TC03190

Appeal number: TC/2012/06583

Excise Duty – restoration – ss 14-16 FA 1994
- deemed confirmation of decision – calculation of 45 day period
- deemed confirmation - reasons –*Alzitrans *considered
- contents of document relevant to decision not disclosed by HMRC - whether decision therefore unreasonable – s3(1)HRA and s16(4)FA94
- whether same decision inevitable

FIRST-TIER TRIBUNAL
TAX CHAMBER

NAS & CO LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MRS CATHERINE FARQUHARSON

Sitting in public at 45 Bedford Square WC1B 3DN on 3 and 4 October 2013 (supplemented by written submissions on 28 October and 25 November 2013)

Mirza Hammad Baig, Tax Adviser, instructed by M&R Tax Advisers Ltd for the Appellant

Mark Fell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Nas & Co Ltd appeal against a decision of the Respondents made on 25 May 2012 not to restore wine and beer seized from the appellant.

2. On the 4 November 2011 the Commissioners detained and took away a number of cases of wine and beer belonging to the Appellant from the premises of River Cash and Carry Ltd. The Commissioners gave notice, on 2 February 2012, that they had seized these goods as liable to forfeiture under section 49 of the Customs and Excise Management Act 1979 ("CEMA"). M&R Tax Advisors Ltd ("M&R") wrote to the Commissioners on 28 February 2012 saying that they did not contest the legality of the seizure and asked for the restoration of the seized goods. On 8 March 2012 Mr Rogers, an officer of the Commissioners, wrote refusing to restore the goods.

3. In a letter dated 5 April 2012 M&R wrote to the Commissioners seeking a review of the decision not to restore the goods. On 25 May 2012 Louise Bines, an officer of the Commissioners, wrote to the Appellant saying that she had conducted a review of the decision and had concluded that the goods should not be restored. The appellant appealed against that decision to this tribunal.

The relevant legislation

4. Section 139 provides:

> "(1) 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.
>
> (2) Where any thing is seized or detained as liable to forfeiture under the customs and excise Acts by a person other than an officer,…
>
> (3) Where the person seizing or detaining any thing as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.
>
> (4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say—

(a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of customs and excise;

(b) …

(5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

(6) Schedule 3 to this Act shall have effect …

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the customs and excise Acts."

Schedule 3 sets out provisions relating to forfeiture.

"*Notice of seizure*

1.—(1) The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.

5. In *Balbir Singh Gora v C&E Comms* Pill LJ said:

"[52].While it is not for the Court to make findings of fact in this case, I do express concern about the length of the detention in Mr Gora's case from 30 December 1999 until 14 April 2000 when notice of seizure was given. That period of time is completely out of scale with the few days of detention which the Court was told was the normal practice….While judicial review of the detention is a remedy available to the owner, it is not one to which he should often be required to resort in this context, given the timescale contemplated. The appropriate procedure is by way of prompt enquiry and decision."

6. The period of detention in this appeal was only a few weeks shorter than that in *Gora*. It was a period in which, Mr Fell accepted, the only remedy of the Appellant would have been by judicial review.

7. If the Respondent's officers seize goods, Schedule 3 Customs and Excise Management Act 1979 ("CEMA") provides a means for the owner to require the legality of the seizure to be adjudicated by a Court in the UK. Paragraphs 3 and 4 of that schedule set out the procedure for instigating that process:

> "3. Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of Customs and Excise."

8. Paragraph 5 of the schedule provides that if the owner does not properly give such notice, "the thing in question shall be deemed to have been duly condemned as forfeited.". We discuss the effect of this statutory deeming in the following section.

9. Section 152 CEMA gives the Respondent a power to restore, subject to any conditions it thinks proper, things which have been forfeited or seized.

10. Section 14(2) Finance Act 1994 provides that a persn affected by a decision "may by …notice require" the Respondent to conduct a review of any decision in relation to that restoration power. But section 14(3) provides that the Respondent is not required to conduct a review unless that person gives notice in writing "before the end of the period of forty five days beginning with the day on which written notification of the decision… was first given to the person requiring the review".

11. Section 15 provides:

> "15. Review procedure
>
> (1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either–
>
> (a) confirm the decision; or
>
> (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.
>
> (2) Where–
>
> (a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 above to review any decision; and
>
> (b) they do not, within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,

they shall be assumed for the purposes of this Chapter to have confirmed the decision.

…"

Section 16 of that Act permits the owner to appeal to this tribunal against any decision made (or deemed to have been made) on that review:

16 Appeals to a tribunal

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say–

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and

(b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(2) An appeal under this section shall not be entertained unless the appellant is the person who required the review in question.

(3) …

(4) In relation to any decision as to an ancillary matter [which term includes matters relevant to this appeal], or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say–

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

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

12. It will be seen that section 16(4) FA 1994 limits this tribunal's power on such an appeal to a consideration of whether or not the Respondent's decision was reasonable,

and also limits the tribunal's powers, if it decides that the decision was not reasonable, to direct that the decision be remade, or remade subject to particular directions, unless the decision cannot "be remedied by further review".

13. For the purposes of section 16 "unreasonable" has a *Wednesbury* meaning. In *Lindsay v C & E Comms* [2002] EWCA Civ 267 Lord Phillips said this:

> "However, the principal issue before the Tribunal, was whether the Commissioners' decision not to restore Mr Lindsay's car to him was one that they 'could not reasonably have arrived at' – within the meaning of those words in section 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998, there can be no doubt that if the Commissioners are to arrive reasonably at a decision, their decision must comply with the Convention. 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 *C & E Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22 at 60 per Lord Lane.

14. In *Gora* Pill LJ accepted that, given the power of the tribunal to carry out a fact-finding exercise, the tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus the tribunal exercises a measure of hindsight in its assessment of the reasonableness of a decision, and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the tribunal.

The effect of the deeming provisions of paragraph 5 CEMA

15. It was common ground that no notice within paragraph 3 Schedule 3 CEMA had been given to the Commissioners by the Appellant and that as a result the deeming provisions of paragraph 5 applied and the goods were "deemed to have been duly condemned as forfeited."

16. In *HMRC v Jones* [2011] EWCA Civ 824 the Court of Appeal considered the extent to which the deeming provisions of paragraph 5 precluded this tribunal from considering the facts which were concomitant of the deemed legality of the forfeiture. Mummery LJ said

> "71(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure."

17. In this appeal Mr Fell accepted that the deemed factual findings which were binding on this tribunal were limited to those facts which were necessary to found the

deemed decision, and that the nature of deemed facts would depend upon the factual circumstances the seizure. Thus in *Jones*, tobacco was seized but also the van in which it was carried. Both were deemed to be duly forfeited under paragraph 5. There was no argument that the van had been imported without the payment of duty but it had been argued that duty on the tobacco was due and unpaid. The effect of the deeming in those circumstances was to deem the tobacco to have been liable to duty and the duty not to have been paid, and to deem the van to have been used for the carriage of the tobacco. It was not to deem the van to have been imported without proper payment of duty or to deem the tobacco to have been associated with the van and forfeited by reason thereof.

18. In this appeal it is therefore necessary to determine, on the basis of the facts relating to the seizure, which facts this tribunal must treat as deemed to have been found as a basis for the (deemed) conclusion that the goods were validly seized.

19. In the circumstances of this appeal the only way that the goods could have been legally seized and forfeit is if they were liable to duty and the duty had not been paid. We must therefore proceed on that basis.

Which decision?

20. Section 15(2) provides that if the Commissioners do not give notice of the determination of their review within "the period of 45 days beginning with the day on which the review was required" then "they shall be assumed for the purposes of this Chapter to have confirmed the decision".

21. In this case the letter requiring the review was dated 5 April 2012 and a decision made by Miss Bines was dated 25 May 2012: that was 50 days after the date of the letter.

22. However 5 April 2012 was Maundy Thursday. Good Friday was 6 April was therefore a bank holiday; there then followed Saturday 7 April and Sunday 8 April. Monday, 9 April 2012 was another bank holiday. Thus, given that it is unlikely that the post would have been opened on a Saturday, the first day on which the Commissioners could have opened the letter from M&R was 10 April 2012, and indeed the letter bore a stamp affixed by the Commissioners showing that date. It was possible however that the letter arrived on Saturday 7 April and was not opened and stamped until Tuesday 10 April.

23. If the date of receipt of the letter was Tuesday 10 April 2012 and the period of 45 days began with the day of receipt of the letter then it ended on 24 May 2012 which was the day after the review letter was posted to the appellant. The appellant told us that it was received some days later. If the date on which HMRC are required by section 15(2) to "give notice " of their review is the date of receipt of the letter requiring a review, then it was given more than 45 days after the date the review was required (whether that date is taken as 10 April or 7 April), and accordingly they would be deemed by section 15(2) to have confirmed their original decision.

24. Two questions therefore arise: (a) as a matter of law, from and to which days the 45 days run; and (ii) as a matter of fact, when the requirement to review and notice of determination were sent or received.

25. The possibility that the review letter had not been sent in time had not occurred to the parties before the hearing. We therefore sought their written submission on the issue. We were most grateful for their efforts. Mr Fell produced an analysis with which both we and Mr Baig agree, and which we can do no better than to repeat:

> 9.1 The date on which the Commissioners are "*required to review*" a decision (within the meaning of sections 14(2) and 15(2)) and the date on which notice is "*given*" to the Commissioners requiring them to review a decision (within the meaning of section 14(3)) should be read as the same date. This accords with the natural reading of these phrases. It also avoids the odd consequence that the 45 day time limit within which the Commissioners must give notice of a review under section 15(2) (which is stated to run from the date on which the Commissioners are "*required*" to review a decision) starts to run from a different date from that on which the deadline for the taxpayer to "*give*" notice requiring a review under section 14(3) expires.
>
> 9.2 The natural reading of the phrases "*require…to review*" and "*notice requiring the review is given*" – especially when read as co-extensive – is that these events will occur on the date the Commissioners receive the notice requiring them to review the decision. That is, the date the notice arrived at its destination – as opposed to the date it was dispatched or posted or the date it was opened.
>
> 9.3 This construction is supported, at least implicitly, by two decisions:
>
> (a) In BT Trasporti SRL v Director of Border Revenue [2010] UKFTT 287 (TC), the Tribunal held at paragraph 32 in relation to section 14(3) of FA 1994 that "the more normal meaning of giving notice" is that "notice is given when received, and not merely when posted".
>
> (b) This approach is reflected, implicitly, in the decision of Mr Justice Park in *Customs & Excise v Telford Tower & Scaffolding Ltd* [2002] EWHC 2994 (Ch). At paragraph 9(v) and (vi) the judge states that the appellant required a review "*by a letter from its solicitors dated 10th August 2001*" and that on "*27th September 2001 the 45-day time limit for a review to be carried out expired*" with the consequence that there was a deemed decision under section 15(2) of FA 1994. Whilst the point is not explicitly considered by the Judge, the date he gives for expiry of the time limit only makes sense on the assumption that the 45 day time limit runs from the date of receipt of the notice requiring a review rather than the date of that notice or the date it is posted.

26. Mr Fell adds that though not relevant to this legislation this construction is consistent with section 7 of the Interpretation Act 1978, which provides that "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" is used)…the service is

deemed…to have been effected at the time at which the letter would be delivered in the ordinary course of the post".

27. The parties agree that the 45 days include the day on which the review was required or the notice given because the time limit is stated in section 15(2) to be "45 days beginning with the day on which the notice was required". We agree.

28. Thus the 45 days to give notice of the review expired on or before 24 May 2012 (being 45 days counted from 10 April 2012). Since Miss Bines' letter cannot have been received by the Appellant before that date, the deeming provisions of section 15 apply.

29. This raises the question of how we should approach the reasonableness of a deemed decision and the extent to which HMRC may advance other evidence or reasons which were not in the original decision.

30. In *C & E Comms v Alzitrans SL* [2003] EWHC 75 (Ch) a similar situation occurred. The appellant had requested restoration of a lorry and the request had been refused in a letter with very limited reasoning. The appellant had requested a review which had not been forthcoming within the 45 day period stipulated by the Act with the result that there was a deemed confirmation of the original decision. Before the tribunal HMRC advanced additional reasons for the refusal to restore setting out those reasons in its statement of case. On appeal to the High Court the appellant submitted that where reasons for a decision were given it was not open to the decision maker to advance other reasons which were inconsistent with and which did not merely supplement or amplify the original reasons.

31. Blackburne J did not accept this submission. He said:

> " I do not accept Mr Maugham's further submission that because they were different (assuming they were) from the reasons which underlay Mr McWilliams original refusal ... it was not open to the Commissioners to advance as reasons the matters set out in their statement of case before the Tribunal. Section 15(1) of the 1994 Act empowers the Commissioners to confirm or withdraw or vary a decision when required to carry out a review of that decision under chapter II of the Act. Implicit in this is a freedom, even when confirming it decision, to give reasons for the decision which are different from those which originally led to its making. Where, as here, the Commissioners fail within the stipulated period to give to the person acquiring the review notice of the determination of that review, it is assumed that they have confirmed the decision. I do not consider that that means that the Commissioners are bound by the reasons originally given for the decision thereby confirmed. Were it otherwise, and it was plain that the reasons originally given were manifestly bad but the decision could be justified on other grounds, the (almost) inevitable consequence is that an appeal to the Tribunal against the decision would result in the matter having to be referred back to the Commissioners for a further review in accordance with section 16(4)(b) (assuming the circumstances were not within section 16(4)(c)). In my judgement therefore, the Commissioners

were entitled to advance, as in their statement of case before the tribunal they did, reasons for the decision not to return the vehicle which were different ... from the reason from the reasons which had led [to the original] decision ..."

32. In the present appeal the reasons given in the original decision were - as will be seen below - (a little) more elaborate than those given in *Alzitrans*, and before us HMRC relied upon the reasons given in their pleadings and by Miss Bines in her review decision.

33. Mr Baig says that the assumption made by Blackburn J, and on which his reasoning is based, that "the circumstances were not within section 16(4)(c)", may not be justified in this appeal since it was likely that HMRC had destroyed the alcohol which was, he says, at the time of the seizure, close to its sell by date.

34. It seems to us that there was some force in this submission. If the decision could not be rectified then the only remedy we could confer would be to give directions for the future. Such directions would necessarily relate to the original decision, which could no longer be remedied - not any later justification of it – because it will be the effect of that original decision which cannot be remedied. In such circumstances the object section 16(4)(c) is to prevent the recurrence of what was unreasonable in the original decision, and cannot be to give the appellant a second chance to have his goods restored. Thus it was only where the goods could still be restored that it made sense effectively to elide the original decision and any second decision on review.

35. However, in this case we were not told that the decision could not be remedied by a further review. We shall return to the issue at the end of the decision, but, because of the possibility that section 16(4)(c) is relevant, and accordingly that Blackburne J's reasoning is not applicable, we consider both Mr Rogers' decision taken on its own, and then also that of Miss Bines taken together with her evidence before us and Mr Fell's submissions.

36. Mr Baig says that, if we do consider reasons other than those of Mr Rogers, we should only consider those reasons to which the Appellant had had a fair opportunity to respond. He says that to the extent additional evidence was disclosed only at the hearing it should be disregarded. In that regard he says that we should therefore ignore the contents of the visit report (the "Smith Report") disclosed by HMRC during the hearing. We address the issue of the Smith Report below. In the light of our conclusions we do not need to address this argument further.

The Evidence and Our findings of fact.

37. We had before us a bundle of copy documents. We heard oral evidence from Miss Bines. Mr Baig told us a number of things, we understood on the instructions of Mr McFarlin of M&R, who sat beside him, and Mr Shah, the director of the appellant, who sat behind him. Neither Mr McFarlin nor Mr Shah gave oral evidence. Thus our ability to test these statements and to ask other questions was limited. In addition to the facts in the Introduction we find as follows. Where we recount statements made to us we accept the facts recounted unless otherwise apparent.

38. Mr Baig told us that Akshay Shah was the owner and (we assumed sole) director of two limited companies. The business of one of these was that of a convenience shop carried on at 7 Civic Square, Tilbury, Essex. The other company was Nas & Co Ltd, whose business encompassed the wholesale of drinks, and which used 8 Civic Square as an office (and indeed to which invoices appear to have been addressed).

39. M&R told HMRC in a letter of 30 January 2012 that "Mr Shah's accountant has amended the trading address of the company to Mr Shah's home address". Mr Baig told us that thereafter 8 Civic Square was used for a retail sales business.

40. Mr Baig told us that Nas & Co Ltd stored the drinks in which it traded at the premises of River Cash & Carry ("RCC") in Grays, Essex. M&R told HMRC in a letter 5 April 2012 that RCC also bought goods from Nas & Co.

41. On Friday 4 November 2011 HMRC officers stopped a lorry unloading alcoholic goods outside RCC's warehouse. It appeared that neither the driver of the lorry nor a worker who was in the warehouse could give the officers any paperwork relating to the contents of the lorry. Miss Bines told us that the officers seized the lorry and its contents. She said that no claim contesting the seizure or any request for restoration of the goods or the lorry had been made.

42. The officers later also detained and, we understand removed, a large quantity of alcoholic products from the premises of RCC. This appeal concerns some of those. Not all the alcohol at the warehouse was seized.

43. During the course of the officers' activities Mr Shah arrived. He was interviewed by one of the officers. The officer's notes of the interview record that after 15 minutes or so the officer cautioned Mr Shah and after that Mr Shah said he was happy with the record made thus far. Mr Shah signed the notes of the interview at the end. The notes record that Mr Shah said that:

(1) the registered address of the Nas & Co was his home address;

(2) he had been asked to attend at RCC's premises by Mr Singh, the owner of RCC;

(3) he had organised the supply of wine on the lorry. He had agreed its purchase from a supplier which was new to him, Britannia Ltd, a company owned by Farouk Khan. He had agreed to buy the wine at £13.99 a case and was intending to sell it at £14.99 a case;

(4) payment for the wine on the trailer had not been made. He expected to pay on Monday, 7 November 2011;

(5) in relation to the supply of the goods on the lorry, he said that he was used to his suppliers having paperwork from bond. But he had had a phone call from Mr Khan who said that he would provide the paperwork on Monday, it being difficult to get it on Friday; and

(6) in response to the officers question "do you know anything about [the] stock inside [the] unit?" He said "No. I don't visit. I just know I have supplied them in the past." He thought that the last supply he had made was about a month ago.

44. The officer's note makes no mention of Mr Shah being asked anything else about wine and beer at RCC's premises. Miss Bines' review letter states that after the interview HMRC officers went into RCC's premises and interviewed Manjit Singh Virk (whom we took to be the Mr Singh mentioned by Mr Shah). In the course of this interview invoices relating to the goods in the warehouse were provided to the officers. Some of these invoices were from Nas & Co. It appears from Miss Bines' letter that the officers determined which parcels of wine and beer at RCC's premises were covered by the invoices provided, and which were not, and that they detained those packages which they determined were not.

45. On the same day HMRC sent a Notice of Goods Detained to RCC, listing 19 packages of wine and beer, and stating the reason for detention as "Production of Invoices".

46. Mr Baig told us that on 14 November 2011 Nas & Co and RCC provided further invoices to HMRC at their Chelmsford office. Miss Bines' letter of review recites that on that day and RCC provided further invoices. She says that these comprised: (1) invoices from Palace Drinks to Nas & Co for Echo Falls wines and to GS Wines, a businesss associated with RCC, for Echo Falls, Skol and Carlsberg Special, and (2) invoices to Glenn & Co for Pone wines.

47. Items 1 - 12 on the list of detained items were Pone and Tervini wines. On 27 January 2012 HMRC sent RCC a notice of seizure of these wines. The appellant maintains no interest in these wines. They appear to have belonged to RCC. Miss Bines told us that no claim contesting seizure or for restoration had been made in respect of them.

48. Items 13 - 19 on the list of detained packages included Echo Falls red and white wine, and packages of various beers (and lagers). Nas & Co assert ownership of these packages. On 2 February 2012 HMRC sent a notice of seizure of these items to RCC, explaining that they considered them liable to forfeiture as goods on which duty was due and had not been paid.

49. Six days later, on 8 February 2012, RCC wrote to HMRC saying that the goods were owned by Nas & Co. The notice was sent by RCC to Nas & Co, and, on 28 February 2012, M&R wrote to HMRC on behalf of Nas & Co enclosing copies of invoices to Nas & Co from (1) Glenn & Co and (2) Palace Drinks, which related to the beers and to the Echo Falls wines in the detained items. M&R sought restoration of the seized items.

50. On 8 March 2012 Mr Rogers of HMRC wrote to Nas & Co refusing restoration.

51. In their letter dated 5 April 2012 M&R sought a review of Mr Rogers' decision. This letter described the results of the investigations into the supply chain which had been undertaken by M&R and Nas & Co.

52. This investigation showed that Palace Drinks had said that the wines (the Echo Falls red and white wines) had been supplied by Pantelis, and formed part of the consignment purchased by Pantelis on the whole of which excise duty had been paid on removal from bond at Dynamic Storage. Copies of Pantelis' invoice and the forms W5 in relation to the payment of duty on the release from bond of the wines were enclosed.

53. Miss Bines then made her review decision. In making that decision she took account of a report prepared by Mr Smith (the "Smith Report") in relation to which we make findings later in this decision.

54. After this M&R made further enquiries. It will be recalled that M&R had sent HMRC a copy of an invoice from Glenn & Co dated 31 October 2011 which included 80 cases of Special Brew. M&R obtained a copy of an invoice from Spice Can & Bottle Limited to Glenn & Co of 13 September 2011 which included 80 cases of Special Brew, and an excise duty invoice from Seabrook Warehousing to Spice Can & Bottle which referred to the intake into bond of 80 cases of Special Brew, together with a dispatch note of 16 September 2011 from Seabrook to Spice Can & Bottle which included 80 cases of Special Brew.

Summary of the documentary evidence before the tribunal in relation to items 13 to 19 of the detained items

55. In summary the evidence before us in relation to the detained items' provenance was :

(1) Items 13 and 14 related to Echo Falls wine supplied to the appellant by Palace Drinks, which itself had been supplied by Pantelis. No Pantelis invoice was before the tribunal, but copies of forms W5 were supplied which indicated that Pantelis had paid excise duty on a total of 3,780 litres of wine. The invoices from Palace to the appellant were for a total of 3,780 litres of Echo Falls red and white wine, but also included 1,270 litres of Echo Falls Rosé.

(2) Item 15 was for 320 cases of Skol Super. This quantity of this lager appeared on the invoice to Nas & Co from Glenn & Co. There was also an e-mail from Glenn & Co asserting that the goods sold were duty-paid and that HMRC had already checked with them and taken a copy of their invoice to the appellant and the duty-paid certificate. The Spice Can and Bottle invoice to Glenn & Co related to 80 cases.

(3) Item 16 was 170 cases of Tenants Super; 130 cases appeared on the invoice from Glenn & Co. The Spice Can and Bottle invoice to Glenn & Co related to 90 cases.

(4) Item 17 was 240 cases of Heineken, this quantity appeared on the invoice from Glenn & Co. The Spice Can and Bottle invoice to Glenn & Co related to 80 cases.

(5) Item 18 was 80 cases of Special Brew. This appeared on the invoice from Glenn & Co, and on the invoice to Glenn and Co from Spice Can & Bottle, to whom Seabrook had invoiced the duty payable. The Spice Can and Bottle invoice to Glenn & Co related to 80 cases.

(6) Item 19 was 113 cases of Guinness, 144 of which appeared on the invoice from Glenn & Co. The Spice Can and Bottle invoice to Glenn & Co related to 72 cases.

56. The copy of the invoice from Glenn & Co before us was in standard invoice format but not on any form of preprinted headed paper. It looked somewhat like a printout of what would be printed by a standard accounting software package onto headed paper. It bore no contact details other than Glenn & Co's address. It included the supplier's VAT number but not that of the customer.

57. We conclude that it is likely that, by reason for the form W5, Pantelis and an officer of HMRC thought that duty had been paid on the wines which Nas & Co received from that source. We also conclude that there was evidence that Glenn & Co had reasonably concluded that some of the goods it had supplied to Nas & Co were duty paid.

The letter of 8 February 2012

58. Mr Rogers' letter was short. The paragraphs of substance were these:

"It is not general policy to restore goods however I have considered your application outside of that policy and cannot allow restoration as I believe it constitutes offences contrary to S170(A) of the Customs and Excise Management Acts 1979.

"Factors taken into account included:

1. The departmental policy not to restore seized goods.

2. During a cautioned notebook interview Mr Shah made no claim of ownership for any of the goods inside River Cash and Carry."

59. Section 170A CEMA provides as follows:

"Offence of handling goods subject to unpaid excise duty.

(1)Subject to subsection (2) below, if—

(a)after the excise duty point for any goods which are chargeable with a duty of excise, a person acquires possession of those goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with those goods; and

(b) at the time when he acquires possession of those goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred,

the conduct of that person falling within paragraph (a) above shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties) which shall be calculated by reference to the amount of the unpaid duty.

"(2) Section 10 of the Finance Act 1994 (exception to civil penalty in cases of reasonable excuse) shall not apply in relation to conduct attracting a penalty by virtue of subsection (1) above; but such conduct shall not give rise to any liability to a penalty under section 9 of that Act if the person whose conduct it is satisfies the Commissioners or, on appeal, a VAT and duties tribunal, that he-

(a)acted in accordance with the directions of, or with the consent of, the proper officer; or

(b)was not himself the person, or one of the persons, liable to pay the unpaid duty and at the time when he acted either—

(i)had no grounds for suspecting that the goods were chargeable with a duty of excise that had not yet been paid; or

(ii)believed on reasonable grounds that the duty had been paid or its payment deferred or that the liability to pay the duty had not yet taken effect."

60. Mr Rogers' reference to "offences" under section 170A does not make clear when he considers the offence was committed or by whom. Plainly he cannot mean that the restoration of the goods would constitute an "offence" otherwise the power of restoration of goods on which duty had not been paid would be almost nugatory. We take him to mean that Mr Shah or Nas & Co had committed an "offence" in having possession of the goods.

61. It will be seen that if Nas & Co, or Mr Shah, was not the person liable to pay the excise duty on the wine, and if they had no grounds for suspecting non payment, or reason to believe that duty had been paid, a penalty under section 170A would not have been due even if on the delivery of the goods to RCC's warehouse it could be said that Nas & Co or Mr Shah had possession of them. Mr Rogers does not address these issues.

Our assessment: the letter of 8 February 2012

62. We undertake our consideration of this letter with two propositions in mind: (i) if this decision was not reasonable then any deemed confirmation of it cannot be reasonable, and (ii) if this is not a case to which section 16(4)(c) applies - so that Blackburne J's reasoning for considering evidence and reasons not in the original decision might not apply – that it may be necessary to limit our consideration to this decision for the purpose of considering whether any direction should be made under section 16(4)(c).

63. Mr Baig says that there is not much to go on in this letter, but what there is is not reasonable. Among other things it makes no mention of the invoices which the Appellant provided to HMRC which were relevant to the bona fides of the Appellant.

64. Mr Fell says that, properly understood, the reference to section 170A is simply recognising - rightly - that duty evasion is a serious matter and not stating that Nas &Co had committed an offence. He says that the letter properly, even if a little inaccurately, takes into account HMRC's policy, and legitimately and relevantly refers to the fact that no claim was made by Mr Shah at the time of detention.

65. He says that, read in the context of the necessary assumption that the goods were dutiable and that duty had not been paid, even if there were inadequacies in the decision embodied in that letter, it would have been inevitable that the same decision would have been made.

66. In *Golobiewska v Customs and Excise* [2005] EWCA Civ 607 Lloyd LJ spoke of the duty of a court or tribunal to give reasons. He cited the oft quoted passage of Henry LJ in *Flannery*:

> "' The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties −especially the losing party − should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex p Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. (2) The first of these aspects implies that want of reasons may be a good self−standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself. (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter.
>
> …The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.'….)"

67. Mr Fell said that HMRC accepted that it had a duty to give reasons for a decision of this nature and that the principles enunciated by Lloyd LJ in *Golobiewska* were instructive (although not strictly applicable) in relation to the extent of that duty, although he submits that before a tribunal a decision letter may be further explained by other evidence.

68. In the case of Mr Rogers' letter no additional evidence was adduced to us. It seems to us that where no further evidence or reasons are offered or where it is not appropriate to take them into account (where perhaps section 16(4)(c) is apposite), the

reasonableness or otherwise of the decision must be judged by reference to the terms of the letter only . We note that Mr Rogers says that his reasons "include " the two he specifies. Without further evidence that he took anything else material into account, and bearing in mind HMRC's acceptance of its duty to give reasons, we conclude that no other material reasons support the decision.

69. We start by recognising a degree of confusion in two parts of Mr Rogers' letter. He says that the policy is not to restore in his numbered paragraph 1 but says that the policy is not *generally* to restore in the opening paragraph. However we read numbered paragraph 1 as merely a defective repetition of the opening words, not as simply the following of a blanket policy never to restore.

70. We also note that his description of what Mr Shah said in the interview was that Mr Shah had made no claim of ownership: what Mr Shah is recorded as saying is that he did not know anything about the goods in the warehouse. A fair deduction from that statement might be that he did not claim ownership; it might have been better to have phrased his reason in that manner, but his statement is not an unreasonable conclusion.

71. Apart from an acknowledgement of M&R's letter requesting restoration, Mr Rogers does not indicate whether he has considered the information supplied by Nas & Co to HMRC, nor does he say what aspects of the goods and their seizure he considered, although it appears that he did look at the officer's notebook.

72. It seems to us that it is not possible to read Mr Rogers' statement in relation to section 170A as merely a statement that duty evasion was a serious matter. It also seems clear that this factor was something he considered relevant in reaching his conclusion. As we have said, in order to reach such a conclusion Mr Rogers would have had to have concluded that Mr Shah or Nas & Co did not come within section 170A(2). The failure either to consider why that was not the case, or, if in fact Mr Rogers did consider it, the failure to explain his reasons for concluding that section 170A(2) was not applicable seems to us to make his decision unreasonable.

73. Whilst Mr Rogers was, by reason of para 5 Sch3, entitled, and indeed bound, to work on the basis that the goods were liable to duty and that duty had not been paid, the issue of whether or not a person had no reason for suspecting duty had not been paid on the goods, and whether or not he reasonably believed that duty had been paid are in our view relevant considerations in relation to whether or not to restore goods. Indeed Miss Bines told us that HMRC's policy in relation to the consideration of restoration of a vehicle used to carry illicit goods treated the innocence of the owner as being a possible ground for deviating from the general non restoration policy. The invoices provided by Nas & Co should at least have prompted some consideration of this issue. But there is no hint in Mr Rogers' letter that it was considered. The failure to consider this potentially relevant factor also makes the decision unreasonable.

74. We therefore find that Mr Roger's decision was not one which could reasonably have been arrived at.

75. If the relevant question for us is whether the confirmation of that decision assumed to take place by section 15(2) was a reasonable confirmation and we were not permitted to have recourse to evidence or reasons other than those in that letter, we would return the same answer. The deemed decision was not reasonable because it would have been unreasonable to have confirmed an unreasonable decision.

76. We shall return to the question of inevitability raised by Mr Fell after our consideration of Miss Bines' review letter.

Miss Bines' review letter of 25 May 2013.

77. Miss Bines' decision was quite a different kettle of fish. We also had the benefit of a witness statement supplementing her decision and her oral evidence. We accept Mr Fells' submission that the reasons for her decision may properly be assessed by reference to the sum of the terms of that decision and her oral evidence.

78. Her letter set out a detailed history of the seizure and summarised the correspondence. It was plain that she had considered all the primary facts. She explained that she had not considered the legality of the seizure: implying that she worked on the basis that it had been legal. Although she did not say so expressly it is clear that she also worked on the basis that the goods had been liable to duty and that it had not been paid.

79. She set out HMRC's policy – which she said was not to restore, although she noted in her witness statement that restoration could be offered in exceptional circumstances. In that witness statement she gave examples of circumstances which could warrant restoration and of factors which could weigh against restoration in those circumstances.

80. In her letter (addressed to M&R) she concludes that the information given was such that she "did not find the mitigation tenable". She then set out six reasons why she concluded that Nas & Co "had no credible paperwork for the goods" and said that "*therefore"* she upheld the decision not to restore. Those six reasons were the following:

> (1) "Your client has had previous dealings with HMRC which you have dealt with, regarding their dealing and location."
>
> In her witness statement Miss Bines explained that this related to the period when the appellant was deregistered for VAT in December 2011. She told us that in coming to this conclusion she had regard to the contents of the Smith Report.
>
> (2) "The invoices provided do not match the goods seized."
>
> Miss Bines provided us with a spreadsheet showing the goods and the invoices. We shall explain this when we turn to assessing this reason.
>
> (3) "The invoices include companies that have since deregistered for VAT after being registered for less than a year."

In her witness statement Miss Bines expands on this by saying that the invoices referred to a company, Pantelis Limited which had been registered for VAT from May 2011 to January 2012 "being less than 1 year".

(4) "The invoices include invoices from a company that is not credible with HMRC."

In her witness statement Miss Bines expands on this by saying that the invoices included an invoice from Palace Drinks which was not credible because it had a considerable outstanding debt to HMRC in relation to an assessment issued in 2011.

(5) "The 2 x W5 forms submitted to evidence duty payment cannot be tallied against the goods."

Miss Bines explained that the W5 forms had no goods or type listed for them. Before us she accepted that the W5 forms did indicate that duty had been paid on still wines in the quantities referred to above.

(6) "Your client appears to run this high-value business from a domestic address."

In her witness statement Miss Bines expands on this by saying that she did not consider it credible that a wholesale alcoholic beverage business could be run from a domestic address with no adequate storage facilities of its own while producing invoices for substantial sums.

81. Miss Bines also told us that the following factors supported her decision: (i) she considered it odd that no claim or application for restoration had been made for the lorry or the goods it had been transporting, (ii) there had been delay in producing the invoices; and (iii) the invoice to Nas & Co from Glenn & Co was lacking in detail.

82. We should say that we consider Miss Bines' consideration of the provenance paperwork to be the consideration of relevant matters. Even working on the assumption that duty was due and unpaid, evidence of documents showing that it may have been documented as paid by others earlier in the supply chain is relevant to the bona fides, innocence or lack of negligence of the appellant (or otherwise). If the Appellant was justified in trusting its suppliers and had been properly invoiced by its suppliers at prices which indicated that duty had been paid, and which could clearly be traced to the goods seized, that could be evidence that the Appellant was innocent and not negligent; and that could be a relevant consideration.

The parties' arguments and our assessment of the review letter

83. Mr Baig criticised each of the reasons given set out above. We shall take them in turn.

(1) The deregistration of Nas & Co

84. It appeared that on 14 December 2011, about a month after the goods were detained, Adam Smith, an officer of HMRC, had visited 8 Civic Square and found it to be a locked shop unit with a sign "Ironing 4U" across it.

85. On the same day Mr Smith wrote to the Appellant saying that it had been deregistered because he had formed the view that it no longer made or intended to make taxable supplies. The Appellant contacted M&R on 21 December 2011 about this and on the same day Mr McFarlin spoke to Mr Smith by telephone. Mr McFarlin made a note of the telephone conversation. Mr McFarlin's billing records indicate that the telephone call was instigated by Mr Smith.

86. After further correspondence with HMRC including the provision of documents identifying Mr Shah and a copy of the lease for 8 Civic Square, Nas & Co's registration was restored on 5 March 2012.

87. Mr Smith wrote a report of his visit to 8 Civic Square. This is the "Smith Report". Miss Bines told us that this report as a whole formed part of her thinking when she addressed the review, and that it conflicted in some respects with Mr McFarlin's note of the later telephone conversation with Mr Smith.

88. Mr Fell told us that HMRC were not willing to disclose the entire report. They were willing to disclose the first part, which contained an account of the visit, but declined to disclose the second part on the grounds of public interest. He said that the second part contained action points. We were given a copy of the first part.

89. Mr Baig noted that on 28 February M&R had asked for copies of all documentation in relation to the matter. No mention had been made by HMRC of the report of the visit. Mr Fell responded that the tribunal's directions had required the listing of documents intended to be relied upon, and HMRC did not intend to rely on this visit report. This was not civil litigation in which there was a duty of full disclosure.

90. There were some differences between the account of Mr Smith's visit recorded by Mr Smith in his report and the record of Mr Smith's account recorded by Mr McFarlin in his attendance note. In Mr Smith's record he said he had visited 7 Civic Square and spoken to the shopkeeper who had put Mr Smith in contact with the owner of Nas & Co, with whom he had had a conversation. By contrast, in Mr McFarlin's note Mr Smith is reported as saying that although he was aware that there was an associated business next door he did not see the need to make further enquiries.

91. In Mr McFarlin's note Mr Smith is recorded as saying that his decision to cancel the registration was due to fraud in the alcohol trade. In Mr Smith's report he concludes that 8 Civic Square was too small, too closed looking and too ill sited for dealing in large volumes of alcohol, and on that basis recommends immediate deregistration of Nas & Co.

92. Neither Mr Smith nor Mr McFarlin gave evidence to us.

93. It seemed that Miss Bines had not been aware of the reversal of the deregistration of Nas & Co when she wrote her letter.

94. Mr Baig says that the consideration given to the deregistration was an irrelevant consideration, but if relevant, the reversal was relevant and consideration had not been

given to that. In addition the effect on Miss Bines' judgment of the other undisclosed matters in the note could not be addressed.

95. Mr Fell says that the fact of deregistration was a relevant matter; he accepts that the company was later reinstated, but it had been deregistered.

96. He also says in his later written submissions that insofar as the tribunal consider the Smith Report problematic the tribunal can disregard it. He says that this is consistent with Blackburne J's proposition that the tribunal should consider additional reasons advanced by the Commissioners. He says that the document is not needed to show that the relevant 'decision' was not one which the Commissioners could reasonably have arrived at.

97. Section 16(6) puts the onus of proof on the Appellant: it must show that the decision was unreasonable.

98. In our judgment it cannot be right that a person whose goods have been seized and who seeks their restoration can be required to prove the unreasonableness of a decision whose full basis he does not know and cannot challenge. We do not know what was in the second half of the note, whether it was true, whether it was relevant and how great or how small an effect it had on the decision maker. Nor does the Appellant. How is it possible for the Appellant to have a fair trial of his case if he does not know the nature of an element on which the decision was based?

99. The giving of reasons for a decision is an important administrative and judicial practice. In *Gora* the Court of Appeal held that the tribunal had erred in law because it did not give sufficient reasons for one of its findings. There is of course a difference between an error of law in reaching a decision and an error of law in not giving sufficient reasons for it, but it seems to us that a decision cannot be called reasonable to the extent that it is not apparent that it is reasoned; and to the extent that part of its reasoning is based on undisclosed material it cannot properly be said to be reasoned.

100. The statutory question for the tribunal is whether the "tribunal are satisfied that the Commissioners could not reasonably have arrived at" the decision. It seems to us that it is possible to give effect to that provision in a way which is compatible with Article 6 of the Convention by treating a decision which is shown in any respect to be without reason as being to that extent one which could not reasonably have been arrived at. In the context of a regime in which the burden of proof lies on the Appellant, it seems to us that section 3(1) of the Human Rights Act 1998 requires us to give section 16(4) that interpretation.

101. Thus we find that to the extent Miss Bines' decision relied on the undisclosed material it was unreasonable.

102. We do not accept Mr Fell's argument that the report can be disregarded. To our minds this pushes the approach of Blackburne J too far. It is tantamount to saying that if the commissioners took into account an irrelevant matter in making their decision then that can be ignored if, had they made their decision by reference only to relevant matters, their decision *would* have been reasonable because it *could* have been

reasonable. But that ignores the fact that the Commissioners have a discretion. If, on the basis of only relevant matters, the Commissioners had decided A, it may be possible to say that that that was a reasonable decision; but that does not mean that if, on that basis, the Commissioners had instead decided B, that B could not be a reasonable decision, It is only if decision A would be, not only reasonable, but inevitable on the basis of only the relevant matters that the irrelevant matters which were taken into consideration may be ignored in that way. We discuss inevitability later in this decision.

103. The reversal of the deregistration should (with the hindsight afforded by this appeal) also have been taken into account as a relevant consideration.

(2) The invoices and the goods seized

104. We have explained that Miss Bines provided a spreadsheet. The rows of the spreadsheet showed the goods invoiced on 13 invoices. Those goods are collected together by type in the columns. Miss Bines drew our attention to the column for Skol Super which shows that eight of the listed invoices included quantities of Skol Super, one of these invoices was for 320 cases of it, which was the amount seized; Miss Bines said it was therefore not clear why the other invoices had been submitted.

105. It seems to us however that this spreadsheet does show that HMRC were sent invoices whose quantities did match the quantities of goods ceased in five of the seven types of goods seized, and for the other two types of goods showed the provision of relevant invoices which could well have been for the goods seized:

(1) First we note that of the 13 invoices listed only 6 relate to supplies to Nas & Co; the others relate to supplies by it and supplies to its suppliers;

(2) Two of the other invoices relate only to supplies of Pone and Tervini wines: these were not wines said to belong, or to have been supplied, to Nas & Co. Whether or not their quantities matched the wines seized was not relevant because those wines had not been seized from Nas & Co;

(3) Of the six invoices to Nas & Co the penultimate and antepenultimate invoices detail the sale of precisely the same number of cases of Echo Falls red (140), Echo Falls white (560) Skol Super (320), Heineken (240) and Special Brew(80) as were seized;

(4) The sole invoice for Guinness is one to Nas & Co for 144 cases; 113 were seized. One possibility is that some were sold after delivery.

(5) The sole invoice for Tennants Super is for 180 cases; 170 were seized; again one possibility is that some were sold after delivery.

106. The final invoice to Nas & Co was dated 4 November, the day of seizure and was for Echo Falls red and white. The quantum on the invoice was unmatched by any wines seized.

107. However the Appellant provided no stock book or stock control account showing purchases, sales and goods on hand, from which the seized goods could be more accurately identified.

108. It seems to us that Miss Bines' statement that the invoices did not match the goods seized was an unreasonable conclusion on the basis of the information in the spreadsheet: the conclusion that Nas & Co had "no credible paperwork" goes too far. But that given the absence of a stock book or stock control records she would have been justified in concluding that there was some uncertainty over the identification of the wines seized with invoices for them.

109. Nor does it seem to us that her statement that more invoices were supplied justify her conclusion on Nas & Co's records. Seven of the 13 invoices were not addressed to Nas & Co.

110. *(3) Compan**ies** in the supply chain that had been deregistered from VAT*

111. As we have said, Miss Bines explained that this related only to one company, Pantelis, which was not a direct supplier to the Appellant. The reference in her letter of 25 May to "companies" was wrong.

112. Mr Baig said that Palace and Glenn & Co were still trading. The deregistration of a company with which the Appellant had no direct dealings was an irrelevant consideration.

113. Mr Fell said that Pantelis was deregistered. That was not an irrelevant consideration.

114. It seemed to us that deregistration might suggest a fly-by-night supplier in the chain and thus a supplier which might be less careful in checking that duty had been paid. But it seems to us that to the extent this was relevant it should have been set against the countervailing relevant consideration that the Appellant's immediate suppliers were still trading.

115. Thus it seems to us to indicate that a relevant consideration was not taken into account.

(4) Palace Drinks was not credible

116. Miss Bines said that when she made her decision Palace Drinks had an outstanding debt to HMRC. She was not aware that the debt had in fact been reduced later.

117. Mr Baig said that the review letter did not give details of the debt which concerned Miss Bines but he provided us with copies of correspondence between M&R, on behalf of Palace Drinks, and HMRC in relation to an assessment of £147,259.12 made on Palace Drinks. The correspondence showed that HMRC later reduced the assessment to some £28k. He says that it was unreasonable to treat Palace's debt as casting a bad light on the Appellant.

118. Mr Fell says that the consideration of whether a company is apparently in default is a relevant consideration in addressing the reliability of its invoices.

119. In our view, a supplier which had large outstanding debts to HMRC might be more likely to be one one which was careless in its administration or intent on default. It might thus be a company which did not ensure it dealt in duty paid goods. The matter was thus potentially relevant to the nature of the companies with which Nas & Co dealt and its care in ensuring that it dealt in goods on which duty had been paid.

120. But it would also be relevant if a large assessment had been paid or reduced. That would reduce any concern as to the nature of the Appellant's counterparties and as to its own standard of care.

121. It was not clear that Miss Bines knew of the reduction in or payment of the assessment. By reference to the facts as we find them now, the failure to consider the reduction or repayment would be the failure to consider a relevant factor. From that perspective this part of her decision was therefore unreasonable.

(5) Tallying or reconciling the W5 forms to the goods seized

122. Miss Bines accepted that the copy forms provided were genuine and provided evidence of duty having been paid, but said that they could not be adequately linked to the goods sold to the Appellant.

123. Mr Baig said that it was unreasonable to expect the Appellant to find invoices for the whole chain. What else could it do?

124. It seemed to us that the correspondence between quantity of the invoiced Echo falls wine and the quantity on which duty was paid (see para 55 above) indicates that it was likely that the Echo Falls red and white wine was the subject of the forms W5. As a result it was likely that Pantelis reasonably considered that the duty had been paid on the Echo Falls red and white wines it delivered to Nas & Co (even though it must be deemed not to have been paid).

125. The invoice from Seabrook to Glenn & Co for duty apparently in relation to 80 cases of Special Brew, and Glenn & Co's email in relation to the 320 cases of Skol Super also suggest that Glenn & Co considered that duty had been paid on those items.

126. Relevant to set against this however, is the absence of indication that anyone thought duty had been paid on the Echo Falls Rose (which does not appear to have been part of the W5 consignment), and on the remaining beer or lager.

127. It seems to us that the likelihood that the W5 indicated that an officer of HMRC thought that duty had been paid on the Echo Falls red and white, and Glenn & Co's belief that duty had been paid on the Special Brew and Skol Super, are relevant factors which have been omitted from consideration.

(6) Running the business from home

128. Mr Baig said that Nas & Co stored its goods at RCC, it had no need of extensive premises. Nas & Co had used 8 Civic Square as its base, but had then made its principal place of business Mr Shah's home. There was nothing wrong with that. Many businesses are run from small premises. It was a high volume/low margin business. It did not need big offices. This was an irrelevant and unfair consideration.

129. We recall that Google started in a garage. But we also recall that many decisions of the tribunal in relation to MTIC fraud have involved traders in the chains of supply with little in the way of establishments. It seems to us that this factor is not wholly irrelevant.

Other matters

130. Miss Bines said that she was also concerned by (i) the lack of challenge to the seizure of the lorry and its cargo, (ii) the time it seemed to have taken the Appellant to produce the invoices, and (iii) the style (and odd numbering) of the Glenn& Co invoice.

131. It seemed to us that the lack of challenge to (and lack of restoration request) in relation to the goods on the lorry was a relevant factor. It suggested that either Britannia or Nas & Co had concluded that the goods had not borne duty, and thus that Nas & Co was not always scrupulous in ensuring that the goods it bought were duty paid.

132. Invoices for the seized Echo Falls wines seem to have been provided to HMRC on 14 November 2011, 10 days after the seizure. We were not clear when the Glenn & Co invoices which elated to the seized goods had been provided but at the latest it was on 28 February 2012 by M&R.

133. Miss Bines criticised the Glenn & Co invoice. We cannot find her concern unreasonable when taken with the period of at least 10 days for its production. She was entitled to have a concern that it was not genuine. No evidence was given by the Appellant to dispel this concern.

134. Mr Baig said that Miss Bines failed to take into consideration the fact that some of the goods in the warehouse had not been seized. HMRC had effectively conceded that those goods had had duty paid on them. We accept that this was a relevant consideration, but in our view it is of limited weight.

HMRC's Policy

135. Mr Fell told us, and we accept his evidence, that the evasion of duty is a serious problem and that HMRC's estimate is that £1.2bn p.a. is lost to the exchequer in duty evasion. He said that the policy needed to be robust to assist in the deterrence of evasion. Evasion was pernicious: it disadvantaged legitimate traders and advantaged evaders. These considerations justified a robust policy of capturing and seizing delinquent goods. He says that a policy under which innocence does not ensure restoration is an entirely proportionate response.

136. Mr Baig accepts that a robust policy is justifiable. But he says that HMRC's policy is draconian. In this case it bore particularly unfairly on the Appellant. The goods were detained on 4 November but it was not until 2 February 2012 that they were formally seized even though invoices for the goods had been provided on 14 November 2011. Mr Baig says that such a harsh policy serves in the end to alienate those on whom it may bear from the aims of HMRC.

137. As we understood Miss Bines' evidence HMRC's policy was to restore only in exceptional circumstances. The carve out for exceptional circumstances means in our view that the policy is proportionate – that is to say that it does not require the imposition of a greater burden than is necessary to achieve its legitimate aim of the collection of tax by the discouragement of smuggling. We do not therefore accept Mr Baig's argument that the policy itself is disproportionate.

138. But the application of the policy must also as regards an individual also be proportionate (see [64] in *Lindsay* per Lord Phillips), and that means that each case must be considered on its particular circumstances.

139. It seems to us that the innocence or otherwise of the owner and the degree of care he took are relevant factors in the decision whether or not to restore, but they are factors which may be balanced by the decision maker against the reasons for a robust policy in which restoration is not the norm. And it seems to us that the decision maker can justifiably make a different decision in relation to an individual buying a crate of gin for a very large party from Tesco from that which might be made in relation to a wholesaler or retailer making a similar size purchase. That is because placing a higher burden on a business dealing with goods which it knows are supposed to be duty paid is a justifiable way of enlisting those businesses in the battle against evasion - albeit by fear of an oppressive penalty.

140. Section 152 CEMA permits HMRC to restore on conditions. The decision to be made is not simply to give the goods back or to retain them. The ability to impose conditions means that a chasm does not divide restoration from non restoration, and a decision may vary according to the circumstances. However for the exercise of the discretion to be proportionate in relation to any particular case, in exercising the discretion the relevant officer must have regard to the possibility of restoring subject to conditions.

Inevitability

141. Mr Fell argues that even if there are factors which might make the decision unreasonable in a *Wednesbury* sense, the tribunal need not set it aside. He says that section 16 gives the tribunal the power to set the decision aside but does not make it subject to a duty to do so. The words of section 16(4) suggest the same result. Rather than speaking of the decision being "unreasonable" they say:

> " where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it".

That suggests that even though some element of the decision is unreasonable, if in the light of all the circumstances the decision remains one which could reasonably have been made the tribunal should not set it aside.

142. Mr Fell referred to *John Dee Ltd v C & E Comms* [1995] STC 941 where, at 953, Neill LJ accepted that a concession in relation to a jurisdiction under section 83 VATA was correct. It had been suggested that the decision maker had failed to take into account relevant material in making a decision. He said:

> "It was conceded by Mr Englehart, in my view rightly that where it is shown that had the additional material been taken into account, the decision would inevitably have been the same the tribunal can dismiss the appeal"

But he said it being likely that such was the case was not the same as it being inevitably so.

143. Mr Fell says that this principle could extend to any defect in the decision making process: all that was necessary was a conclusion that the particular decision was inevitable.

144. In this appeal he says that it is inevitable that the goods would not be restored. A decision maker would properly have regard to HMRC's policy. Looking at the facts in the round there are no exceptional circumstances. The Appellant had not been able to show quickly and reliably whence the goods came; it was a commercial supplier; and a substantial amount was involved. All the indicia were against restoration under the policy. It was inevitable that a decision maker would come to the same conclusion.

145. Mr Baig says that *John Dee* can be distinguished. That case was concerned with factors known to all the parties; this appeal related factors which had not been made clear. Had Miss Bines not been influenced by the second half of Mr Smith's report she might well have viewed the Appellant in a different light, and come to a different decision.

146. We agree with Mr Fell that if we find the decision unreasonable we are not bound by section 16 to set it aside: the section confers a "power" on the tribunal, not a duty. But we do not accept that if, despite some vitiating elements of the actual decision made, the decision is nevertheless one which could reasonably have been made that the tribunal cannot, or should not, find it be unreasonable. That is because section 16(6) asks whether the tribunal is satisfied that the decision is one which the Commissioners "could not reasonably have arrived at". These words are in the past tense; the question is not whether the Commissioners "could reasonably arrived at the decision now. Although "could have arrived at" may in some circumstances mean "could arrive at", these words are used in the context of the exercise of a discretion. That is the point we make in relation to the Smith Report at para 102 above: a discretion is given and is to be exercised: it is possible that the exercise of discretion could reasonably have more than one possible result on the same facts. It is not the tribunal's job to exercise the discretion. It is only if the facts are such that the only decision which could possibly result from the exercise of the discretion – that is to say

if the result were inevitable – that it would be permissible not to set aside the original decision.

147. But we agree with Mr Fell that if a decision maker would inevitably make the same decision then this tribunal should not direct that the decision be set aside and remade.

148. Miss Bine's witness statement described HMRC's policy as being that seized goods should not be restored but that "restoration may be offered exceptionally at the discretion of the officer". She then set out examples of exceptional circumstances and factors which might weigh against them.

149. It was clear that the examples were not comprehensive.

150. HMRC's policy, like the legislation, confers a discretion on the officer. It seems to us that it is possible that an officer considering the facts as we have found them might conclude that the Appellant (and/or it suppliers) reasonably thought that duty had been paid at least some of on the goods. He or she might also conclude that although duty was deemed not to have been paid the forms W5 and the other paperwork indicated that even officers of HMRC might think that duty had been paid on some of the wines. In such circumstances it seems to us that it would be open to the officer to restore the goods, or some of them, or to restore them, or some of them subject to conditions. It does not seem to us that the result would be inevitably not to restore.

Conclusions

151. We have found that the decision under appeal is the deemed decision confirming Mr Rogers' decision.

152. If we consider Mr Rogers' decision divorced from any of the material put forward by Miss Bines, we find that it was not a reasonable decision, and accordingly that the deemed confirmation of that decision was not reasonable.

153. If section 16(4)(c) does not apply then we are bound by Blackburne J's decision in *Alzitrans* to take into account additional material supporting that deemed decision. That seems to us to include Miss Bines' evidence including her letter.

154. We find that if the question before us was whether Miss Bine's decision was reasonable, that it was not. That is because:

(1) It relied to some extent on information in a document not produced to the tribunal;

(2) It did not take into account the re-registration of Nas & Co;

(3) It rested on an unreasonable conclusion in relation to some of the invoices for the seized goods;

(4) It appeared to ignore the fact that the appellant's immediate suppliers were still trading or at least not to set that fact against the deregistration of one of those suppliers' suppliers;

(5) It did not consider the reduction of the VAT debt due from Palace Drinks.

155. We find that it was not inevitable that an officer considering the matter afresh on the basis of our appraisal of the evidence would make the same decision as that made by Mr Rogers or Miss Bines.

156. Thus whether or not we take into account Miss Bines' evidence we consider that the relevant decision should cease to apply.

157. We are not clear from the evidence whether section 16(4)(c) is applicable. If section 16(4)(c) is not applicable, we would make the direction at A below. If section 16(4)(c) is shown to be applicable we would seek the parties' views on the direction we should make. We therefore direct that unless either party write to the tribunal asserting that section 16(4)(c) applies (with any representations it or they care to make about the appropriate directions) within 14 days of the release of the decision the Directions at A below shall apply.

A. DIRECTIONS (subject to paragraph 157)

The restoration application shall be reconsidered by another officer who has had no involvement with Nas & Co or this appeal.

That officer shall not be shown any material which is based on or includes information from the undisclosed sections of the Smith Report. In particular he or she shall not be shown or provided with information from any document which is not fully disclosed to the Appellant.

The officer shall take into account in particular the following facts:

(i) that it was likely that the W5 forms provided by Pantelis related to the Echo Falls red and white wine supplied to the Appellant and indicated that Pantelis reasonably thought that duty had been paid on those wines the appellant derived from that source (despite the fact that duty is deemed not to have been paid); and the corresponding lack of such evidence in relation to other wines;

(ii) that (despite the relevant deeming) there was evidence that (a) Glenn & Co thought that duty had been paid on the Skol Super it had supplied to Nas & Co, and that HMRC had a copy of the duty paid certificate, and (b) Spice Can and Bottle thought that duty had been paid on the 80 cases of Special Brew; and the corresponding lack of evidence in relation to the other beers or lagers;

(iv) the extent to which, and the times at which, invoices relating to the supplies to Nas & Co had been provided to HMRC; and

(v) that none of Nas & Co's direct suppliers had been deregistered.

Rights of Appeal

158. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 6 January 2014