[2018] UKFTT 148 (TC)

TC06401

Appeal number: TC/2016/05707

EXCISE DUTY – restoration of vehicle – refusal – whether unreasonable – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHU GREG-CAR **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE FAIRPO
MRS SONIA GABLE

Sitting in public at Fox Court on 9 May 2017

Mr Wienceke of Euro Lex Partners LLP, for the Appellant

Michael Newbold, Counsel for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant against a decision of the respondents (HMRC) to refuse restoration of a tractor unit and a trailer, seized at the port of Dover on 28 April 2016, to the appellant.

Background

2. On 28 April 2016 a tractor unit (WND 49057) towing a trailer (FG95667) (jointly "the vehicle") was stopped by officers of the Respondent at the port of Dover. The vehicle was being driven by a driver engaged by the appellant, Andrzej Imanski.

3. A search of the vehicle found 2,687,800 cigarettes in the load within the trailer, hidden inside packages of pasta. The duty payable on the cigarettes was calculated at £614,915.90. The goods and vehicle were seized.

4. The driver was arrested and later charged with an offence contrary to s170(2) Customs and Management Act 1979 ('CEMA'). The driver was subsequently found guilty in criminal proceedings.

5. Information provided by the appellant and obtained during the criminal proceedings taken against the driver showed that:

(1) The CMR for the load showed that the consignor, and loading point, was AB Foods Polska sp Zoo and that the load was to be delivered to Howard Tenens Organix, Ashby de la Zouch.

(2) The documents provided were false and had not been issued by AB Foods, which does not produce pasta. The specified consignee was not expecting the goods and does not deal in dried pasta.

(3) Analysis of the tachograph evidence for the vehicle had shown that the goods had not in fact been loaded at AB Foods, which is located at Nowa Sól but at a completely different location some distance away, near to Poznan in Poland.

6. The seizure of the vehicle was not challenged within the statutory one month period and so was deemed forfeit.

7. On 30 April 2016 a request was made for restoration. HMRC replied, requesting additional information as to the vehicle and the appellant, on 5 May 2016. The appellant provided further information on 25 May 2016. On 4 July 2016, HMRC refused the appellant's request for restoration.

8. The appellant requested a review of this decision on 15 August 2016. HMRC acknowledged the request on 18 August 2016 and asked for any further evidence

available, particularly with regard to similar trips by the vehicle in early April 2016. No further material was provided.

9. The review was concluded and, on 21 September 2016, HMRC informed the appellant that the vehicle would not be restored.

Appellant's evidence

10. The appellant is a sole trader, Grzegorz Szczepaniak, operating under the trading name Phu Greg-Car. The appellant provided a witness statement and oral evidence at the hearing with the assistance of a Polish language interpreter.

11. The appellant commenced his transport business on 22 January 2016, providing domestic and international transport services for freight forwarders. The appellant had previously worked for another transport business which provided domestic transport services within Poland, principally in relation to the transport of minerals. The appellant had no international haulage experience before he commenced his business.

12. The appellant leased the necessary vehicles and so both elements of the vehicle seized are leased: the tractor unit is leased under a leasing agreement dated 14 January 2016 from Millennium Leasing sp. z o.o. and the trailer is leased under a leasing agreement dated 5 April 2016 from PPUH KRYS-BUD.

13. When the appellant began his business he applied for a certificate to carry goods internationally and so had to make himself aware of policies relating to international haulage. Particular attention was given to the smuggling of people, as that was prominent at the time: the focus was on coverage of trailers to prevent access, and things to be alert to which might indicate an attempt by an individual to smuggle themselves in the trailer.

14. The appellant explained that he was not able to find out about other types of smuggling, such as drugs. The nature of his business was such that he was not in a position to check for such things, as his business could only check the amount of the goods in the load. Although they had responsibility for the security of the pallets or other packages, they had no opportunity to check deep inside loads. The appellant explained that he would ask the driver to check for damage to the trailer, such as to the tarpaulin covering the loads, and to check for damage to the seals on the trailer.

15. When asked about checks in relation to the smuggling risk in respect of alcohol and tobacco, the appellant replied that, in his opinion, in relation to excise duty goods, the details of such goods should be mentioned in the transport documentation received by the carrier company. If the goods were not detailed in the documents and were not immediately visible then there was nothing that a carrier business such as his could do. They did not have power to open pallets which had been packed and so could not check inside to see there was any illegal concealment of goods such as alcohol. Provided everything looked ok, the carrier's role was simply to transport the goods.

16. The appellant agreed that, as he considered that he had such limitations, he would need to make careful checks that he was not working with criminals involved in smuggling. He had employed three drivers and checked their references, and ran credit checks. The contracts with the drivers did not cover what was to happen if they were involved in smuggling because this is not something that is enforced in Polish documents. Before a driver was engaged, the procedure for checking for irregularities such as damage to the trailer was discussed, and they were informed that they needed to advise the appellant of any irregularities found.

17. The appellant explained that he obtained customers by advertising available space for loading goods. He would advertise the space on haulier portals. On 26 April 2016, he was contacted by an individual, Jan Winnicki of PIKO, who had a load for which he wished to purchase the space. The appellant confirmed that he had not known Winnicki before this although he had dealt with PIKO before, as they had placed an order for the transport of an earlier load on 5 April 2016.

18. That earlier transport for PIKO involved the same consignor, AB Foods, as this load on 26 April 2016. The load was also carried by the same driver as the load on 26 April 2016.

19. That earlier load had been returned to Poland without being delivered. The appellant explained that the driver had advised him by phone at the time that he, the driver, had received a telephone call from the consignor, AB Foods, to return immediately as the load was incorrect. The driver had also informed the appellant that AB Foods had stated that PIJO would €900 for the return load on the grounds that it was their error that had led to the return, in compensation for the fact that the appellant would therefore not have an opportunity to book a load onto the return journey for the vehicle. The appellant confirmed that the fee was quoted to him by the driver, and was not negotiated by the appellant himself.

20. The driver had provided the appellant with a CMR for this return, and that document had been sent to PIKO with the invoice.

21. The appellant confirmed that the return load had been the same weight as the outbound load.

22. The appellant explained that he had no reason to believe that this was not a genuine transport and so had no hesitation in taking another order from PIKO on 26 April 2016. He explained that he had no reason to believe that this first order had been a smuggling attempt as the driver had told him that the trailer seal had not been broken.

23. The appellant confirmed that he carried out checks on customers, confirming the registration and status of companies with the Polish company registers. The appellant initially confirmed that he had carried out these checks on PIKO.

24. When it was pointed out to the appellant that these checks would have shown that PIKO did not in fact exist, the appellant explained that he had carried out the company register checks on AB Foods, but not PIKO as he had no concerns about

PIKO because the order on 5 April 2016 had been on business letterhead. The appellant stated that he had misunderstood the question.

25. The appellant confirmed that he had not obtained any references for PIKO and had not carried out any further checks before accepting the second order.

26. The appellant was asked whether he had not been concerned that he was taking a risk when dealing a company that he knew so little about. He replied that he did not think that PIKO would be using his business for criminal activities. He considered that he had been taken advantage of by PIKO, Winnicki and the driver. He denied that he had known that both orders were attempts to smuggle cigarettes into the UK.

27. The appellant explained that he was not aware of the smuggling attempt: he had entered into a contract with the freight forwarder to transport goods and not to check the transaction. The appellant further explained that he was also not required to directly contact the purported consignor and the consignee, nor to enquire whether they sent and expected the load, and that he did not in fact carry out any checks on consignors or consignees as these were not his customers.

28. The appellant stated that he was not aware of any suspicious or unusual circumstances surrounding the execution of the transfer order until after he made a request for restoration. The appellant stated that he had no doubts regarding the consignor and that his contract was with the freight-forwarder, PIKO. Accordingly, the appellant was not permitted to contact the consignor directly regarding the load or the documents provided by the freight-forwarder.

29. The appellant was not aware of the driver's involvement in the smuggling until February 2017, at the time of the criminal proceedings. At the time of the transport, the driver had advised the appellant by telephone that the load was checked, sealed and conformed to the transport documentation. The driver did not provide any information that indicated that he was collecting the load at a place other than that designated in the contract.

30. The appellant confirmed that neither PIKO nor Winnicki had specified which driver should be used for the transport booked on 26 April 2016 and so any one of the three drivers engaged by the appellant could have been used for that load. Loads were allocated to the driver closest to the loading point.

31. When asked whether it was, therefore, "good luck" on the part of the smugglers that the load went to a driver who was involved in the smuggling attempt, the appellant replied that he did not know whether it was good luck or not, he had no knowledge of the matter.

32. When asked about the vehicle tachograph, which showed that the goods were not loaded at AB Foods, the appellant replied that he had no knowledge of this until he had seen the papers for the hearing. He had not been aware that the driver went to a different address to that on the transport order.

33. When asked how PIKO or AB Foods would have the driver's contact details, the appellant explained that these would usually be given by the driver at the point of loading, and that it would be noted on the CMR documents. On being shown the relevant CMR documents for the seized load, the appellant confirmed that the driver's contact details were not shown.

34. The appellant noted that the driver had made a number of assertions during the criminal proceedings which the appellant disputes. Firstly, the driver asserted that the instructions for the delivery location and loading/unloading of the transport came from someone called "Mr Dariusz" of Greg-Car. The appellant confirmed that he has never employed someone called Dariusz. The driver also stated that he, the driver, had purchased the ferry tickets: the appellant explained that this was not correct as the appellant had purchased the tickets. Unlike the contracts with the appellant's main customer, this contract had not included the provision of ferry tickets for the transport and so the appellant had purchased the cheapest ferry tickets he could locate, being tickets from Freight Link Euro.

35. The appellant stated that he had now stopped accepting international transport orders and only provided domestic transport services. He also carries out more checks of the freight-forwarders. The appellant did not, however, consider that the checks which he carried out in 2016 were inadequate. He had undertaken what checks he could, to the best of his abilities under the CMR Convention.

Appellant's submissions

36. The appellant submitted that it was unreasonable of HMRC to require hauliers to comply with Border Force requirements without publicising those requirements.

37. The appellant submitted that there was nothing in the CMR Convention that requires a carrier to make any enquiries in respect of the load or transport documentations. The appellant pointed out that Article 11 of the Convention states that the "carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents and information". It was therefore unreasonable for HMRC to expect hauliers to take a "different approach" to the CMR Convention without making that clear to carriers entering the UK.

Policy publication

38. The appellant submitted that HMRC should publicise any general policy that it has not to restore vehicles in various circumstances so that carriers have adequate notice and also can assess the approach of a reviewing officer to determine whether a decision is reasonable in the context of that policy. The appellant quoted Judge Hellier in *Nas and Co Ltd* [2014] UKFTT 050 at §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."

39. In further support of this, the appellant quoted *Rogers t/a LJR Transport* [2004] UK E00773 in which the judge considered that "If the Commissioners wish to rely on a policy which has potentially such damaging effects on individual hauliers, they ought to put the hauliers likely to be affected on sufficient notice of the policy. By "sufficient notice" in this context we mean such effective and specific (detailed) notice as it was practical to give to those likely to be affected by the policy."

40. In this case, HMRC had only disclosed their "Restoration Policy for Disclosure" and this contained material differences to the policy extracts provided in their decision to refuse restoration and their review of that decision. The appellant submitted that the policy stated in the original decision and the review is unreasonable as it takes no, or no sufficient, account of blameworthiness.

Whether the appellant failed to take reasonable steps to prevent smuggling

41. The appellant submitted that the business was very new, as the seizure took place less than five months after the business commenced. At the time of the seizure, there were no circumstances that would warrant care or special attention and so the appellant could not be said to have "turned a blind eye" to any such circumstances.

42. The appellant submitted that at the time of the seizure they were not yet aware of various risks associated with transport orders, and had no notice of such risks, including any notice from HMRC, in contrast to the situation in the case of *Lindsay* [2002] EWCA Civ 267 in which it was stated that HMRC had circulated information about the risk of vehicle loss if involved in smuggling.

43. It was submitted that the appellant was not present at the time of loading, only the driver who had advised the appellant that all was in order. The appellant had made sure that they had the appropriate transport documents. The appellant had made checks of the consignor, although he was not permitted to contact them directly. In Poland there is a general practice that the freight forwarder does not permit carriers to contact clients under a penalty of a fine and the appellant was bound by his contract with the freight forwarder.

44. It was submitted that, in any event, even if the appellant unintentionally failed to take relevant measures, this did not mean that the appellant was knowingly involved in the smuggling attempt on 28 April 2016. Any failure to take reasonable steps was, it was submitted, a breach of HMRC's policy and not a contravention of the law. The appellant was an innocent carrier as opposed to a deliberate smuggler, and cannot be held liable for criminal activities of others.

Reasonableness of HMRC's original decision

45. The appellant submitted that HMRC's decision not to restore the vehicle was unreasonable and contrary to their own policy in that the appellant had no knowledge of the smuggling attempt and so HMRC should have taken that into account, as their policy requires that "vehicle restoration terms should provide a graduated response depending on the degree of blame that can be attributed to the individual". It was

submitted that some degree of blameworthiness is required before a refusal to restore could be a reasonable decision and that, as the appellant is innocent, the decision incorrectly applies HMRC's own policy and so cannot be reasonable.

46. The appellant further submitted that the reason given for non-restoration was simply that the appellant had "failed to take measures to prevent [the] smuggling attempt". It was submitted that this is reason is unclear and so is not compatible with HMRC's policy and is therefore unreasonable.

47. The refusal to restore the vehicle to an innocent party was also submitted to be disproportionate in the case circumstances under Article 1 of the First Protocol to the European Convention on Human Rights. *Rogers* at §64,65 was cited in support of this submission, and that it was an unjustified imposition of a punitive measure which went beyond what was strictly necessary for the objectives pursued and the gravity of infringement.

Reasonableness of the review decision

48. The review decision upheld the original decision and stated that "on the balance of probabilities, the operator was involved or at least complicit in the smuggling attempt" and noted that the appellant "chose to become involved in a smuggling attempt". It was submitted that this reasoning was different to that in the original decision, which leads to confusion and ambiguity.

49. It was submitted that the Review Officer had no or insufficient evidence to decide that the appellant was responsible for the smuggling attempt. It was submitted that the reasoning for the review decision is therefore not intelligible and was inadequate. The decision failed to disclose how any matter of law or fact was resolved. The Review Officer erred in law by failing to reach a rational decision on relevant grounds.

50. It was, therefore, submitted that HMRC were unreasonable in upholding the original decision, which itself was unreasonable as it failed to apply HMRC's policy correctly.

Summary submission

51. The appellant submitted in summary that all of the information indicated that the appellant was not involved in the smuggling attempt. No documentary evidence was inconsistent with that, and it was clear from the documents that the appellant was not involved.

52. HMRC's decision was clearly unreasonable as it did not take into account relevant factors: the appellant was a new business and could not be compared with a long-established business. The appellant had done everything possible to check the load and had no reason to believe or be suspicious that there was anything wrong. The appellant had limited involvement in the process and was not responsible for checking anything that was not on the CMR.

HMRC evidence

53. HMRC produced a bundle of evidence. Officer Hodge produced a witness statement and gave oral evidence.

Review process

54. Following the request for restoration, HMRC asked for proof of ownership of the vehicle and for information about steps taken to prevent smuggling. The appellant provided the lease agreement, transport order and drivers contract. The appellant also confirmed that there were no specific internal procedures regarding smuggling because the appellant did not consider that anyone would use the vehicle for smuggling. The driver's criminal records and statement of psychological fitness had been checked. The order for the load had been placed by Mr Winnicki and that they had been unable to contact him since the seizure.

55. Following the refusal to restore, when a request was made to review the decision, HMRC asked for further information including support documentation regarding the load shipped to the UK on 5 April 2016 and returned to Poland on 6 April 2016. No information was received in response to this request.

Border Force Policy

56. In the review decision, the officer set out Border Force Policy as follows:

57. Border Force Restoration Policy requires that each case be considered carefully on its own merits and depends on the circumstances.

58. Circumstance A: where an operator (including a carrier) provides evidence satisfying Border Force that *neither the operator nor the driver* were responsible for nor complicit in the smuggling attempt then, if the operator also provides evidence that basic reasonable checks were carried out to confirm the legitimacy of the load and detect any illicit load, the vehicle will normally be restored free of charge. Otherwise, on a first occasion, the vehicle will be restored for a fee. On a second or subsequent occasion within 12 months, the vehicle will not be restored.

59. Circumstance b: if the operator provides evidence satisfying Border Force that *the driver but not the operator* was responsible for or complicit in the smuggling attempt then, if the operator also provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless the same driver, working for the same operator, is involved on a second or subsequent occasion in which case a fee will be charged for restoration unless that second or subsequent occasion is within 12 months of the first, in which case the vehicle will not be restored. If the operator cannot show that reasonable steps were taken, then the vehicle will normally be restored for a fee on the first occasion but will not normally be restored on a second or subsequent occasion.

60. Circumstance C: if the operator *fails to provide evidence* satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt then, where the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for a fee. If the revenue involved is £50,000 or more, or the seizure is the second or subsequent occasion within 12 months, the vehicle will not normally be restored.

61. The Review Officer had considered that Condition C applied: the driver was clearly involved. On the basis of the whole of the information available, the Review Officer had considered that the appellant was also involved.

62. In the hearing, the Review Officer was asked why they had not disclosed their full policy on restoration. The officer explained that HMRC only disclose relevant policies. In this case, as the appellant was a haulier, it was not relevant to disclose the policy applying to finance companies.

63. It was put to the Review Officer that expecting drivers to know of HMRC's policy, to know that HMRC expects more than compliance with the CMR Convention, was not reasonable. The Review Officer replied that all that was necessary was to know not to smuggle. Knowledge of HMRC policy should not make any difference to a decision whether or not to be involved with smuggling.

64. The Review Officer was further asked how the reasonableness of checks could be measured when no description of what amounted to reasonable checks had been given. The Review Officer explained that there was no prescriptive list of checks: such checks were a matter of common sense.

65. It was put to the Review Officer that the appellant had taken reasonable care. The Officer replied that, in giving evidence, the appellant had confirmed that he had made no checks in respect of his customer or the load.

Review decision

66. The review decision considered all the information afresh and noted that the burden of proof was on the appellant to provide the evidence required. The review looked at whether the overall decision should be upheld, it did need to confirm the specific thought processes underlying that decision.

67. HMRC were acting within their powers in the seizure of the vehicle and then have a statutory discretion which is clear as to the basis on which a seized vehicle may be restored.

68. The failure of the appellant to provide any information regarding the load carried on 5 and 6 April led the Review Officer to doubt the legitimacy of those trips. Enquiries made of the consignee showed that the consignee had not been expecting such goods and did not deal in dried pasta. The ferry crossing tickets on 5 and 6 April had been obtained in the account of Freight Link, as had the ferry crossing for the date of seizure, whereas records showed that the appellant otherwise used LKW Walter.

69. The Review Officer considered that the nature of the load seized was such that it was not reasonable to consider that they had to have been placed into the load when the vehicle was loaded, so that the operator and driver must have been aware. As the revenue involved was in excess of £600,000 and the operator had not provided evidence that they were not complicit in the smuggling attempt, the Border Force policy was that the vehicle should not be restored.

70. The Review Officer considered proportionality and concluded that, given the amount of revenue involved, it was reasonable not to restore the vehicle. The question of hardship was also considered, and the Review Officer concluded that the operator had chosen to be involved in the smuggling attempt and should have considered the consequences of his actions in advance of becoming involved.

71. The review decision included details of the applicable legislation, extracts from Border Force notices, a summary of procedures on the movement of excise goods between the EU and the UK, a note about the CMR Convention, a list of reasonable checks to be undertaken by operators/drivers to prevent smuggling and a list of indicators that suggest that an operator has taken reasonable steps to prevent smuggling.

72. The review, date 21 September 2016, concluded that non-restoration was appropriate as the Review Officer had "not found sufficient or compelling reasons to offer restoration". The original decision was therefore upheld.

73. The Review Officer was asked why they considered that the appellant was responsible for the smuggling attempt. The officer explained that it had not been possible to give full details at the time of the restoration request as the criminal investigation had been ongoing.

74. The Review Officer was asked where the proof was of illegal activity or wrongdoing by the appellant. The Officer replied that the overall evidence pointed to the involvement of the appellant. The decision had been taken on the basis of a basket of information:

(1) The vehicle had not gone to the address given on the documentation for the consignor and the named consignor knew nothing of the load and did not produce the type of goods listed in the documentation;

(2) The consignee also knew nothing of the load and did not purchase the type of goods listed in the documentation. The address given for the consignee was also not the address at which they would have received deliveries;

(3) The documentation was therefore fictitious and had been confirmed to be so with minimal checks;

(4) The driver could not have been solely responsible for the smuggling attempt as he was not in a positon to acquire more than 2,500,000 cigarettes;

(5) The circumstances of the return of the previous load on 5/6 April were also unusual in that the purported consignor was said to have contacted the

driver directly to request the return. In the Review Officer's experience, such request would have been made through the haulier and the freight forwarder;

(6) The driver had negotiated a price for the return of the goods in the previous load on 5/6 April 2016 without reference to the appellant, which seemed unusual;

(7) The circumstances relating to the loading of the goods indicated that the appellant must have been involved: someone had told the driver to go somewhere other than the address on the documentation, and that person had known which driver was involved in the load. All of this indicated that the appellant had some knowledge of the smuggling attempt.

HMRC submissions

Proportionality

75. It was submitted that the cases referred to by the appellant on proportionality, including *Lindsay*, related to individuals smuggling for their own use and so were not relevant to a commercial smuggling attempt. It was submitted that there was nothing disproportionate or unfair about a refusal to restore a vehicle used to smuggle cigarettes with duty in excess of £600,000.

Failure to promulgate policy document

76. It was submitted that it would not be good practice or in the public interest to have access to the fine detail of internal policy because of the risk that smugglers would tailor their behaviour to that published policy.

77. In any case, it should not be a surprise that smuggling over 2,500,000 cigarettes is not permitted and has serious consequences.

Reasonableness of the review decision

78. It was submitted that this is an appeal against the review decision: the original decision is not relevant as the Review Officer was required to and did approach the matter afresh rather than reviewing the first letter.

79. It was further submitted that the key question was whether the Review Officer's decision was unreasonable, outside the range of reasonable decisions on the basis of the information available. It was submitted that it was not, that the decision was a conclusion which could be reasonably reached on the evidence.

80. It was submitted that the review letter was clear as to the reasons for the refusal to restore.

81. It was submitted that the appellant has not shown that the decision in the review letter was unreasonable. The driver's responsibility does not mean that the appellant cannot also be responsible. It was submitted that the standard of proof is the balance

of probabilities taking into account all the relevant circumstances which, it was submitted, are:

(1) There was a smuggling attempt by someone in which the driver was involved, as shown by his conviction, and this is not disputed by the appellant;

(2) The appellant had no internal procedures to prevent smuggling and stated that this was because the appellant did not believe that anyone would use the vehicle for smuggling. It is not credible that a business involved in international transportation would have such a belief. At best, the appellant's statement suggests that it is a business wiling to exercise wilful blindness towards smuggling being conducted using its vehicles;

(3) The appellant failed to provide satisfactory evidence in relation to the load transport on 5/6 April which had the same characteristics as the seized load – the same vehicle, the same driver, the same description of the goods, the same consignor and consignee and the same freight forwarder on the same terms as to ferry crossings;

(4) The purported consignor and consignee had no knowledge of the loads. Evidence showed that vehicle was not driven to or near to the purported consignor;

(5) The nature of the concealment of the cigarettes was such that it must have been carried out with the knowledge of the driver either on loading or later; if the cigarettes had been inserted after loading, the appellant must have had knowledge of this from the vehicle records as a substantial delay in transport would have arisen;

(6) It was not credible to think that the driver acted alone.

82. It was submitted that the appellant's suggestion that they did not foresee any risk of smuggling and the overall approach of the appellant, including the failure to make any reasonable checks, goes beyond naivety and negligence. It was submitted that the appellant has a history of working in the haulage businesses and so it is further not credible that this is a case of incompetence rather than complicity.

83. It was submitted that the appellant's failure to make basic checks of the freight forwarder was not credible commercially. No check had been made on the corporate register system, which would have shown that the freight forwarder did not exist. No financial checks to confirm ability to pay had been made. No business would fail to make such checks in a genuine business relationship because of the direct risk to the business itself if it provides services which cannot be paid for.

84. It was submitted that the appellant's assertion that they were unable to contact the consignor because of the existence of the intermediary freight forwarder was not credible. The appellant had not explained how the consignor had the driver's contact details when the appellant was unable to contact the consignor.

85. It was also submitted that the appellant's failure to make any checks in respect of the consignee was beyond negligence or recklessness.

86. It was submitted that the appellant's reaction to the 5/6 April load being returned was not credible, particularly not their statement that all communication had been between the consignor and the driver and that the driver had agreed the return fee without reference to the appellant. It was submitted that it was not credible that the appellant should have believed that this was a genuine commercial transaction nor that the appellant made no further checks when an identical transaction was presented three weeks later and no payment had been made for the first transaction.

87. It was submitted that the appellant must have had knowledge of the smuggling attempt for the driver to have been told to collect the load at a place other than that listed on the CMR documentation, and to have been informed where the load should be delivered, as the address listed on the documentation for delivery was clearly not correct as the business there had no knowledge of the consignment. Those involved in the smuggling could not have known which driver they would get if the appellant had no knowledge of the smuggling attempt.

88. It was therefore submitted that, given these factors, it is within the range of reasonable conclusion for the Revenue Officer to conclude that the business must have been complicit in the smuggling attempt in relation to the seized load.

Relevant law

89. The relevant law was not in dispute can be summarised as follows:

90. Section 152(b) CEMA 1979: the Respondents may, as they see fit, restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts;

91. Section 14(2) FA 1994: a person in relation to whom, or on whose application, a decision under Section 152(b) CEMA 1979 has been made may require the Respondents to review that decision;

92. Section 16(1) FA 1994: the person who required the review may then appeal against the review decision;

93. Section 16(4) FA 1994: in relation to any such appeal, the powers of this Tribunal are confined to a power, where this Tribunal is satisfied that that the decision could not reasonably have been arrived at, to direct that the decision is to cease to have effect from such time as this Tribunal may determine, to require the Respondents to conduct, in accordance with the directions of the Tribunal, a further review of the original decision or, in the case of a decision which has already been acted on or taken effect, to declare the decision to have been unreasonable and to give directions to the Respondents as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.

Discussion

Reasonableness of the decision

94. The relevant law makes it clear that the decision as to whether or not to restore a forfeited vehicle is a matter for HMRC to determine at their discretion and that this Tribunal can disturb that decision only if it is unreasonable in the sense described in the leading case *of Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*). The Tribunal is not permitted to consider the relevant facts afresh and determine whether or not the Tribunal agrees with the conclusion that HMRC has reached.

95. Instead, the Tribunal needs to consider whether, in reaching that conclusion, HMRC have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. We are entitled to consider whether HMRC have applied their general policy and whether that general policy is reasonable in the *Wednesbury* sense but, as long as both of those are the case, HMRC's decision cannot be impugned simply because this Tribunal or some other person might have reached a different conclusion on the same facts.

96. The decision being appealed is the review decision; the role of the reviewer is to approach the matter afresh and come to their own conclusion on the matters involved. We therefore consider that the appellant's submission that there is confusion between the original decision and the review decision is not relevant.

97. We have considered the submissions of both parties and conclude that the review decision was within the grounds of reasonable decisions for the following reasons.

98. It is not sufficient for the appellant to state that it had no reason to believe that the load might have been a smuggling attempt: the burden of proof is on the appellant to show that it took reasonable steps to establish that this was the case.

99. We do not agree with the appellant's contention that it is unreasonable for HMRC to expect operators to undertake reasonable steps to prevent smuggling in excess of the CMR requirements: the CMR Convention is not intended to prevent smuggling, it governs contracts for the international carriage of goods by road (as stated in the title of the Convention).

100. We consider that the factors which the Review Officer took into account, set out in evidence, are relevant factors, and note particularly:

(1) the appellant's statement that it had no internal procedures in relation to smuggling because it did not believe that anyone would use them for smuggling purposes. Although this is an explanation, it is not a reasoanble excuse or in any sense a matter which was relevant to the application of HMRC's policy. HMRC were entitled and (given their policy) obliged to have regard to the aspects in which there was a failure to carry out basic reasonable checks in the process of reaching their decisions – these were plainly relevant matters; and

(2) it is clear that the driver was involved with the smuggling attempt and it is clear from the tachograph evidence that the driver made no attempt to collect the load at the address on the CMR documentation. The appellant gave no explanation as to how the driver knew that the load should be picked up from a different location and has confirmed in evidence today that the freight forwarder would not have known which driver was assigned to the delivery.

101. We agree that it is not unreasonable for HMRC to refuse to restore the vehicle in such circumstances.

102. We do not consider that HMRC failed to take into account any relevant factors: the appellant's assertion that they were not involved in the smuggling attempt was clearly taken into account and we consider that HMRC were not unreasonable in deciding that the evidence did not support this.

103. We do not agree with the appellant's assertion that a relevant factor was that they were a new business and could not be expected to have the same experience as a long-established business. A business providing international transportation should familiarise itself with the requirements of the territories in which it operates. The appellant as an individual had, in any case, been employed in the haulage industry in general for some time before beginning this business.

104. Finally, we do not agree that HMRC are required to publish full details of their policy on restoration of vehicles. It should be clear to anyone involved in smuggling that there will be serious consequences to such actions without HMRC specifically publishing what such actions will be. We consider that the policy information provided by HMRC in the review decision was sufficient for the appellant to understand the basis on which the information was made.

Proportionality

105. The case of *Rogers* was cited by the appellant in support of the submission that the refusal to restore was disproportionate. That decision noted that "we consider that the policy is inherently liable to produce a figure for a restoration fee which is disproportionate in a case where the haulier is not implicated in any attempted excise fraud".

106. In this case, we have found that it is reasonable for HMRC to have to concluded that the appellant was implicated in the attempted smuggling attempt and so the refusal to restore is not disproportionate.

Decision

107. The appeal is dismissed as we find that HMRC's decision was not unreasonable for the reasons given above.

108. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 20 MARCH 2018