



**TC06454**

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**Appeal number: TC/2017/01821**

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*Customs Excise and Management Act 1979 sections 88 and 139 - seizure and confiscation of vehicle - refusal of restoration - s 16 Finance Act 1994 - whether refusal reasonable - no - Respondent's policy relating to restoration where vehicle belongs to a third party who was not present at the time of seizure was not correctly applied - further review directed under s16(4)(b) FA 1994*

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**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

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**DANIEL WYSK**

**Appellant**

**- and -**

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**THE DIRECTOR OF BORDER REVENUE**

**Respondents**

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**TRIBUNAL: JUDGE: MICHAEL CONNELL  
MEMBER: RAYNA DEAN**

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**Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham on 8 November 2017**

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**Mr Shaun Donovan for the Appellant  
Ms Rachel Pennington of Counsel instructed by the General Counsel and Solicitor to UK Border Agency for the Respondents**

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## DECISION

### The Appeal

5 1. This is an appeal by Daniel Wysk, (“the Appellant”) pursuant to s 16 Finance Act  
1994 (“FA 1994”) against the decision of the Respondents upheld in a review  
decision dated 1 February 2017, under s 14(5) and Schedule 5 of the Finance Act  
1994, not to restore the Appellant’s vehicle, an Audi A6, registration number NSZ  
10 GR29 (“the vehicle”). The vehicle was seized on 12 November 2016 at the port of  
Dover.

### Background

15 2. On 12 November 2016 at Eastern Docks, port of Dover, the vehicle was  
intercepted by an Officer of UK Border Agency. The vehicle was being driven by the  
Appellant’s father Mr Zbigniew Wysk. The Officer established from replies to initial  
questions that the vehicle belonged to Mr Wysk’s son, the Appellant, and that Mr  
Wysk senior was going to Mansfield, Nottinghamshire. In reply to further questions  
he said that he did not have any cigarettes or tobacco.

20 3. The vehicle was searched and during the course of that search, a total of 4,400  
cigarettes, with an Excise Duty of £1,014.60, (“the goods”), were found concealed in  
the dashboard, boot and bumper of the vehicle.

4. The Officer was satisfied that the goods were not for own use and therefore held  
for a commercial purpose. She therefore seized the goods under s 139(1) of CEMA as  
being liable to forfeiture under both Regulation 88 of the Excise Goods (Holding,  
Movement and Duty Point) Regulations 2010 and s 49(1)(a)(i) of CEMA.

25 5. The vehicle was also seized under s 139(1), as being liable to forfeiture under s  
141(1)(a) CEMA because it was used for the carriage of goods liable to forfeiture.

30 6. Mr Wysk senior was given form ENF156 “*Seizure information notice*” and Notice  
12A, “*What you can do if things are seized by H M Revenue & Customs*”. Notice 12A  
explains that one can challenge the legality of a seizure in a Magistrates’ Court by  
sending a notice of claim to the Border Force within one month of the date of seizure.

7. Neither Mr Wysk senior nor the Appellant challenged the legality of the seizures  
and the vehicle and goods were therefore condemned as forfeit to the Crown by the  
passage of time under paragraph 5 of Schedule 3 of CEMA. This meant that the goods  
were deemed to have been held in the UK for a commercial purpose.

35 8. On 24 November 2016 Mr Shaun Donovan of Resolutions, Legal Services, acting  
on behalf of the Appellant, wrote to the National Post Seizure unit of Border Force,  
providing proof of the Appellant’s ownership of the vehicle asking for it to be  
restored to the Appellant.

9. On 15 December 2016 an Officer of UKBF replied refusing to restore the vehicle. Mr Donovan was provided with a summary of the policy adopted by UKBF for the restoration of private vehicles as below:

5 *'A Summary of the Policy for the Restoration of Private Vehicles Seized For Carrying Excise Goods Liable To Forfeiture*

The general policy is that private vehicles should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored subject to conditions (if any) (e.g. for a fee) in the following circumstances:-

- 10
- If the excise goods were destined for supply on a 'not for profit' basis, for example, for re-imburement at the cost of purchase but not including any contribution to the cost of the journey.
  - If the excise goods were destined for supply for profit, but the quantity of excise goods is small, and it is a first occurrence.
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- If the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle.

In all cases, any other relevant circumstances will be taken into account in deciding whether restoration is appropriate.'

20 10. The Officer making the decision advised that he had looked at all of the circumstances surrounding the seizure but did not consider that there were any exceptional circumstances that would justify a departure from the Commissioners' usual policy not to restore. The Appellant was advised that he could request a review of the decision by an impartial review officer.

25 11. On 1 January 2017 the Appellant's agent replied to Border Force asking for a review of the decision and provided his reasons for restoration.

- The vehicle belongs to the Appellant not Mr Wysk senior, being the person involved in the seizure of goods. The value of the car is £4,000.00.
  - The Appellant was not present when the vehicle was seized. He is not named on the 'warning letter' and is wholly innocent in the matter.
  - Mr Wysk senior does not speak English at all and was not afforded the right or courtesy of a Polish interpreter when stopped on 12 November 2016. Had a Polish interpreter been present, Mr Wysk senior would have been allowed to explain that the cigarettes were for personal use and gifts. He had last visited the UK in 2001, in his former profession as a truck driver and this was the first time he was visiting his son in England.
  - Mr Wysk Senior had 3,600 cigarettes with him, not 4,440 as claimed. The value of the cigarettes was £200.00 not £1,014.60 as claimed. In any event
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there is no duty or tax due on the cigarettes on the grounds that they were brought in from Poland, an EU member State for personal use.

- Mr Wysk senior ‘does not have any previous offence or at all’.

5 12. The agent’s letter was acknowledged by Border Force on 16 January 2017. An Officer wrote explaining the review process and invited the Appellant to provide ‘any further information’ in support of his request for a review. The Officer said that the Department had a statutory obligation to conduct the review within 45 days and therefore, as the request had been received on 5 January 2017, the review had to be undertaken by 19 February 2017.

10 13. On 1 February 2017, Officer David Harris, the reviewing Officer, refused the Appellant’s request for restoration. He said that he had considered the decision afresh on its own merits including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances existed that should be taken into account.

15 14. He said he had “*examined all the representations and other material that was available to the Border Force both before and after the time of the decision*”. Officer Harris did not elaborate further. He did not address or make any reference to the points raised in the Appellant’s agent’s letter of 1 January 2017, but said “*you were invited to provide any further information in support of your request for a review but*  
20 *nothing has been received*”. The invitation to send “*any further information*” was contained in the Border Force’s acknowledgement letter of 16 January 2017, which it is assumed the Appellant’s agent ignored, having already put forward in his letter of 1 January 2017 facts and reasons which he considered should be taken into account.

15. Officer Harris went on to say:

25 “*If the vehicle were owned by a third party who was not present at the time of the seizure, and can show that they were both innocent of and blameless for the smuggling attempt, then consideration may given to restoring the vehicle for a fee. If in addition to being both innocent and blameless the third party demonstrates that they had taken reasonable steps to prevent smuggling in the*  
30 *vehicle then consideration may be given to restoring it free of charge. However, a vehicle will not normally be restored to a third party in a situation where that would be tantamount to restoring it to the person responsible for the smuggling attempt.*”

35 *I have not been presented with any submissions from your client concerning the reasons or circumstances as to why your client’s vehicle was being driven by his father and being used to smuggle excise goods in to the UK. In the absence of such representations I cannot determine if indeed your client is wholly innocent in this matter.”*

40 16. Officer Harris then listed 17 questions mainly regarding the circumstances surrounding the use by Mr Wysk senior of his son’s car, and proceeded to conclude

5 that without answers to those questions he could not determine “*which element of the policy your client fits in to, and therefore I must maintain the original decision not to restore the seized vehicle to your client. I have not found sufficient and compelling reasons to offer restoration. I consider this decision to be both reasonable and proportionate.*”

17. Officer Harris advised the Appellant’s agent:

10 “*If your client has fresh information that he would like me to consider then please write to me: however..... if your client wishes to contest my decision he may now, within 30 days of the date of this decision, lodge an appeal with a Tribunal.*”

18. The Appellant’s agent did not respond to Officer Harris’s letter but instead lodged a notice of appeal with the Tribunal on 18 February 2017. In the grounds of appeal the Appellant explained more background regarding his father’s use of the vehicle.

15 “*The grounds to my appeal are that my car was seized from my father, who was delivering the car to me from Poland on the 12 of November 2016. The car is my only vehicle. My father does not own a car and had the use of my car since I have been living in England. I was not present when the car was seized and I am wholly innocent and blameless of any ‘smuggling’ attempt. I have been deprived of my car for 3 months now since I expected its delivery. The car is insured for any driver.*

20  
25 *It is my understanding that my father was not asked any questions in Polish and no Polish interpreter was present or called for by the Border Force officer. It is clear that he was unable to answer any questions of the Border Force officers speaking in English. My father does not speak English. This was explained to the Review Officer in the application for a review, however it has not been addressed.*

30 *The Review Officer in his decision refers to an “invitation to provide any further information” made on the 16th of January, 2016. However he failed to describe what this information may be until his decision dated 1st of February, 2017 where he lists 16 or 17 questions he would like answering. I believe it is unreasonable to expect answers to questions that have not been asked or communicated. As the Review Officer decided that there was further information he required to make his decision, the onus was on him to ask those questions, prior to his review. In consequence his review decision is unsafe on the ground of natural justice.*

35 *The last time my father visited England was in 2001. He is not a frequent traveller to England. The car has not been adapted for ‘smuggling’ or at all.*

40 *I have been living and working in England for one and a half years, having arrived by coach from Poland. My father was coming to England to work as a driver for a Polish speaking Transport Company and to deliver my car to me. While it is understood that the Tribunal cannot consider the legality of the*

*seizure, had my father been asked in Polish who the cigarettes were for, his answer is that they were his and for his own use only, as he was coming to England to work and settle. My father's statement of truth will be referred to at my appeal.*

5 *My father and I have never been stopped by the Border Force or had any goods seized at any time before."*

10 19. By setting out the background to his father's use of the vehicle and providing further information regarding insurance, whether he owned another vehicle and that neither he nor his father had ever travelled to the UK with excise goods, the Appellant answered all the points that had been raised by Officer Harris, insofar as relevant.

### **Relevant legislation**

20. Section 88 of CEMA provides as follows:

"Forfeiture of ship, aircraft or vehicle constructed, etc. for concealing goods.

Where-

15 (a) a ship is or has been [in United Kingdom waters]; or

(b) an aircraft is or has been at any place, whether on land or on water, in the United Kingdom; or

(c) a vehicle is or has been within the limits of any port or at any aerodrome or, while in Northern Ireland, within the prescribed area,

20 while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ship, aircraft or vehicle shall be liable to forfeiture."

21. Section 139(1) of CEMA provides that:

25 "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."

22. Section 141(1) of CEMA states that:

"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 things so liable, shall also be liable to forfeiture."

35 23. Section 152 of CEMA establishes that:

“The Commissioners may, as they see fit-

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

24. Sections 14 to 16 of the Finance Act 1994 provide that:

5 “Section 14 (2):

(2) 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,

10 (b) a person in relation to who, 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,

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

15 “Section 15(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

20 (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.”

“Section 16 (4) to (6):

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

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

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

(c) ....

(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.

24. Under s16 Finance Act 1994, it is for the Appellant to show that the grounds on which any appeal has been brought, have been established.”

### **Evidence**

5 25. The bundle included correspondence between the parties including the decision letter, the review letter and associated paperwork. The witness statements of Officer Harris who also gave evidence on oath, and the witness statements of both Mr Wysk senior and the Appellant were also included and we were provided with a statement of case by both parties.

10 26. The UK Border force Officer who intercepted the vehicle and whose copy ID was shown in the bundle as ‘S Cory’, did not provide a witness statement, did not attend the appeal hearing, and page 1 of BOR156 which would have provided the Officer’s full name, unique identifier and signature was missing from the bundle.

27. Mr Wysk senior attended and gave oral evidence to the Tribunal via a Polish interpreter.

15 28. In his oral evidence he agreed that he had been able to answer the Border Force officer’s questions in English, but said here had been very few questions and in reply to some questions, he had used gestures rather than words. He said that he kept asking for an interpreter, (this is not mentioned in the Border Officer’s notebook.)

20 29. In his witness statement, he said that he was “coming to England to deliver the car and to work for a Polish speaking transport company based in Nottingham” where he is now employed.

25 30. When asked for an ID card he understood the request and had given the Officer his son’s vehicle registration document and his own ID card. He agreed that he had been given Form 12A and he was aware that he was able to challenge the seizure but did not do so.

31. He said that:

- 30 • He had brought with him 18 cartons of cigarettes for his own use. At the rate of 20 cigarettes per day they would last him almost 26 weeks, which would see him through until he was properly earning. The cigarettes were not a popular brand and of little commercial value. He had paid approximately £200.00 for the cigarettes. He said that he was not asked in English or in Polish whether the cigarettes were for his own use.
- He asked the UK Border Officer to engage the services of a Polish interpreter during questioning.
- 35 • The word for tobacco in Polish is “Tyton” and for cigarettes it is “Papierosy”; neither word was used in questioning.



- The last time he visited England was in 2001. He is not a frequent traveller to the UK and certainly not a “smuggler”.
- His son Daniel Wysk had no knowledge that he was bringing any cigarettes with him from Poland. His son is wholly innocent and wrongfully suffering the loss of his only vehicle through no fault of his own.
- He has never been stopped by Border Control before and has no record for any offence at all.

32. In giving evidence at the hearing, Mr Wysk senior agreed that the cigarettes had been hidden in the vehicle rather than left lying in an open place. They were behind panels that were easily unclipped and those under the bonnet had been placed there without the need to remove the bumpers. There were packets/sleeves, each containing 200 cigarettes. In answer to the question “why were the cigarettes concealed” he replied “I don’t know.”

33. In giving oral evidence Officer Harris was asked why he put questions to the Appellant whilst at the same time arriving at a decision. He said that he was under time pressure having only 45 days to conclude the review. He agreed that he had not told the Appellant that he had or was running out of time. He said that he wanted to arrive at a conclusion which was in line with ‘Policy’. However his review letter was dated 1 February 2017 and he had until 19 February 2017 to complete the review, so it was not entirely clear why he put questions to the Appellant if he was going to arrive at a conclusion, without having the benefit of the Appellant’s answers. He said that in his letter he did say to the Appellant that he would *‘take into account any fresh information provided’*. However he informed the Appellant that if he disagreed with the decision he could lodge an appeal with the Tribunal.

34. Officer Harris accepted that Mr Wysk senior’s English was very poor and that possibly as a consequence, the UK Border Force Officer who seized the vehicle had asked very few questions of him, in particular with regard to the circumstances relating to the use of his son’s car and whether the cigarettes were intended for personal use. He also accepted that he had not addressed this particular point or any of the other points referred to in Appellant’s agent’s letter of 1 January 2017.

35. He also agreed that having now seen the information in the Appellant’s Notice of Appeal he would if asked to review the matter again be in a much better position “*to make an informed decision*”.

### **The Appellant’s case**

36. The Appellant contends that the Respondents erred in refusing to restore the vehicle. The reviewing Officer failed to properly consider and apply the Respondent’s Policy to the Appellant’s circumstances given that he was not present at the time of seizure. He also failed to reach a reasoned conclusion upon the Appellant’s knowledge, or lack of knowledge, of the importation of the cigarettes and arrived at a

conclusion without answers to questions which were very relevant to a reasoned decision.

5 37. Under the relevant regulations there is no restriction on the amount of cigarettes a person is allowed to bring into the UK for their own use from an EU country. - Regulation 13 (3)(b) Excise Goods (Holding, Movement, and Duty Point) Regulations 2010.

10 38. Mr Wysk senior was not asked in English or in Polish whether the cigarettes were for his own use. It is clear from the note books of both Border Enforcement Officers (BEOs) that Mr Wysk senior did not speak English and yet no effort at all was made to engage the services of an interpreter during questioning.

15 39. It is relevant to note the word for tobacco in Polish is “Tyton” and for cigarettes it is “Papirosy”; neither word was used in questioning. Mr Wysk senior was not asked if he had paid duty on the cigarettes in Poland. This assumption by the reviewing Officer is obtuse. The amount of cigarettes involved (20 or 22 cartons) could hardly be considered on the balance of probabilities to be a “fraudulent commercial venture”. There would be very little commercial value in 20 or 22 cartons of non-commonly known cigarettes. On the balance of probabilities, it is much more likely that the cigarettes were for personal use.

20 40. The Appellant is innocent and wholly blameless; in addition he has demonstrated that he took every reasonable step in preventing his car from being used for smuggling by trusting only his father to have access to his car.

25 41. The last time Mr Wysk senior had visited England was in 2001. He is not a frequent traveller, and certainly was not aware that the provisions of reg.13(4)(h) of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 had changed in 2011 from 3,200 (16 cartons) cigarettes to 800 to alert Border Enforcement Officers to ask if they were for own use. This is not a limit or restriction, but merely a guide for the BEOs to ask questions.

30 42. The Appellant accepts that following the decision of *Revenue and Customs Commissioners v Jones and Another* [2012] 2 WLR 544, the Tribunal does not have the jurisdiction to consider the lawfulness of the seizure of the vehicle because it is deemed to have been lawfully seized pursuant to paragraph 5 of Schedule 3 of CEMA. However whilst the Appellant does not dispute the legality of the seizure, he does claim that the proper procedures were not followed in Mr Wysk senior’s case or at all. An assumption was made that the cigarettes were for commercial use without the question ever being put to Mr Wysk senior.

35 43. Mr Wysk senior’s human rights were compromised when the Border Enforcement Agency made no endeavours to communicate with him or alert him to the substance of the allegation made against him.

40 44. From the outset, the Agency wrongly assumed the cigarettes were for commercial use. The Officer did not ask whether they were for own use either in English or Polish and then, without having an answer to that question, went on to compound her error

by seizing a third party's vehicle. In the Appellant's agent's words "The Border Force Officers were on a frenzy of errors. This was not reasonable."

5 45. The Notice of Appeal presented "fresh information" in the form of answers to the Reviewing Officer's 17 questions. However, the Appellant has not received any further consideration from the Reviewing Officer as promised in his letter.

10 46. Officer Harris does not appear to have considered all factors within the Respondents' policy, insofar as the vehicle belonged to a third party, the Appellant, who was not present at the time of seizure. The importance of ascertaining the circumstances regarding Mr Wysk senior's use of the vehicle is reflected in the 17 questions which Officer Harris put to the Appellant at the same time as arriving at his review decision.

15 47. The Appellant's letter seeking a review refers to the fact that his father was not given a proper opportunity to explain that the cigarettes were for personal use and gifts. Given that was one of the main reasons for the Appellant's request for a review, the failure to specifically address the Appellant's case in the context of that part of the Respondents policy was unreasonable. The Respondent failed to consider a material assertion by the Appellant and its applicability to the Respondents policy.

20 48. Officer Harris did not address the knowledge of the Appellant as the owner of the vehicle, or reach any reasoned conclusion as to the Appellant's knowledge of the circumstances leading up to the seizure of the vehicle.

### **The Respondents' case**

25 49. As the legality of the seizure of the vehicle was not challenged by the Appellant or any other party at the Magistrates' Court, the vehicle was condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to CEMA (deemed condemnation). It is therefore not open to the Appellant to raise the liability to forfeiture or legality of seizure as a ground of appeal, in that the Tribunal has no jurisdiction other than to find that the vehicle was lawfully seized.

### *Reasonableness of Review decision*

30 50. Officer Harris's decision on 1 February 2017 not to offer to restore the vehicle was reasonable. This was not an arbitrary exercise of power by the Officer, but rather had been carefully considered in the light of relevant legal and policy considerations. The Respondents policy in these matters is intended to prevent cross-border smuggling and to disrupt the illicit flow of goods to the market. However, each case is determined on its individual merits and the precise application of the policy will  
35 depend upon the various factors referred to in the policy.

40 51. In its letter dated 1 February 2017, Officer Harris clearly sets out how he came to the decision not to restore the vehicle. In particular, the facts of the case led the Review Officer to reasonably conclude that the goods were held for a commercial purpose: the Appellant's father failed to disclose any of the excise goods, thus misleading the Officer about the true quantity of them. The Appellant did not provide

any further information to support his request for restoration as invited in the letter to his agent of 16 January 2017. In consequence the Respondent reasonably applied its policy to the Appellant's case.

5 52. The review officer could find no reason to vary the Agency's normal policy not to restore. There were no exceptional factors that militated towards restoration of the vehicle. The review decision was one that could reasonably have been arrived at.

### Conclusions

10 53. The function of the Tribunal is to determine whether the Respondents' decision not to restore the vehicle to the Appellant was a decision which could not have been reasonably arrived at. In assessing whether the decision was reasonable, the decision maker, Officer Harris, had to properly consider all relevant matters and not take into account any irrelevant matters.

15 54. The Tribunal can exercise its fact finding power to consider all the facts of this case, assessing whether the facts upon which the Respondents acted were correct and also assess the reasonableness of the decision on the basis of facts that were not before the Respondents at the time of the decision - *Gora and Others v Customs and Excise Commissioners* [2004] QB 93, including the information provided by the Appellant in his notice of appeal.

20 55. For the purposes of s16 FA 1994 the term "unreasonable" has a *Wednesbury* meaning, as defined by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, when he held:

25 "A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from the consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it may within the powers of the authority. *Waddington L J in Short v Poole Corporation* (1926) Ch. 66 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into  
30 consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all those things run into one another."

56. It is clear from the note book entries of the Officer who seized the vehicle that no questions were put to Mr Wysk senior as to whether the cigarettes were for his own personal use, or the circumstances which led to him driving a third party's vehicle.

35 57. The reviewing Officer failed to properly consider and apply the Respondents' Policy to the Appellant's circumstances given that he was not present at the time of seizure. As a consequence he failed to address the Appellant's knowledge, or lack of knowledge, of the importation of the cigarettes. The 17 questions which were put hypothetically or otherwise to the Appellant show that the reviewing Officer was  
40 clearly aware of the need to reach a reasoned decision in this regard. However he arrived at a decision without answers to those questions.

58. Although the reviewing Officer informed the Appellant that he would consider any *fresh* information, it is not clear how he intended to use any fresh information because he had reached a final decision, having informed the Appellant that if he wished to contest the decision he had to lodge an appeal with the tribunal within 30 days of the decision.

59. The reviewing Officer conceded in cross examination that had he been given the information provided by the Appellant in his Notice of Appeal, in effect answering these 17 questions put to him by the officer, he, the reviewing Officer would have been in a better position to make an informed decision.

10 60. Lord Lane in *Customs and Excise Commissioners v J H Corbitt* [1980] 2 WLR 653 described the test of a review of a decision by the Tribunal:

15 “It could only properly [review the discretion] if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted, if they had taken into account some irrelevant or had disregarded something to which they should have given weight.”

61. We have to conclude that the Respondents did not consider or reach a reasoned conclusion upon the innocence of the Appellant as the owner of the vehicle, and as held in *NAS & Co Limited v The Commissioners for HMRC* [2014] UKFTT 050 (TC), §73, the failure to consider and reach a conclusion upon this critical factor makes this decision unreasonable. Although the reviewing Officer says that he was guided by established policy, he did not apply that policy. He did not take into account all relevant factors when arriving at his decision to refuse restoration of the Appellant’s vehicle. The decision appealed against is therefore in our view not one that could have been reasonably and proportionately arrived at.

25 **Order**

62. We make the following orders pursuant to our decision to allow the Appeal and in accordance with s 16(4) of the Finance Act 1994:

63. The decision not to restore the Appellant’s vehicle shall cease to have effect from the date of release of this Decision.

30 64. The Appellant has already been deprived of the vehicle for sixteen months. The Respondent shall conduct a further review of the decision to restore the vehicle and serve the same on both the Appellant and the Tribunal within 28 days of release of this Decision and such review shall be on the basis of the conclusions reached in this Decision.

35 65. An Officer not previously involved with the case shall conduct the further review.

66. The Review Officer shall take account of all material before this Tribunal and any further material or representations made by the Appellant within 14 days from release of this Decision. The representations shall be made to The Review Team, Border Force, 3rd Floor, WestPoint, Ebrington Street, Plymouth PL4 9LT.

67. The Appellant will have a further right of appeal to the Tribunal if dissatisfied with the outcome of the further review.

5 68. 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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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 17 APRIL 2018**