changed and the fact that a colleague dealt with the loading. Mr Harris noted that this version of events was "clearly at odds with your client's account". Mr Harris goes on to quote the following text, which was clearly taken from IESA's response to the Border Force's list of questions on 14 February 2017, and which Mr Harris said did not seem to "sit well" with what the driver said on the day of seizure:

> "During loading we proceeded in accordance with the Convention… During loading, in accordance with CMR driver controls the amount of loaded pallets and packaging of goods… The pallet according to the communication of our driver, who was loading goods packed in the original, the whole wrapped with stretch film up to the top... Amounts declared and loaded pallets match record on the CMR consignment note."

41. Secondly, the decision letter records that Mr Harris had tried to contact HPF but to no avail as the numbers supplied were either unobtainable or just rang. He had also tried to contact them by email according to their website, but without success. The website gave no indication that HPF had ceased trading and also made no mention of charcoal, only that they sold fish as their name suggests. The letter adds that no one had come forward to claim the actual charcoal, so Mr Harris would question who the goods were actually for and to what address the consignment was actually going to be delivered. The letter records that the solicitors had told Mr Harris that HPF had been a customer of their client since 2016 and that the client regularly transports grills and charcoal and frozen fish (this reference is taken from Anthony Seddon's letter dated 10 May 2017). Mr Harris was surprised and puzzled by this given that the website only refers to fish.

42. Thirdly, Mr Harris refers to the order for the delivery that IESA had supplied (at that time without an English translation) and the fact that this quotes a price of €3,272, which Mr Harris considered was a very high price for a journey supposedly from the Czech Republic to Birmingham, and drew suspicion.

43. The letter continues by stating:

> "With all of the above inconsistencies I am not persuaded that your clients are as uninvolved in this illicit movement of goods as they claim to be."

44. The letter adds that the operator and driver did not comply with the Border Force's expectations of reasonable checks of the load, which are reproduced at

Appendix E of the letter, in that the trailer was already loaded and the driver just swapped trailers. Since the revenue exceeded £50,000 the second part of category C of the policy applied so the vehicle should not be restored. The letter also records that Mr Harris considered proportionality and refers to IESA's estimate of the combined value of the tractor and trailer of £105,000, concluding that it was reasonable not to restore the vehicle given the fact that over £186,000 of revenue was involved. As regards hardship, that was a natural consequence of having a vehicle seized and hardship would need to be exceptional to allow restoration in this case. The inconvenience and expense caused was not exceptional.

45. The letter concludes by upholding the original decision that the seized vehicle should not be restored (in fact the letter omits the all-important word "not", but this is clearly an error), but adds that if IESA has fresh information he would be prepared to consider it.

46. The appendices to the letter include a note about the CMR Convention, Appendix E entitled "Reasonable checks to be undertaken by operators/drivers to prevent smuggling in the load" and Appendix F headed "Indicators that suggest a operator has taken reasonable steps to prevent drivers smuggling". Appendix E lists "common indicators" that the operator/driver has not conducted checks that could reasonably have been expected to reveal the illicit nature of the load. This list includes "basic checks that would have revealed the presence of the illicit goods" and the driver making no attempt to check that what is contained in the load conforms to what is described in the paperwork. There is a comment that drivers "cannot however be expected to detect sophisticated concealments within the load which take experienced Customs officers or scanning technology to detect". Another item on the list reads:

> "The driver and/or operator have made no attempt to check that the destination for the goods is expecting them (particularly relevant for bonded warehouses in the context of diversion fraud)."

47. The list of indicators in Appendix F includes a copy of the terms and conditions of the driver's contract being made available showing that smuggling is considered to be an act of gross misconduct leading automatically to dismissal or other strong sanction, the operator having sought and obtained employment references from the driver's previous employers, and making enquiries from previous employers to establish that the driver has had no previous dealings with Customs.

Mr Harris's evidence

48. Mr Harris confirmed in evidence that he judged each case on its merits. Culpability is very important, as is preventing loss of revenue. In evaluating complicity he would consider for example whether the operator took reasonable steps and whether he believed that the driver was involved. In his view complicity included turning a blind eye.

49. In this case Mr Harris had identified a number of inconsistencies. In addition to those referred to in the review letter he referred to an apparent inconsistency between the driver telling the Customs officer that the goods were not loaded at the Prague

address in box 1 on the CMR, and a comment in Anthony Seddon's letter of 10 May 2017 which states that IESA "transported 33 pallets noted on the waybill as charcoal, from H&P Fish's premises at [the Prague address] to Faversham Limited Company [at their address]". Mr Harris explained that he had taken a look at the Prague address on Google Street View. It appeared to be a large stone building in the middle of Prague, which from the number of plaques at the entrance he thought to be a company accommodation address, and certainly not a commercial address where pallets could be loaded.

50. As regards the price of the load, Mr Harris confirmed that he considered that a cost of over €3,000 seemed a lot for transporting an unremarkable load from the Czech Republic to the UK. He accepted that the broken down price of €2,230 was not as unusual, although he suggested that it still seemed rather expensive for a one-way journey.

51. Mr Harris also volunteered that the original case officer had contacted the consignee stated on the CMR, Faversham, and that as a result of this the Border Force had no reason to suspect that they were involved. Mr Harris thought that this meant that the goods were in fact destined for another address, and speculated that the driver would have been instructed to divert the load. Mr Harris accepted that this point had not been included in the letter, but had been in his mind in reaching his decision. (In fact there is an oblique reference querying who the goods were for, see [41] above, but no mention of contacting Faversham.) In Mr Harris's view it was not unreasonable for an operator to check with the consignee that they were expecting the load (referring to the indicator listed in Appendix E of the letter and quoted at [46] above), but in this case he considered that this had not been done.

52. In addition, Mr Harris volunteered in cross-examination that he had formed his view on the basis that the operator, and not the driver, was complicit in the smuggling, and on that basis compliance by IESA with the list of indicators in Appendix F of the review decision letter (relating to steps taken by operators in relation to drivers) was not relevant, although based on the evidence now available Mr Harris accepted that the requirements of appear to be satisfied. Mr Harris's views on the non-involvement of the driver are not apparent from the letter.

53. Mr Harris was asked about the telephone call he made to IESA's solicitors on 9 June. It was part of the appellant's case that it was made clear on that call that the solicitor dealing with the matter was away until 19 June, but Mr Harris went ahead anyway to issue the decision on 12 June. (No evidence was sought from the solicitors to support this because they are no longer acting for IESA.) Mr Harris's evidence was that he called to see if the solicitors had any more information about HPF because it was unusual that a fish seller was dealing in charcoal. He did not call for any other reason or raise any other issue. He was told that the individual was unavailable. Mr Harris's evidence, which I accept, is that he told the person he spoke to that he intended to complete his review on the following Monday but would be prepared to look at further information provided subsequently if it was provided. No such information was supplied. He could not recall being told that the solicitor was away until 19 June, but had no reason to disbelieve that. When asked why he had not waited

his response was that the statutory deadline was Sunday 25 June, he had a lot of other cases to deal with and did not want to hold those up. He had also made it clear, and did in the review letter, that he would be prepared to look at fresh information. The 11 May letter had also given a clear opportunity for further information to be provided.

Inconsistencies and failures to check: Mr Brazda's evidence

54. Mr Brazda was asked about the description IESA gave about the loading in its response on 14 February 2017, set out at [40] above. He explained that the answers were prepared by employees at IESA, with the final version being translated by the employee with the best English. Mr Brazda had seen the letter in Czech but his English was not good enough to check the final English version. The reference to "our driver" was to the driver originally intended to undertake the work, Mr Sumek. I accept this.

55. In relation to the reference in Anthony Seddon's letter of 10 May to the 33 pallets being transported from HPF's premises in Prague, Mr Brazda said that his English was not good enough to translate what was said, but if the letter said that the goods were loaded at HPF's premises then that was not correct. Again, I accept this explanation. What appears to have happened is that Anthony Seddon simply took the details from HPF's address on the CMR, without checking the position properly and without appreciating that the CMR itself actually lists the loading location as Humpolec.

56. Mr Brazda was asked whether he undertook further checks on HPF beyond those already described when it was taken on as a customer, and in particular whether he had visited its address or checked that it traded charcoal. Mr Brazda confirmed that the checks undertaken were those described above at paragraph [18]. He had not visited the address or for example checked it on Google. He was not sure whether anyone else in the company had. However, IESA has hundreds of customers and follows the system already described to check proposed new customers. As regards dealing in charcoal, Mr Auster had explained that dealing in grills and charcoal was a new business. Mr Brazda had looked at the website but commented that companies do not list everything they trade in on their websites.

57. Mr Brazda was also asked whether any check was carried out on the delivery address. He could not answer this directly because it was a matter for the relevant dispatcher. He confirmed that it was common practice for the dispatcher to be in contact with the consignor and to check if there was anything that was unclear. However, I note that IESA's letter of 14 February 2017 to the Border Force comments, in response to a question about the consignee, that the CMR provided the full address and that "we received even a phone number for the recipient, where our dispatcher checked the accuracy of the delivery address and landing sites and to inform the recipient approximate delivery time". This is effectively repeated in response of the following question which also refers to checking the correctness of the delivery address and contacting the consignee concerning delivery date as being "standard in every way". I conclude from this that a check is more likely than not to have been made.

58. Following seizure of vehicle Mr Brazda contacted HPF by phone to ask for an explanation, and was told that they knew nothing about it. He did not seek to contact Faversham. When asked why he said that it was not standard practice to contact the customer's customer. He did contact the Slovakian consignor and asked about the original Slovakian load. He was told that the goods arrived in a container from the Ukraine, and were transloaded to the Slovakian lorry (clearing customs at that point) before making the journey to IESA's premises. He was also sent the documents for the container shipping, including an invoice from Ukraine, and checked that the listed purchaser was a standard Slovakian company. The explanation he received from HPF about acquiring the goods from Ukraine was that that was financially advantageous.

Submissions

Submissions for IESA

59. IESA's case in summary was that neither it (through its officers) nor its driver knew that the load included cigarettes, and that the concealment was such that no reasonable or permissible check would have revealed them. The decision not to restore was based on inferences and hypotheses to which IESA was not given an opportunity to respond, resulting in procedural unfairness, and was in any event not justified by the information available. The decision should be quashed and remitted to the Border Force for review by a different officer.

60. Mr Howells, for IESA, submitted that a decision is unreasonable if it is arrived at in a way that is procedurally unfair, and that was the case here because IESA had not been given a proper opportunity to present its case by responding to the allegations made with evidence it had available: *R. v. Customs and Excise Comrs., ex p. Haworth* (17 July 1985, unreported), cited in Halsbury's Laws, 5th ed. (2012), vol. 31, para. 1184, footnote 2. Mr Harris had gone ahead and issued the review decision without waiting for the solicitor to return from holiday and respond to his questions, and in any event those questions only related to one aspect of the alleged inconsistencies on which Mr Harris had relied. It was not a sufficient answer to this to say that the review decision invited fresh information, because once the decision was made there was a natural confirmation bias not to depart from it.

61. There was no inconsistency between the driver's account and that given by IESA in its letter of 14 February, because one of its other drivers was present for loading. HPF is a supplier of charcoal and charcoal grills, with whom IESA had a history of dealing. IESA had met and carried out due diligence on HPF before taking it on as a customer and had previously delivered charcoal and charcoal grills to UK customers. Mr Harris's reliance on not being able to contact HPF and the contents of its website bordered on the irrelevant but were certainly outweighed by these other factors. Mr Harris was also mistaken about the price of the transport, and the actual price was consistent with normal commercial rates.

62. The review decision also appeared to rely on an alternative basis that IESA and the driver had not carried out reasonable checks (see [44] above). However, the concealment was sophisticated and none of the types of checks listed in Appendix E

or any similar checks could reasonably have been expected to reveal the cigarettes. It was also reasonable for Mr Marecek to rely on Mr Cech's assurances.

63. It was also clear from *Lindsay* that the decision maker must take a proportionate approach. The decision was not proportionate, either in the result or in the failure to conduct a proportionate enquiry. Mr Harris was too hasty and too perfunctory in his approach given the significance of the outcome.

Submissions for the Border Force

64. Ms Murray, for the Border Force, submitted that Mr Harris's decision was a reasonable and proportionate one. He arrived at it by applying the restoration policy, the reasonableness of which has not been challenged. Whilst accepting that the Tribunal has fact-finding power, the Tribunal must consider whether the decision was reasonable only having regard to the information that was available to Mr Harris at the time it was made, and not based on evidence which Mr Harris did not have before him at the time of the decision.

65. Ms Murray submitted that there was no procedural irregularity in making the decision on 12 June without waiting for further evidence. IESA had been given a full opportunity to supply evidence before the decision was made, and had had the benefit of legal representation. The 11 May letter from the Border Force also made it very clear that any further information should be provided at that stage. Mr Harris explained on the 9 June call that a decision would be made on 12 June, and the decision letter also invited any fresh information to be provided. Even if there had been a procedural irregularity it did not affect the outcome.

66. Mr Harris based his conclusion on (1) contradictions between the account given by the driver and the submission about the place of loading in the letter dated 10 May 2017, on which it was reasonable to rely, (2) the fact that no evidence was provided to support the contention that HPF (legitimately) traded charcoal or that IESA made any checks about the nature of HPF's business, (3) the price being suspiciously high (the further explanation provided at the hearing about the journey from Slovakia had not been available to Mr Harris), and (4) the operator and driver not complying with the Border Force' expectation of reasonable checks.

67. On point (4), Ms Murray relied on no evidence having been supplied at the time of the review or since to show that any checks had been done on the delivery address (bearing in mind the lack of detail in the delivery address in the CMR, and the absence of evidence that anyone at IESA had confirmed the address), on no checks apparently being conducted to establish the credibility of a load coming from an unknown entity in the Ukraine, on a lack of explanation about why a Slovak haulier was used (and if it was used why that was for only part of the journey), on the absence of any evidence about checks on the Slovak haulier or any knowledge of the details of loading in Slovakia or where the goods came from in Ukraine, and on the absence of information about the three additional pallets. Ms Murray also relied on an "arguable" failure to conduct sufficient checks on HPF whose Prague address appeared to be an accommodation address, and on the driver's account that he was not present at

loading, the alternative explanation about Mr Sumek only being provided at the hearing. As regards Appendix F to the review letter (checks on the driver) Ms Murray argued that IESA was relying on information not available to Mr Harris when his decision was made. (I note that there is some inconsistency in Ms Murray's approach: she submitted that IESA could not rely on information not available to Mr Harris when the decision was made, but appeared to be doing just that in some of her submissions, for example in relation to Slovakia and the Ukraine.)

68. Ms Murray also submitted that Mr Harris had considered hardship and was not provided any evidence of it. *Lindsay* at [72] made clear that, subject to "exceptional" considerations, the "vehicles of those who smuggle for a profit, even a small profit, should be seized as a matter of policy". Again, the evidence now provided had not been available to Mr Harris, and in any event did not amount to evidence of hardship.

Discussion

69. In this discussion I consider first whether the facts justify the conclusion that IESA was responsible for or complicit in the smuggling. Secondly, I consider the scope of the Tribunal's jurisdiction and specifically Ms Murray's submission that it is limited to considering information available to the review officer. Thirdly, I consider the basis for the review decision. Finally, I comment on aspects of the decision-making process.

Was IESA in fact responsible for or complicit in the smuggling?

70. My conclusion from the facts is that IESA was neither responsible for nor complicit in the smuggling.

71. I have accepted the evidence of Mr Brazda and Mr Cech, and subject to the reservations already noted that of Mr Marecek. There is nothing in that evidence to indicate that IESA was knowingly involved in smuggling, or that it did anything that could really be described as turning a blind eye.

72. Mr Brazda gave a clear account of the due diligence undertaken on HPF (see [17], [18] and [56] above). I am not persuaded that it would have been appropriate to conduct additional due diligence. It was not unreasonable to accept an explanation that dealing in grills and charcoal was a new business. I also do not think that, given the CERS search conducted by IESA on HPF, it was necessary for it to go further and, for example, question whether the Prague address was a mere accommodation address.

73. Whilst it does not appear that Mr Harris was ultimately relying on any suggestion that Mr Marecek was involved in smuggling, IESA clearly conducts careful checks on its drivers as a matter of routine. The detailed work instructions to drivers are clear and a careful reference was taken from Mr Marecek's previous employer. What was done appears fully consistent with the indicators listed in Appendix F to the review decision letter.

74. I have accepted Mr Brazda's explanation for the error in the 10 May letter. The loading took place at IESA's premises at Humpolec, as in fact reflected in the CMR (which was available to Mr Harris). I have also accepted Mr Brazda's explanation about the description of the loading in IESA's letter of 14 February 2017. The reference to "our driver" was to the driver originally intended to undertake the work. It is true that the letter should have been clearer but it is apparent that there were language difficulties.

75. Ms Murray placed reliance on an apparent failure to check the delivery address, being one of the factors listed in Appendix E to the review decision. She also referred to a lack of explanation about use of a Slovak haulier or any checks about the origin of the goods. I do not find these points persuasive. Appendix E makes it quite clear that drivers cannot be expected to detect sophisticated concealments, which this clearly was. It was also undisputed that a haulier in the position of IESA would not be entitled under its contractual arrangements to break into the packaging to conduct checks. Of the 10 indicators in Appendix E, just one relates to the delivery address and that is qualified as being "particularly relevant for bonded warehouses in the context of diversion fraud". This is clearly not a case involving a bonded warehouse. In any event I have concluded that a check is more likely than not to have been made: see [57] above. None of the other listed indicators that the operator has not conducted reasonable checks are in point. I also do not consider it reasonable to expect a haulier, dealing with a consignor from whom it has accepted a number of previous consignments without problem and about whom there were no obvious concerns, should be required to conduct additional due diligence about the origin of the goods carried.

76. Ms Murray suggested that it was not explained why a Slovak haulier was used for part of the journey. In fact Mr Brazda gave an explanation (that IESA's vehicles do not generally travel to Slovakia) which was not challenged in cross-examination. Mr Brazda also explained that the Slovakian haulier was chosen from a database of trusted hauliers.

77. It is also clear from the evidence that the price of the transport from the Czech Republic to the UK was €2,230. Although Mr Harris suggested that this was rather expensive he did accept that it did not stand out. In my view there is no basis to reach any conclusion other than a conclusion that the rate charged is within the range of normal commercial rates, and therefore that it does not support a case that IESA was involved in smuggling.

Scope of jurisdiction: limited to considering information available to review officer?

78. At the hearing I referred both parties to *Balbir Singh Gora and others v Commissioners of Customs and Excise* [2003] EWCA Civ 525 ("*Gora*"), which discusses the Tribunal's fact-finding powers in the context of the Tribunal's jurisdiction under s 16(4) FA 1994. In submissions made following the hearing Ms Murray accepted the existence of those powers but maintained that the Tribunal must consider whether the decision was reasonable only having regard to the information

available to the decision maker at the time it was made. She did not refer to any other case law in support of this.

79. One of the issues in *Gora* was whether the Tribunal's jurisdiction and powers were insufficient to satisfy the requirements of the Convention. In discussing this Pill LJ set out at paragraph [38] an extract from Customs' own written submissions in that case, which included the following:

> "…3. The Commissioners accept:
>
> a. It would be open to the Appellants to contend in the Tribunal that the decision on restoration was not reasonable (within the meaning of s 16(4) of the Finance Act 1994) on the grounds that it was based upon an unreasonable policy.…
>
> b. For the purpose of deciding whether the policy was unreasonable, it is submitted that the Tribunal should not substitute its view for that of the Commissioners as to the appropriate policy in this area of administration. It should ask itself, applying judicial review principles, whether the policy was one that could reasonably be adopted. In a context where Article 1 Protocol 1 of the ECHR was engaged, the principles of judicial review would include that of proportionality.
>
> 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."

80. Pill LJ went on say the following paragraph [39]

> "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. As a "tribunal" to which recourse is possible to challenge a refusal to restore goods under section 152(b) of the 1979 Act, the Tribunal in my judgment meets the requirements of the Convention."

81. In *Jones*, Mummery LJ referred to this discussion without disagreeing with it, see paragraphs [46] and [47], whilst clarifying that HMRC were not accepting that the Tribunal would be entitled to find facts contrary to the deeming process in paragraph 5 of Schedule 3 to CEMA.

82. In my view these comments in *Gora*, and in particular paragraphs 3(d) and (e) of the submissions and paragraph [39] of the judgment, do not support Ms Murray's submission that the Tribunal is only able to consider information available to the decision maker. There is no suggestion of that limitation in Pill LJ's comments. If Ms Murray's submission were correct it would in my view largely deprive the Tribunal's fact-finding powers of real effect. At the very least it would prevent the Tribunal paying any regard to oral or documentary evidence that was not also reflected in information available to the decision maker. The Tribunal would simply be unable to satisfy itself that "the primary facts upon which the Commissioners have based their decision are correct" ([38]3(d)).

83. Accordingly, I consider that the Tribunal is entitled not only to make its own findings of fact, but in the light of that to consider whether the facts on which the Border Force have based their decision are correct.

The basis for the review decision

84. As already explained the review decision explicitly refers to three particular aspects to support Mr Harris's conclusion that IESA was involved in the smuggling (albeit that the conclusion is expressed rather less clearly as not being "as uninvolved…as they claim to be"). Each of these, the reference to "our driver" in the letter of 14 February, the due diligence on HPF and the price of the delivery, have been addressed above. On a proper understanding of the facts neither the first nor the third provides any support for a decision not to restore, and in my view IESA undertook reasonable due diligence on HPF.

85. The letter also relied on a failure to conduct reasonable checks in accordance with Appendix E, but the point relied on here was that the trailer was already loaded and the driver just swapped trailers. In fact, Mr Marecek relied on Mr Cech's assurances about the loading. In my view it was reasonable in the circumstances for Mr Marecek to rely on someone who is clearly a senior and trusted employee of IESA and has direct responsibility for loading and checking cargo.

86. Based on Mr Harris's oral evidence it appears that he also relied on the inconsistency between Anthony Seddon's letter of 10 May and the driver's account to the Customs officer about the place of loading. Again, on a proper understanding of the facts, the reference in the letter was incorrect. The correct place of loading is in any event stated on the CMR, which Mr Harris had available.

87. Finally, Mr Harris appears to have placed reliance on a contact made by the original case officer with the consignee, which led Mr Harris to speculate that the driver would have been instructed to divert the load. No direct evidence of that contact with Faversham was supplied, or about what was actually said, and there is also absolutely no evidence to support Mr Harris's speculation about diversion. Even if it was correct it would not of itself support a conclusion that IESA was involved in the smuggling, unless the suggestion is that IESA's dispatcher was complicit. However, if that was the case then proper notification of that allegation should have been provided to IESA so that it had the chance to respond. That did not happen and the point was also not raised in cross examination of any of IESA's witnesses. Mr Harris also appears to have disregarded the comments in the 14 February letter about contact with the consignee (see [57] above).

88. For these reasons I do not consider that the key facts on which the Border Force based their review decision are correct. In *Wednesbury* language, irrelevant considerations were taken into account and there was a failure to take into account relevant considerations based on the actual facts. In the circumstances the review decision must be set aside and the Border Force must conduct a further review.

89. In doing so, it is worth clarifying that there was no challenge to the reasonableness of the Border Force restoration policy as summarised in the review decision letter. What is challenged is whether the facts can actually support a conclusion by the Border Force that category C of the policy applies, such that it is appropriate not to restore the vehicle.

The decision-making process

90. In view of my conclusion that the Tribunal is not limited to the evidence that was before the decision maker, and in view of the findings I have made which are inconsistent with the factual bases on which the decision was made, it is not strictly necessary for me to comment further on the decision-making process or on IESA's submission about procedural irregularity. However, I think it is worth making clear that I do have concerns about that process.

91. Most significantly, I agree with IESA that Mr Harris relied on aspects of the case which had not been flagged with IESA as giving rise to any issues, and to which it had not had a proper opportunity to respond. It is also of concern that some of the reasoning on which Mr Harris apparently relied is not set out in the letter. I do not think it is a sufficient answer to this to say that the review decision letter invited fresh information to be supplied. IESA can hardly be criticised for appealing to the Tribunal following receipt of the decision, within the 30 day time limit made clear in the letter itself, rather than supplying fresh information. And even if further information had

been supplied in response to points raised by Mr Harris, IESA would have been unable to respond to points not raised in the letter. These included the error in Anthony Seddon's letter about the place of loading, which was in any event contradicted by the information on the CMR.

92. Mr Harris also appears not to have placed any real weight on some of the points that were raised on behalf of IESA in correspondence. For example, Anthony Seddon's letter refers to due diligence checks undertaken by IESA on new customers and fact that HPF had been a customer since 2016 for which IESA regularly transported grills and charcoal. Although the review letter does refer to HPF being said to be an existing customer for whom IESA had transported grills and charcoal, Mr Harris appears to have placed little weight on this and there is no reference to due diligence. The 14 February letter also refers to checks made on consignors and indicates that the accuracy of the delivery address was also checked, but again that appears not to have been given any weight.

Disposition

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

94. The Border Force is required 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 further review shall take full account of the facts found and conclusions reached by this Tribunal.

95. 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: 1 MAY 2018