



**TC03320**

**Appeal number: TC/2012/09357**

*EXCISE DUTY – Appeal against decision to restore wine seized on entry into the UK on payment of duty and VAT – Whether the decision could reasonably have been reached – Yes – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**EURO DIRECT WHOLESALE LIMITED**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS  
LESLEY STALKER**

**Sitting in public at 45 Bedford Square, London WC1 on 4 February 2014**

**Christopher Snell, counsel, instructed by Rainer Hughes, for the Appellant**

**Rupert Jones, counsel, instructed by the Director of Border Revenue, for the Respondents**

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## DECISION

1. Euro Direct Wholesale Limited (the “Company”) appeals against the decision of the UK Border Force (“UKBF”), contained in a letter dated 29 June 2012, in which it was notified that, after conducting a review, the decision made by the UK Border Agency (“UKBA”), on 1 May 2012, not to restore 13,050 litres of wine should be varied and the wine restored on payment of a fee of £40,386.62 (£31,480.51 excise duty and £8,906.11 VAT).

### 10 *Evidence*

2. We were provided with witness statements from Liliana Ninu, director of the Company and Deborah Hodge, the UKBF Officer who made the decision, against which the Company has appealed, to restore the wine for a fee. Although Mrs Hodge gave oral evidence under oath we did not hear from Ms Ninu whose evidence was therefore not subject to cross examination. We were also provided with a bundle of documents that included all of the material that was before Mrs Hodge when undertaking the review in addition to the correspondence between the parties.

3. On the basis of this evidence we make the following findings of fact.

### *Facts*

4. The Company is a wholesaler of wine, beer, spirits and other alcoholic and non-alcohol beverages based in Malaga, Spain.

5. On 17 February 2012 it received an order from Eastenders Cash & Carry plc (“Eastenders”) for a variety of wines. A receipt for these was sent, on 24 February 2012, by Eastenders to Seabrook Warehousing Limited (“Seabrook”), a UK bonded warehouse, to accept the goods when delivered as arranged by the Company. Having received the order from Eastenders the Company, on 17 February 2012, sent a purchase order to No Limit, a company in Calais, for the following goods:

- (1) 200 x Vin Italien Alpa;
- (2) 150 x St Benedict Liebfraumilch;
- 30 (3) Really Chile Cabernet Sauvignon;
- (4) 600 x Really Chile Chardonnay;
- (5) 600 x Really Chile Merlot; and
- (6) 600 x Really Chile Sauvignon.

6. No Limit issued a sales invoice for these goods in the sum of €26,747.50 (£22,289.59) to the Company which although is dated 20 January 2012 probably should have been 20 February 2012 as it corresponds with the Company’s purchase order of 17 February 2012.

7. The Company invoiced Eastenders for these goods in the sum of €27,435 (£22,862.50) on 21 February 2012 the day the goods left ATP Trading SARL, a bonded warehouse in Calais en route by road and sea via Dover for Seabrook's bonded Warehouse.

5 8. On arrival at Dover Eastern Docks later that day the driver of the vehicle transporting the goods was stopped by UKBA officers and the vehicle examined. As a result 13,050 litres of wine, documented as "foodstuffs/soft drinks", was found. Subsequent enquiries revealed that the Administrative Reference Code ("ARC") number presented to the officer when the vehicle was stopped was invalid and the  
10 goods had not been booked into Seabrook's bonded warehouse.

9. The officer was satisfied that the wine was held for a commercial purpose but none of the proper methods of removing excise goods to the UK had been used. He therefore seized the goods under s 139(1) of the Customs and Excise Management Act 1979 ("CEMA") as being liable to forfeiture under both Regulation 88 of the  
15 Excise Goods (Holding, Moving and Duty Point) Regulations 2010 and s 49(1)(a)(i) CEMA issuing a seizure notice in respect of the goods on 21 February 2012.

10. On 16 March 2012 enquiries by the UKBA Revenue Fraud Detection Team established, contrary to the officer's understanding at the time the vehicle was stopped and the wine discovered, that the ARC number was, in fact, valid but had not been  
20 processed onto the UKBA's system due to it being "down" at the time.

11. By a letter, dated 3 April 2012, to the UKBA the Company, through its solicitors sought to challenge the seizure of the goods in the Magistrates' Court under paragraph 3 of schedule 3 to CEMA. However, as this was outside the statutory time limit of one month the seized goods were "deemed to have been duly condemned as  
25 forfeited" in accordance with paragraph 5 of schedule 3 to CEMA. The 3 April 2012 letter also requested that the wine be restored.

12. In its reply, dated 1 May 2012 the UKBA refused to restore the wine to the Company. A review of this decision was requested in a letter sent by fax on 28 May 2012. This letter was acknowledged in a letter from the UKBA dated 28 May 2012 to  
30 the Company's solicitors which explained the review procedures and invited the Company to provide "any further evidence or information" in support of the request for a review.

13. Following a telephone conversation between the Company's solicitors and a UKBA Officer, the UKBA wrote to the solicitors on 12 June 2012 requesting "an  
35 explanation as to how the goods were booked into Seabrooks and a copy of any supporting evidence". No further information was provided to the UKBA either by or on behalf of the Company

14. The review was undertaken by UKBA Officer Deborah Hodge who, on 29 June 2012, wrote to the Company's solicitors setting out the conclusions of her review  
40 which was to restore the wine for a fee of £31,480.51 excise duty and £8,906.11 VAT.

After setting out the factual background the letter summarised the UKBA restoration policy for excise goods as follows:

5 The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

The letter continued:

10 It is for me to determine whether or not the contested decision should be upheld, varied or cancelled. I am *guided* by the restoration policy but not *fettered* by it in that I consider every case on its individual merits. I have considered the decision afresh, including the circumstances of the events of the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the UKBA both before and after the time of the decision.

15 You were invited to provide further information in support of a review but as nothing has been received from you I have to make my decision based on the evidence that I already have.

20 In considering restoration I have looked at all the circumstances surrounding the seizure but **I have not considered the legality or the correctness of the seizure** itself. If you are contesting the legality or correctness of the seizure – and that includes any claim that excise goods were imported properly – then you should have sent a Notice of Claim to UKBA within 1 month of the date of the seizure (or notice of seizure) for your appeal to be heard in a Magistrates’ Court as no one else has the jurisdiction to consider such a claim.

25 Having had an opportunity of raising the lawfulness of the seizure in the Magistrates’ Court one does not have a second chance of doing so at tribunal or statutory review as the tribunal does not have jurisdiction to consider it and the Review Officer should not normally do so.

#### The Excise Goods

30 I have read your letters carefully to see whether a case for disapplying the UKBA policy of non-restoration has been presented. I have considered the following points:

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- The goods were manifested as foodstuffs
  - Originally the ARC was thought to be invalid but this was subsequently found to be an error in the system
  - The goods listed on the pre-notification did not exactly match the goods listed to ARC12FRG0074000027937149. There is no record of when this was received by Seabrooks only an e-mail from the Seabrooks Director to the warehouseman on the day after the goods were seized
  - There was no booking on the Seabrooks database for the storage of the goods in bond
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5 I have also considered proportionality in relation to this case and it is my view that non-restoration is disproportionate. I am therefore varying the decision and am offering restoration of the goods for a fee of £40,386.62 (£31,480.51 excise duty and £8,906.11 VAT). Payment of this fee will mean that the goods can be released into free circulation within the UK therefore the goods do not need to go into the bond.

15. In cross examination Mrs Hodge explained that she had been concerned that there was a danger of the goods not going into the bond if they were released without payment and although checks could be made to ascertain whether the goods had in fact gone to a bonded warehouse and an excise duty assessment raised if they did not this would be after the event and there could be a loss to the Revenue.

*Law*

16. Under the Alcoholic Liquor Duties Act 1979 excise duty is charged on spirits, wines and beer imported into the United Kingdom.

15 17. Regulation 88 of the Excise Goods (Holding, Moving and Duty Point) Regulations 2010 provides that excise goods which are liable to duty which has not been are liable to forfeiture.

18. Also where excise duty has not been paid on imported alcoholic goods which are “unshipped in any port”, s 49(1)(a)(i) CEMA provides that:

20 ... those goods shall .....be liable to forfeiture.

19. Section 139(1) CEMA provides that:

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.

25 20. Under s 141(1) CEMA: where any thing has become liable to forfeiture under the Customs and Excise Acts-

30 (a) any ship, aircraft, vehicle, animal, container (including any article of passengers’ baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the fittings so liable, shall also be liable to forfeiture

21. Section 152 CEMA establishes that:

35 The Commissioners may, as they see fit –

(a) ...

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.”

22. Section 14(2) of the Finance Act 1994 provides that:

Any person who is –

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

5 (b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

10 may by notice in writing to the Commissioners require them to review that decision.

23. Section 15(1) of the Finance Act 1994 states:

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 –

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(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.

24. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

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(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this sections 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 -

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(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

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(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.

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(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal;

(6) On an appeal under this section the burden of proof as to –

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(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

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(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or

23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).

shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established

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25. Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) provides that an “ancillary matter” is:

... any decision under section 152(b) 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.

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26. In *HMRC v Jones & Jones* [2011] EWCA Civ 824 the Court of Appeal held that the Tribunal does not have the jurisdiction to consider the legality of the seizure of goods which have been “deemed to have been duly condemned as forfeited” in accordance with paragraph 5 of schedule 3 to CEMA.

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#### *Discussion and Conclusion*

27. The jurisdiction of the Tribunal in an appeal such as this is limited.

28. First, although it is accepted that the ARC number was valid despite initially being treated otherwise it is clear from the decision of the Court of Appeal in *HMRC v Jones & Jones* that it is not open for us to find as a fact the goods were legally imported and illegally seized by HMRC.

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29. Secondly, it is clear from the legislation, in particular s 16(4) of the Finance Act 1994, that the issue for us to determine is whether, having regard to our findings of fact, the decision taken by the UKBF to restore the wine on condition of payment of the excise duty and VAT is one that could reasonably have been reached. It is not sufficient that we might ourselves have reached a different conclusion.

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30. Lord Phillips of Worth Maltravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

“... 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”

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31. Having carefully considered all of the evidence before us, we find that, in reaching her decision Mrs Hodge did not take any irrelevant matters into account or fail to take account of any relevant matters or give undue or too much weight to any particular issue as Mr Snell contended on behalf of the Company. It therefore follows that, having regard to all the circumstances of the case, we find the decision to restore the wine for a fee to be reasonable and proportionate.

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32. Accordingly therefore, we dismiss the appeal.

*Right to Apply for Permission to Appeal*

33. 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.

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**JOHN BROOKS  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10 February 2014**