



[2022] UKFTT 00130 (TC)

**TC 08461**

*Restoration –third party – genuine third party – reasonableness of decision – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/ 2020/03815**

**BETWEEN**

**ALEKSANDRA TOMCZAK**

**-and-**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE RACHEL SHORT**

**JULIAN STAFFORD MEMBER**

**The hearing took place on 10 February 2022. The form of the hearing was V (video) with the consent of the parties through the Tribunals' video platform. A face to face hearing was not held because of the coronavirus restrictions in place at the time the hearing was listed.**

**Prior notice had been published on the [gov.uk](https://www.gov.uk) website, with information about how representatives of the media and/or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.**

**The Appellant in person**

**Mr William Dean, litigator of Director of Border Revenue, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal considers the Appellant's right to have a vehicle which she owns restored to her by the Respondents. The vehicle was used by her husband and a friend to import goods on which excise duty had not been paid and was seized by the Respondents. The Appellant argues that she is an innocent third party and that the Border Force did not act reasonably in deciding not to restore the vehicle to her as its owner. The Border Force decision appealed against is contained in their review letter of 23 October 2020.

### BACKGROUND FACTS

2. The Appellant is the registered keeper of vehicle number NU15 VWE a Peugeot boxer van ("the Vehicle")

3. The Vehicle was seized by Border Force officials on 28 June 2020 because excise goods had been found concealed in it. At that time the vehicle was being driven by the Appellant's husband who was accompanied by his friend Piotr Fabianczuk. The Appellant was not present.

4. The Appellant's husband refused to sign the Seizure Information Notice and Notice 12A on request by Border Force officials and the Vehicle was therefore seized.

5. The Appellant requested the restoration of the Vehicle on 2 July 2020 which was refused by letter on 15 August 2020. That decision was reviewed and confirmed on 23 October 2020. The Appellant appealed to this Tribunal on 28 October 2020.

### THE LAW

6. S 139 Customs and Excise Management Act 1979 sets out the basis on which goods may be seized after forfeiture:

#### **Provisions as to detention, seizure and condemnation of goods, etc.**

(1) Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

7. S 152 CEMA sets out the basis on which seized goods may be restored

#### **Powers of Commissioners to mitigate penalties, etc.**

"The Commissioners may, as they see fit—

(a) [...]1 [compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings] or for the condemnation of any thing as being forfeited under the customs and excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; .....

8. S 14 – 16 Finance Act 1994 set out the powers of this Tribunal to review decisions made about the restoration of goods which have been seized, where the matter is an "ancillary matter":

#### **Appeals to a Tribunal**

"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 list of “ancillary matters” is set out at Schedule 5, paragraph 2 (r) of the Finance Act 1994 including:

“any decision under section 152(b) [of the Customs and Excise Management Act 1979] as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored”.

### **Authorities**

10. The extent and remit of the Tribunal’s powers to review a decision such as that made by the Border Force not to restore the Vehicle to the Appellant has been considered in various decisions by this tribunal and the higher court. The Respondents referred to:

- (1) *Customs & Excise v J H Corbitt (Numismatists)Ltd* [1980] STC 231
- (2) *Gora v Customs & Excise Commissioners* [2003] EWCA Civ 525
- (3) *HMRC v Lawrence and Joan Jones* [2011] EWCA Civ 824
- (4) *Lindsay v Customs & Excise Commissioners* [2002] 1 WLR 1766
- (5) *David Arthur Hemms v Commissioners of Revenue and Customs* [2009] UKFTT 355 (TC)
- (6) *Amanda McLarnon v Commissioners of Revenue & Customs* EO00919

### **EVIDENCE SEEN**

11. Finance documents relating to the Vehicle in the Appellant’s name dated 11 May 2019 showing that the Vehicle was purchased by the Appellant under the terms of a hire purchase agreement.

12. Invoice for the Vehicle dated 11 May 2019

13. Registration certificate for the Vehicle in the Appellant’s name

14. Questionnaire from Border Force completed by the Appellant dated 14 July 2020, confirming that:

- (1) The Vehicle was borrowed by the Appellant’s husband from 25 June 2020 to 28 June 2020.
- (2) The Appellant’s husband had full access to the Vehicle although it belonged to her.

- (3) Her husband had previously used the Vehicle for a trip to Poland with the same friend a week previously.
  - (4) She was aware that the Vehicle was being taken abroad when it was used on 25 June 2020 but was not aware that it was being used to purchase excise goods.
  - (5) Her husband called her on 28 June 2020 to tell her about the seizure of the goods and that he was not aware of excise goods above the legal limit being concealed in the Vehicle. That was the first time she was made aware of the circumstances of the seizure of the Vehicle and the illegal goods being carried.
15. Appellant's request for restoration dated 2 July 2020 stating "I was not present at the time of the seizure nor was I aware of the circumstances".
  16. Border Force letter of 15 August 2020, referring to the Board Force's policy on restoration and giving their decision on the Appellant's restoration request, refusing the request because:
    - (1) The Appellant cannot be considered to be a genuine third-party owner.
    - (2) It is probable that Mr Tomczak would have unrestricted access to the Vehicle again if it was restored.
    - (3) There are no exceptional circumstances which would justify the restoration of the vehicle to the Appellant.
  17. The Appellant's appeal against the Border Force letter dated 17 August 2020 explaining that she was not aware of the circumstances of the seizure or the carrying of the excise goods; "I was not present during the seizure and had no knowledge of the excise goods being transported until the phone call at the time of the seizure". "I fully consider myself a third party in those circumstances" and "Mr Tomczak would not have unrestricted access to the vehicle if it was returned to me, I would take every single step to make sure the vehicle is used for legal purposes only".
  18. Border Force review decision of 23 October 2020 explaining their review conclusion that the Vehicle should not be restored, referring to the value of the non-excise goods being transported, the fact that receipts for the goods were found in Mr Tomczak's diary, that Mr Tomczak accepted that some of the bottles of beer and cigarettes in the vehicle were his. The letter also refers to the seizure of Mr Tomczak's driving licence.
  19. The review officer states, as the reason why the Vehicle was not restored (referring to Border Force policy) that "A vehicle adapted for the concealment of goods will not normally be restored" and gives as his conclusion and the basis for his decision the statement that: "A vehicle will not normally be restored to a third party in a situation where that would be tantamount to restoring it to the person involved in the smuggling attempt".

## **WITNESS EVIDENCE**

### **Ms Tomczak**

20. At the hearing the Appellant reiterated what she had stated in her correspondence with the Border Force, that she had no knowledge of the attempt to smuggle goods into the UK on 28 June 2020 in her Vehicle. Ms Tomczak was a credible witness who was adamant that she had not been involved in the smuggling attempt during which her Vehicle had been seized.
21. She felt that she was being blamed for actions of which she had not been aware, while the person who had been most involved, her husband's friend Piotr Fabianczuk, had not been

punished at all. Since the incident in June 2020, she had broken off all contact with Mr Fabianczuk, who had also refused to make a witness statement as part of this appeal.

22. She accepted that the Vehicle had been seized because it had been used for illegal purposes, but thought it was completely unfair that she should have to suffer as a result just because she was the legal owner. She no longer had access to the Vehicle but was still paying the outstanding finance charges on it.

23. She told us that her husband was a plumber who also earned money by delivery goods, including picking up building materials in Poland and bringing them into the UK. The Vehicle had been adapted for use in his plumbing business.

24. She accepted that her husband had made many previous journeys to Poland in the Vehicle and that until the date of the smuggling attempt her husband had access to the Vehicle, mainly for use in his plumbing business. She also used the Vehicle and it had been bought because it was large enough to carry camping gear for weekend trips.

25. She insisted that she would ensure that no further illegal activity was carried on with her Vehicle and stressed that it was not logical to assume that just because Mr Tomczak had used the Vehicle on one occasion for these activities, he was bound to use it for similar activities in the future if it was returned to her.

26. She would prevent any future similar activities and had cut off all contact with the person who she held responsible for the previous smuggling attempt.

### **Mr Collins**

27. Mr Collins's witness statement of 5 January 2021 was adopted and Mr Collins gave oral evidence to the Tribunal.

28. At the hearing Mr Collins said that in coming to his decision of 23 October 2020 he had applied the Border Force Policy in a flexible way and had considered all the relevant facts in this particular case. He explained the logic which had been applied in determining whether the Vehicle should be restored to Ms Tomczak as:

(1) Considering in the first instance whether she was a "third party"; on this point he explained that he had concluded that Ms Tomczak was not a "genuine third party" a term which he said was used in the Policy document.

(2) Having decided that Ms Tomczak was not a genuine third party, he did not go on to consider whether she was an innocent third party. In explaining why he considered Ms Tomczak not to be a genuine third party he explained that this was because of the marital relationship between Ms Tomczak and Mr Tomczak.

(3) It was clear that Mr Tomczak had free access to the Vehicle before the smuggling attempt and it was reasonable to assume that if the Vehicle was restored to his wife he would continue to be able to access the Vehicle. Restoring the Vehicle would therefore be tantamount to restoring it to Mr Tomczak.

29. Mr Collins had said that he had not considered whether there were any reasonable conditions which could be applied to ensure that Mr Tomczak did not have access to the vehicle given the domestic situation. However, given that Ms Tomczak worked away from home each day from 9 to 5 and there was no way of ensuring that Mr Tomczak would not have access to the vehicle, particularly since it was mainly used for his business.

## APPELLANT'S ARGUMENTS

30. The Appellant argues that she should be treated as an innocent third party in these circumstances. She had no knowledge of the attempt to import the goods without paying excise duties until her husband called her on 28 June 2020 to tell her that the goods and the Vehicle had been seized. She was not present at the time when the goods were seized and had no knowledge of the amount of excise goods which were being carried in her Vehicle. As far as she was aware the only goods which were being transported were tyres.

31. The Vehicle is her vehicle, as shown by the financing documents provided and she needs it for her work and there are finance payments outstanding on it. Although the Vehicle belongs to her, her husband is allowed to use it.

32. The other passenger in the Vehicle has told her that it was he who put the excise goods in the Vehicle, not her husband, although he was not questioned by the Border Force officials at the time of the seizure because he was not driving the vehicle.

33. The Appellant says that she and her husband have cut contacts with Mr Fabianczuk as a result of this incident and that she will not allow her husband to use the vehicle again without her being present, so that she has full control of it.

## RESPONDENTS' ARGUMENTS

34. The Respondent's stress that the Appellant did not challenge the legality of the seizure of the Vehicle in the magistrates' court. The Vehicle must therefore be treated as legally seized.

35. The Appellant can challenge the reasonableness of the decision not to restore the Vehicle. The burden of proof is on the Appellant to show that the decision not to restore the Vehicle was unreasonable. The test to be applied is set out in particular *JH Corbitt (Numismatists) Ltd*; Did the review officer act in a way which no reasonable review officer could have acted. Did he take account of an irrelevant matter or disregard something which was relevant?

36. The Border Force decision not to restore the Vehicle was argued to be reasonable because:

(1) The officer applied the Border Force's "reasonable policy" that private vehicles used for the improper importation of excise goods should not normally be restored.

(2) All relevant evidence was considered by the Border Force in their review decision.

(3) It was reasonable to conclude that Mr Tomczak was equally responsible for the smuggling attempt.

(4) Mr Tomczak had unrestricted access to the Vehicle at the time. He had made numerous previous trips abroad in the Vehicle.

(5) The Appellant is not a "genuine innocent third party" because Mr Tomczak is her husband and as she stated (14 July 2020) "We live together and he has full access to the vehicle".

(6) To restore the Vehicle to the Appellant would be tantamount to restoring it to Mr Tomczak. The Border Force referred to part of their internal policy (provided at the request of the Tribunal) which states:

"be aware that where the restoration of a vehicle would be tantamount to restoring it to the offender, restoration must not normally be offered. An example of this would be

restoring a vehicle to a wife, where a husband has used the vehicle and caused its seizure”

(7) The decision not to restore is fair, reasonable and proportionate – see *Lindsay*:

“Every case will have to be dealt with on its own facts. But in principle we do not see a lack of balance when the factors set out above are brought into the reckoning. Where the owner is the driver he will know that he risks losing the vehicle when he sets out to bootleg. He takes the risk and loses when he is caught.” [46]

37. In response to a request from the Tribunal, the Border Force provided further information about the concept of a “genuine third party” by letter of 16 March 2022 saying:

“The definition of a genuine third party in the context of the review in this case is based on the ordinary meaning of the words and is therefore not specifically defined across any policy. It is to be read as an individual who is removed from the perpetrator of any offence and thus uninvolved in said wrongdoing or breach..... They had no knowledge the vehicle was to be taken abroad, had no knowledge that the individual would use the vehicle to smuggle and are remote from the offender. They do not reside at the same property and are not connected financially. Conversely, an individual who had knowledge the vehicle was to be used abroad, is married to the perpetrator of the offence, resides at the same address and is linked financially, is not someone who is considered a genuine third party in the context of the review”.

38. Hardship was considered but there was no “exceptional” hardship in this case; the Appellant is the owner of another vehicle which is available to provide transport.

#### **FINDINGS OF FACT**

39. On the basis of the evidence provided we make the following findings of fact:

(1) The Appellant was not involved with the importation of non-duty paid goods in the Vehicle driven by her husband on 28 June 2020.

(2) The Appellant had not been involved in any use of the Vehicle for transporting goods from abroad herself on any previous occasion.

(3) The legal owner of the Vehicle was the finance company with whom the Appellant had signed a hire purchase agreement.

#### **DISCUSSION AND DECISION**

40. Our jurisdiction to consider the review decision of Border Force is supervisory only in accordance with s 16 (4) and (6) Finance Act 1994.

41. The decision not to restore the Vehicle is an ancillary matter (Schedule 5 para 2(r) Finance Act 1994 and s152(b) Taxes Management Act 1970) and therefore if the Tribunal decide that the officer did not act reasonably its powers are limited. It can only direct that the Border Force decision shall cease to have effect and/or remit the appeal back to the Border Force to reconsider their review decision in accordance with the Tribunal’s Directions in accordance with Finance Act 1994 s 16(4).

42. Burden of proof is with the Appellant to show that the Border Force acted unreasonably in coming to their decision of 23 October 2020.

43. We have taken as our test of reasonableness the test as it is set out in *Corbitt*, where Lord Salmon cited with approval this approach of Viscount Simon LC in *Charles Osenton*

“... if however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight has been given to relevant considerations, then the reversal of the order on appeal may be justified” [p236 at d-e]

and the same approach was taken up by Lord Lane

“Assume that the tribunal has the powers to review the Commissioners’ decision. It could only properly do so if it were shown the Commissioners had acted in a way which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight” [p239 j]

44. In considering the extent of the Tribunal’s remit we have relied on the statements made in *Gora*: The Tribunal can consider both evidence which was before the original decision maker and factual evidence which was not before the original decision maker and can reach its factual conclusions based on that evidence in deciding whether the officer acted reasonably:

“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.” *Gora* [38]

### **Is the Appellant a third party?**

45. The Respondents’ own guidance, some excerpts of which were shared with the Tribunal, makes a distinction between those who are innocent third parties and others in considering how the Respondents’ discretion should be exercised. We have started by applying this guidance to the facts in this appeal and the Appellant’s situation.

46. Ms Tomczak’s clear evidence was that she was not aware of the smuggling attempt until after her Vehicle had been seized. Her lack of knowledge of the smuggling attempt was not challenged by the Border Force and we have concluded that she knew nothing of this smuggling attempt until after it had happened.

47. We saw no indication in the evidence that the Appellant had ever been involved in smuggling activities or had driven the Vehicle abroad, in fact the opposite is true (see Border Force form completed by the Appellant). It seems to us that there is no basis on which the Border Force can impute knowledge of her husband’s smuggling activities to the Appellant.

48. In our view there can be no doubt that the Appellant was a third party to the smuggling attempt.

### **Is the Appellant a genuine third party?**

49. We have some serious misgivings about the Respondents’ attempts to establish that Ms Tomczak is not a “genuine” third party. We are not taking as our starting assumption that wives know everything about their husbands’ activities or vice-versa, or that a wife cannot be a third



party in respect of activities of her husband. We note in passing that it is some years since husbands have been legally liable for the activities of their wives under the law of this country.

50. It seems to us that the Respondents' arguments are based on some assumptions about the relationship between married couples which goes almost as far as to suggest that a wife can never be innocent in respect of the actions of her husband. At best, Ms Tomczak has been treated as involved merely by reason of being the wife of Mr Tomczak.

51. We do not consider that this is a reasonable approach to the application of the Respondents' discretion in this case. Mr Collins could not provide any real explanation for why he would not treat Ms Tomczak as a "genuine" third party, other than the suggestion that both she and Mr Tomczak had equal access to the Vehicle.

52. In our view the Border Force have conflated an involvement with the perpetrator of an offence with an involvement in the offence itself. In this case, the Appellant is involved with the perpetrator as his wife, but on the basis of all the evidence which was provided, was not involved with the offence.

### **Is the Appellant an innocent third party?**

53. Our conclusion is that, in respect of the smuggling attempt on 28 June 2020, Ms Tomczak is an innocent third party; she was not present at the time of the attempt and it is her unchallenged witness evidence that she knew nothing about the attempt until her husband told her about it on 28 June after the seizure had occurred.

54. On that basis the Border Force Policy about the treatment of innocent third parties should have been considered in Ms Tomczak's case, but it was not.

55. Instead, the Border Force seemed to ask themselves a different question; whether restoring the Vehicle to Ms Tomczak would be tantamount to restoring it to her husband. In our view that is relevant not to whether or not Ms Tomczak is an innocent third party, but only to whether there are relevant conditions which could be applied to ensure that no further smuggling attempts are made with the Vehicle.

### **Are there any conditions which could be applied to the restoration of the Vehicle?**

56. At the Tribunal Mr Collins said that he did not consider whether any conditions were relevant to the restoration because he did not consider that Ms Tomczak was a genuine third party. However, he told us that in his opinion it was very difficult to impose conditions which could be enforced in domestic situations such as this.

57. Mr Dean stressed that the only condition which had been suggested by Ms Tomczak was that the Vehicle was never used when she was not present, and given the information provided about the working patterns of the couple, that was not practical. It was not open to the Tribunal to consider any other feasible conditions; the reasonableness of Mr Collins' decision had to be judged by reference to the conditions which Ms Tomczak had suggested.

58. It is worth pointing out that throughout their statements the Respondents concentrated not on what conditions could be imposed to prevent the use of the Vehicle for another smuggling attempt, but what conditions could be imposed to prevent Mr Tomczak from having access to the Vehicle at all. In our view that is not the correct test; the test is whether conditions can be imposed which will prevent the use of the vehicle for smuggling. The tests applied are set out in the Border Force review letter and state:

“Vehicles may be restored at the discretion of the Commissioners and subject to such conditions as they think proper in the following circumstances:

.....

If the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle”

59. As to whether it is open to the Tribunal to suggest other conditions which might have been imposed, we accept that we must judge Mr Collins’ decision by reference to the conditions suggested by Ms Tomczak in the first instance, but that does not mean that the Tribunal cannot undertake a theoretical exercise to test whether the Respondents have properly exercised their discretion; part of the relevant test is to ask whether the Respondents have failed to consider a relevant matter. Mr Collins’ evidence was that he had not even considered whether any conditions might be applied at the time of his decision letter, because of his prior conclusion that Ms Tomczak was not a genuine third party.

60. Failure to properly consider whether any conditions might be imposed which could have prevented the Vehicle from being used for future smuggling activities is a failure by the Respondent to consider a relevant matter.

61. Instead, the Respondents seem to have treated the question of whether Ms Tomczak was a third party as including a question about whether access to the Vehicle could be restricted in the future. That is not the way their own guidance suggests the decision should be made, particularly because it fails to take account of Ms Tomczak’s position as an innocent third-party owner of the Vehicle. We note in particular here the Respondents’ own guidance notes which state that: “Vehicle restoration terms should provide a graduated response depending on the degree of blame which can be attributed to an individual and the potential harm caused by the evasion of excise duty”.

### **Ownership of the Vehicle**

62. The Respondents explained that they treated the de facto owner of the Vehicle as the owner for the purposes of applying their policy on restoration, in this instance the person who made the restoration claim, Ms Tomczak.

63. In our view there is no doubt that for legal purposes the owner of the Vehicle is the finance company in whose name the hire purchase agreement was entered into, in this case MotoNovo Finance Limited. This is made clear in the finance agreement itself “you will not become the legal owner of the vehicle until you have paid all payments due”.

64. Mr Collins told us that in “commercial circumstances” Border Force officials would notify the entity which had financed the relevant vehicle and they would then have the opportunity to challenge the seizure. That was not done in this case.

65. In asking whether the Respondents considered all relevant facts in this case, we have taken account of the fact that the question of whether the legal ownership of the Vehicle was with someone other than Ms Tomczak was not taken account of as part of the decision-making process.

### **Conclusion**

66. Taking account of the guidance provided in the relevant cases of *Corbitt* and *Gora*, we have concluded that the decision of Mr Collins of 23 October 2020 not to restore the Vehicle to Ms Tomczak was not reasonable. It took account of irrelevant matters; the assumption that a wife could not be a “genuine” third party, and failed to take account of relevant matters; the clear guidance in their own policy about how innocent third parties should be treated when considering restoration, whether any conditions could be imposed to prevent future use of the Vehicle for smuggling and the question of who legally owned the Vehicle.

67. The decision not to restore the Vehicle is an “ancillary decision”. As such, we have the right to direct that the decision (not to restore the Vehicle) ceases to have effect and/or direct that the Border Force reconsider its decision in the light of our findings and subject to our directions, but cannot replace their decision with a decision of our own. (s 16(4) Finance Act 1994).

68. We therefore direct that the Border Force decision of 23 October 2020 should cease to have effect from the date of the release of this Decision.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

69. 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.

**Rachel Short  
TRIBUNAL JUDGE**

**RELEASE DATE: 12 April 2022**