[2021] UKFTT 0209 (TC)

TC08159

Excise – seizure of electric bicycles and window tint film – refusal of request for restoration – whether or not refusal to restore unreasonable – yes, because proportionality was not properly considered as regards the availability of a lesser sanction – whether or not proportionate – no – appeal allowed and directions given

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02509 V

BETWEEN

E RIDER LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC

The hearing took place on 8 March 2021. With the consent of the parties, the form of the hearing was video. A face to face hearing was not held by virtue of the Covid-19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Kenneth Ferguson, director, for the Appellant

Miss Hannah Bains, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against HMRC's refusal to restore 47 electric bicycles ("the Bicycles") and 120 units of window tint film ("the Film") seized and forfeited following importation by E Rider Ltd ("E Rider") from China. The basis for the seizure was HMRC's allegation that the electric bicycles had been misclassified and were subject to anti-dumping duty. E Rider commenced, but then withdrew, condemnation proceedings. E Rider maintains within this appeal that the refusal to restore was unreasonable, disproportionate, and did not take into account various matters including E Rider's understanding that the electric bicycles had been properly classified.

FINDINGS OF FACT

2. As there were no substantial disputes of fact, it is convenient to begin with my findings of fact.

3. I read witness statements on behalf of E Rider from Mr Kenneth Ferguson and Mr Timothy Willan (both of whom are directors). I also read witness statements on behalf of HMRC from Officer Julie Green (the original review officer) and Officer Elaine Matthews (a substitute officer adopting the evidence of Officer Green). I heard oral evidence from Mr Ferguson and Officer Matthews. They were both credible and helpful witnesses. Mr Willan was also called in order to verify his witness statement but was not cross-examined. In making my findings of fact, I bear in mind the written and oral witness evidence and the documents provided to me by the parties.

4. E Rider is a retail supplier of electric bicycles, electric motorbikes, and electric mopeds. It has imported such goods from China since 2013.

5. E Rider's range includes the Bicycles. Although the Bicycles comprise two models from the same manufacturer, I have only been shown a specification for one of them ("the Specification"). This Specification has not been disputed by HMRC and includes the following:

> "Place of Origin: Zhejiang, China
>
> …
>
> Power Supply: Storage Battery.
>
> Wattage: 351-500w
>
> …
>
> Max Speed: 25/32km/h
>
> Brand: Jueshuai
>
> …
>
> Function: electric motor scooter bicycle.
>
> …
>
> Voltage: 48V
>
> …
>
> Product name: e bike electric motor scooter bicycle electric
>
> Special: electric motor scooter
>
> Battery: li-ion battery lead acid
>
> Motor Power: scooter bicycle electric
>
> Frame: electric bike e bike with pedal."

6. There has been no evidence provided as to the other model comprising the Bicycles, save for having a wattage of less than 250 watts.

7. The Bicycles and the Film were in a container imported from China. The declaration classified the consignment under commodity code 8711 90 00.

8. The container was inspected by HMRC on 3 December 2018. It was HMRC's view that the declaration contained the wrong classification code and that the Bicycles should have been declared under commodity code 8711 60. The Bicycles were therefore seized by HMRC by a decision dated 11 December 2018. The anti-dumping duty was at that point said to be 106.4% and the duties and taxes due £21,183.95.

9. E Rider took the view that its declaration was correct and so did not accept that the Bicycles were subject to anti-dumping duty. On 12 December 2018, E Rider challenged the legality of the seizure and also sought restoration of the Bicycles and the Film. This made the following additional points: first, that E Rider had not been informed of the anti-dumping tariff; secondly, that the Bicycles will have no market value if they are not restored as their batteries will deteriorate if not charged; thirdly, E Rider was willing to pay the alleged underpayment of duties and tax until its challenge to the legality of the seizure had been heard; and, fourthly, E Rider was considering judicial review. The parties treated this as the start of condemnation proceedings. Although I was not given any evidence of the stage that the condemnation proceedings reached, it is common ground that they were withdrawn prior to any determination by the magistrates court.

10. On 13 December 2018, a notice of seizure was sent to E Rider.

11. HMRC refused to restore the Bicycles or the Film by virtue of a letter dated 9 January 2019. The reasons given by the decision making officer, Officer Ramzan, were that the goods were imported for a commercial purpose, it is not HMRC's policy to restore goods seized in these circumstances, and HMRC did not consider there to be any exceptional circumstances.

12. E Rider requested a review of this decision, which resulted in a review conclusion letter dated 3 April 2019 from the reviewing officer, Officer Green. Officer Green upheld the original decision. The essence of the decision was as follows:

> "The HMRC Restoration Policy confirms goods must not be restored where they have bene misdeclared, concealed or there has been a deliberate attempt to evade duty. Restoration can only be offered in exceptional circumstances. I have also considered whether the decision not to restore is reasonable and proportionate.
>
> Having viewed the facts and evidence of the case, I am satisfied that by misclassifying the goods, you would have avoided paying the full tax and duty due on a relatively large quantity of goods, and gained a commercial advantage over traders who had paid the correct taxes.
>
> I will acknowledge that I have seen no evidence suggesting you have had goods seized or ever been involved in such matters previously. However in this instance, I consider the seriousness of the offence justifies the decision not to restore the goods.
>
> I have considered whether the circumstances of this case constitute an exception to the policy. Each case should be considered on its own merits to determine whether restoration may be offered and under what terms, but restoration of goods would generally be the exception and not done as a matter of course. I do not consider there to be any exceptional circumstance to this case, or any reason why restoration should be offered on humanitarian or hardship grounds.

> My conclusion
>
> Having considered the evidence presented to me, I have found that the decision not to restore the goods was reasonable, proportionate and in line with HMRC's policy,
>
> Seizure and non-restoration is an important and effective tool to ensure traders comply and make truthful declarations. If HMRC were to simply allow payment of the duty at this stage, there would be no incentive to make truthful import declarations at the time of making the initial import entry."

13. Officer Green revisited the sums calculated in the original decision. She stated that the consignment attracted anti-dumping duty at the rate of 62.10%, countervailing duty at the rate of 17.2%, and third country duty at the rate of 6%, amounting in total to £20,318.54. HMRC's documentation includes a calculation which allocates £10,256.21 of the total sums due as being anti-dumping duty.

14. Officer Matthews has since revisited these figures and notes in her witness statement that the rates relied upon by Officer Green related to the period after 19 January 2019 rather than the date of importation. Officer Matthews states that on the date of entry of the goods the appropriate rate for anti-dumping duty was 83.60% and no countervailing duty was applicable. She says that this would result in an underpayment of £21,170.74.

15. E Rider's notice of appeal was received by the Tribunal on 23 April 2019.

16. I was informed by the parties that there has been no assessment for duties or tax and no further duties or tax have been paid in respect of the seized goods.

17. Mr Ferguson gave the following oral evidence by way of evidence in chief and under cross-examination.

> (1) E Rider found the situation with the classification codes very complex. The codes had recently changed and in particular introduced new codes for rated power in excess of 250 watts.
>
> (2) E Rider's understanding was that in order for the Bicycles to be classified as electric bicycles under EU regulations they needed to be capable of propulsion only on pedals and should not be capable of being ridden on throttle alone.
>
> (3) E Rider had not therefore acted deceitfully.
>
> (4) The figure levied was not disputed. However, E Rider's position that it was prepared to pay this was a commercial decision as opposed to an acceptance of liability.
>
> (5) E Rider withdrew the condemnation proceedings because, even though it had positive legal advice, the costs involved did not make commercial sense.

18. For the avoidance of doubt, I accept the evidence set out in paragraph 17 above because HMRC did not submit that it was inaccurate, it was given in a credible manner, and it is consistent with (or at least not contradicted by) such documentary evidence as there is available.

19. The cross-examination of Officer Matthews focussed upon establishing what had been taken into account in Officer Green taking the decision. Officer Matthews confirmed that the matters taken into account appear on the face of the review decision. She also noted that HMRC accepted that there had not been any deliberate attempt to evade duty. Officer Matthews also made the point that she did not treat ignorance of the law as special circumstances.

THE LEGAL FRAMEWORK

20. The broad legal framework was not in dispute.

21. Section 49(1) of the Customs and Excise Management Act 1979 ("CEMA 1979") provides for the forfeiture of goods improperly imported as follows:

> "49. Forfeiture of goods improperly imported:
>
> (1) Where
>
> (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—
>
> (i) unshipped in any port,
>
> (ii) unloaded from any aircraft in the United Kingdom,
>
> (iii) unloaded from any vehicle in ,or otherwise brought across the boundary into, Northern Ireland, or
>
> (iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or
>
> (c) any goods, being goods chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft or, while in Northern Ireland, in any vehicle; or
>
> (d) any goods are imported concealed in a container holding goods of a different description; or
>
> (e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or
>
> (f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer, those goods shall, subject to subsection (2) below, be liable to forfeiture."

22. Sections 139(1), (1A) and (1B) of CEMA 1979 provide for seizure as follows:

> "139. Provisions as to detention, seizure and condemnation of goods, etc.
>
> (1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.
>
> (1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing.
>
> (1B) References in this section and Schedule 2A to a thing detained as liable to forfeiture under the customs and excise Acts include a thing detained under subsection (1A)."

23. Section 141(1) of CEMA 1979 provides for the seizure of items mixed, packed or found with the relevant items as follows:

> "141. Forfeiture of ships, etc used in connection with goods liable to forfeiture
>
> (1) Without prejudice to any other provision of the customs and excise Acts 1979, where anything has become liable to forfeiture under the customs and excise Acts –

(a) any ship, aircraft, vehicle, animal, container (including any article of passenger's 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 thing so liable,

shall also be liable to forfeiture."

24. Section 152 of CEMA 1979 entitles HMRC to restore forfeited or seized goods. Section 152(b) includes the power to restore with or without conditions as follows:

"152. Powers of Commissioners to mitigate penalties, etc.

The Commissioners may, as they see fit –

…

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

25. Schedule 3 to CEMA 1979 provides for condemnation proceedings. Paragraph 5 provides a deeming provision as follows:

"5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

26. Section 14(1)(a) of the Finance Act 1994 ("FA 1994") provides for a review of a restoration decision. An appeal against the review is appealable to this Tribunal pursuant to section 16 of FA 1994. As it is an "ancillary matter", the Tribunal's jurisdiction is limited to a supervisory role as set out in section 16(4) as follows:

"(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;

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

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

THE ISSUES IN DISPUTE

27. E Rider's notice of appeal and submissions at the hearing effectively raised the following issues:

(1) The electric bicycles were not misclassified and so the seizure was illegitimate.

(2) The decision was unreasonable as there was no deliberate intention to avoid duties, E Rider had not been told about (and did not otherwise know about) the correct tariff, and E Rider offered to pay the anti-dumping duty.

(3) Non-restoration would have a significant impact upon E Rider's business. Effectively, this issue is one of proportionality.

28. I note that E Rider has not raised any separate issues, evidence or submissions about the Film, focussing only upon the Bicycles. I therefore approach the remainder of this decision upon the basis that the reasonableness of HMRC's refusal to restore the good as a whole is to be determined by reference to whether or not the refusal to restore the Bicycles was reasonable.

29. I remind myself that the burden is upon E Rider to establish that the decision not to restore was unreasonable. A decision not to restore seized goods will be unreasonable if HMRC take into account irrelevant matters or fail to take into account all relevant matters (see *Lindsay v C&E Commissioners* [2002] STC 588 ("*Lindsay*"), *per* Lord Phillips MR at [40]) or if HMRC acted in a way which no reasonable panel of commissioners could have acted (see *C& E Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231, *per* Lord Lane). I am not restricted to the evidence before HMRC, as set out in *HMRC v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319, [2020] STC 760 *per* Henderson LJ at [7]:

> "[7] It is common ground that a decision made by HMRC under s 152(b) of CEMA 1979 is an 'ancillary matter' for the purposes of s 16, from which it follows that the powers conferred on the FTT on an appeal from the relevant
>
> [2020] STC 760 at 765review decision are confined to those set out in sub-s (4), and are also dependent upon the FTT being satisfied that the decision is one which HMRC 'could not reasonably have arrived at'. The apparent strictness of this approach has, however, been significantly alleviated by the decision of this court in *Gora v Customs and Excise Comrs, Dannatt v Customs and Excise Comrs* [2003] EWCA Civ 525, [2004] QB 93, [2003] 3 WLR 160, where Pill LJ accepted the submission of counsel for HMRC (Mr Kenneth Parker QC, as he then was) that the provisions of s 16 do not oust the power of the FTT to conduct a fact-finding exercise, with the consequence that it is open to the FTT on an appeal from a review decision to decide the primary facts and then determine whether, in the light of the facts it has found, the decision was one which could not reasonably have been reached: see the judgment of Pill LJ at [38] to [39]. The correctness of this approach has not been challenged before us, and in *Jones* Mummery LJ said at [71](7) that he 'completely agree[d] with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora's* case'.

THE CLASSIFICATION OF THE BICYCLES

Submissions

E Rider

30. Mr Ferguson submitted that the Bicycles had been properly classified. His position was that bicycles which are compliant with electrically assisted pedal cycle regulations as defined by the EU were imported within CN Codes 8711 60 10 as electric bicycles whereas mopeds and other more powerful bikes are properly imported under CN Codes 8711 90 00. He said electric bicycles are to be defined as bicycles which have a motor no more powerful than 250 watts designed as an auxiliary to pedalling. A number of the Bicycles were more powerful than 250 watts and so, on this basis, were not electric bicycles. Further, E Rider's position is that in order to qualify as an electrically assisted pedal cycle under EU regulations the throttle should not be capable of propelling the bicycle at more than 6kph without pedal assistance; a feature which Mr Ferguson asserted applied to all the Bicycles and so precluded them all from being

classified as electric bicycles. As such, Mr Ferguson maintained that the Bicycles were all correctly imported under code 8711 90 00, which covers "motorcycles (including mopeds) and cycles fitted with an auxiliary motor".

31. The EU Regulation relied upon by Mr Ferguson is Directive 2002/24/EC relating to the type-approval of two or three-wheel motor vehicles ("the 2002 Directive"), albeit that he noted that this directive had been repealed. Article 1(h) of the 2002 Directive excluded from being motor vehicles:

> "cycles with pedal assistance which are equipped with an auxiliary electric motor having a maximum continuous rated power of 0,25kw of which the output is progressively reduced and finally cut off as the vehicle reaches a speed of 25km/h, or sooner, if the cyclist stops pedalling."

32. Mr Ferguson acknowledged that E Rider had withdrawn the condemnation proceedings but submitted that although this meant that E Rider could not reopen the legality of the seizure, this could be relied upon as part of the background for the purposes of restoration.

HMRC

33. Miss Bains submitted that the Bicycles and the Film are deemed to have been condemned as forfeit. As such, the Tribunal has no jurisdiction to consider the legality of the seizure. Miss Bains drew my attention to *HMRC v Jones and Jones* [2011] EWCA Civ 824, [2012] Ch 414 ("*Jones*") and *European Brand Trading Ltd v HMRC* [2016] EWCA Civ 90 ("*European Brand Trading*") in this regard.

34. In any event, Miss Bains submitted that the Bicycles were misclassified.

Discussion

35. I accept Miss Bains' submission that I do not have the jurisdiction to consider the legality of the seizure, even for the purposes of considering whether or not the decision not to restore was unreasonable or by way of background.

36. In *Jones*, the Court of Appeal made it clear that it is not open to the Tribunal to reopen the question of the legality of the seizure of goods where the seizure has already been deemed to have been legal. Mummery LJ summarised the position at [73]:

> "To sum up: the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the respondents' personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the respondents' own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol: there is no judge-made exception to the application of paragraph 5 according to its terms; the respondents had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation."

37. I note that it is clear from *Jones* that the deeming provision in paragraph 5 of Schedule 3 to CEMA 1979 is applicable in circumstances where an appellant has withdrawn the notice of claim giving rise to the condemnation proceedings as well as where no notice of claim has been made at all.

38. In *European Brand Trading*, the Court of Appeal made it clear that the Tribunal's inability to consider the legality of the seizure extends to assuming that the excise duty is payable, including for the purposes of considering proportionality.

> "[31] Mr Pickup argues that *HMRC v Jones* is concerned only with the jurisdiction of the FTT. Although the decision of the magistrates' court creates a *rem judicatam* between HMRC and EBT it does not directly impact on HMRC's discretionary power to restore goods, or on the power to review. The decision to restore or not to restore is a different issue which was not that raised in the condemnation proceedings. HMRC must make its decision on restoration in the light of all relevant factors, which will include the duty paid status of the goods in question. If I have understood this argument what is said is that in deciding whether or not to exercise the discretionary power to restore things seized or forfeited HMRC must consider the question (if it is raised by the applicant) whether excise duty was in fact payable and, if so, whether it had in fact been paid. But HMRC's decision is only one part of the overall process. If HMRC refuse to restore, them the applicant can appeal to the FTT. If HMRC have refused to restore on the ground that excise duty was payable and has been deemed not to have been paid, then the clear effect of *HMRC v Jones* is that the FTT cannot investigate that question. It would make for an incoherent system if HMRC was required to investigate the question whether duty had been paid, but any appeal against its decision had to be conducted on the basis of a different set of assumed facts. The answer to this argument is, in my judgment, to be found in two passages from the judgment of Mummery LJ in *HMRC v Jones*. First, at [71] (5) he said:
>
> > "In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use."
>
> …
>
> [35] It is a necessary corollary of a condemnation (whether actual or deemed) that the excise duty has not been paid.
>
> …
>
> [37] The third argument is that to preclude HMRC from investigating the question whether excise duty has in fact been paid on the forfeited goods in the context of an application for restoration deprives the appeal process of any real content. I do not agree. First, HMRC's power is a power to restore goods that have been either seized or forfeited. Take the case of goods that have been seized but not forfeited, either because proceedings for condemnation have not been concluded or because the one month time limit for giving notice of challenge has not yet expired. That would be a case in which HMRC would be required to investigate whether excise duty had been paid on the seized goods. Second, although it is HMRC's general policy not to restore goods that have been forfeited for non-payment of excise duty, any policy admits of exceptions if the circumstances are exceptional. Third, as HMRC accept, where a decision not to restore is founded on the policy it would (at least in theory) be open to an applicant to challenge the lawfulness of the policy itself on the usual grounds for judicial review. This was HMRC's position as recorded in the judgment of Pill LJ in *Gora v HMRC* [2003] EWCA Civ 525,

> [2004] QB 93 at [38] and remains their position on this appeal. Fourth, in the application of the policy HMRC will consider any mitigating circumstances. Such circumstances would include whether or not the owner of the goods knew that duty had not been paid, whether he believed that duty had been paid (even though it had not), what steps by way of due diligence he took to satisfy himself that duty had been paid, whether there were any other steps that he could have taken but did not, and any other relevant consideration. This was common ground before the Upper Tribunal and is referred to in its decision at [69]. Fifth, in exercising the discretionary power to restore goods that have been forfeited, HMRC must consider the proportionality of a refusal to restore. It might, for example, be disproportionate to refuse to restore a new Rolls Royce used to carry a small quantity of smuggled brandy. However, in the light of *HMRC v Jones*, the question of proportionality must be considered on the assumption that the goods on which excise duty was payable (and any vehicle in which they were carried) have been validly and lawfully forfeited and that the excise duty has not been paid. In our case EBT wishes to advance the argument that the excise duty has in fact been paid on the very goods that have been forfeited. In my judgment *HMRC v Jones* plainly prevents that argument from being raised once the goods have been condemned, either by the magistrates or by the deeming provision."

39. It follows that the question of whether or not E Rider correctly classified the Bicycles is not relevant to whether or not HMRC's decision to refuse restoration was an unreasonable decision.

40. Given that the question of classification was argued by the parties, I note that if I had been able to consider the legality of the seizure I would have reached the conclusion that E Rider had wrongly classified the Bicycles. This is for the following reasons.

41. The competing commodity codes are CN Code 8711 60 (as contended for by HMRC) and CN Code 8711 90 00 (as contended for by E Rider). Although the duty is the same, anti-dumping duty is applied to CN Code 8711 60. The relevant headings are as follows:

> "8711 - Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars:
>
> …
>
> 8711 60 - With electric motor for propulsion:
>
> 8711 60 10 -- Bicycles, tricycles and quadricycles, with pedal assistance, with an auxiliary electric motor with a continuous rated power not exceeding 250 watts,
>
> 8711 60 90 -- Other
>
> 8711 90 00 - Other."

42. The Combined Nomenclature is to be considered in accordance with the General Rules for the Interpretation of the Combined Nomenclature ("the GRIs"), which provide as follows:

> "Classification of goods in the Nomenclature shall be governed by the following principles:
>
> 1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2.(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) camera cases, musical instrument cases, gun cases, drawing-instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) subject to the provisions of rule 5(a), packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For

> the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

43. The GRIs are a hierarchical set of principles and they must be applied in sequential order (see *HMRC v Epson Telford Limited* [2008] EWCA Civ 567 *per* Sir John Chadwick at [8]).

44. It is clear from the facts as set out above that the Bicycles all have electric motors for propulsion. This therefore places them within CN Code 8711 60. Those of the Bicycles that have pedal assistance, with an auxiliary electric motor with a continuous rated power not exceeding 250 watts are within CN Code 8711 60 10. Those Bicycles which exceed 250 watts are within CN Code 8711 60 90 ("Other") as they still have an electric motor for propulsion, as shown in the Specification. The "Other" within CN Code 8711 90 00 therefore refers to "Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side cars" which do not fall within any of the other CN Codes under heading 8711.

45. The 2002 Directive and any other EU Regulations relating to type approval do not affect the definitions within the Combined Nomenclature, as these are to be determined in accordance with the GRIs not any other definition of electric bicycle. Indeed, "electric bicycle" is not a term used within the competing CN Codes.

WHETHER OR NOT THE DECISION WAS UNREASONABLE ON GROUNDS OTHER THAN PROPORTIONALITY

Submissions

E Rider

46. Mr Ferguson submits that HMRC has been inconsistent as to whether or not they assert that E Rider has been dishonest. He further submits that it is very clear that E Rider was not acting dishonestly and had no deliberate intention to evade duties.

47. Mr Ferguson submits that E Rider did not know that it had misclassified the Bicycles. The classification was complex and the law had changed very recently. Further, neither HMRC nor anybody else had made E Rider aware of the rules. Seizure is to encourage compliance with the rules but this does not help E Rider as it was not aware of the rules at the time.

48. Mr Ferguson also made the point that the offer to pay the duties in its request for a restoration dated 12 December 2018 was not an acceptance that E Rider had misclassified the Bicycles. He said that it was not clear why HMRC now relied upon the offer and asks whether or not it was taken into account in the decision not to restore.

HMRC

49. Miss Bains submits that HMRC does not allege any dishonesty by E Rider, that it was E Rider's responsibility to declare the Bicycles properly, and that the offer to pay the duties was of no consequence.

Discussion

50. As regards dishonesty, neither the original decision nor the review conclusion state that there has been any dishonesty by E Rider or any deliberate intention to evade duties. HMRC have made it clear in their statement of case, skeleton argument, and oral submissions that they do not submit that E Rider acted dishonestly and did not treat E Rider as dishonest when making the decision. As such, it cannot be said that the decision was unreasonable by virtue of wrongly taking into account dishonesty or deliberate intention.

51. As regards knowledge, I do not accept that HMRC (or any other government body) was under any obligation to explain to E Rider the application of the Combined Nomenclature in respect of the Bicycles. E Rider was responsible for its own declaration. The recent changes relied upon by Mr Ferguson were in fact the imposition of anti-dumping duty on imports of

electric bicycles from China pursuant to Regulation 2018/1012 of 17 July 2018. This did not give rise to any change at all to the wording of the competing CN Codes. As such, it cannot be said that HMRC failed to take into account a legitimate reason for the mistake. Indeed, I find that E Rider has not provided any reason for the mistake because it does not in fact treat it as a mistake; to the contrary, E Rider has continued to insist that the classification was correct.

52. As regards the offer to pay the anti-dumping duty, it is not entirely clear whether Mr Ferguson argues that it was not (but should have been) taken into account in favour of E Rider because it was prepared to make payment or alternatively that it was (but should not have been) taken into account because this would wrongly signify an acceptance by E Rider that the classification was incorrect. I find that it is clear on the face of the review conclusion that this was considered by HMRC and so E Rider is therefore wrong to say that it was not taken into account. I also find that HMRC have not treated this offer as an admission that E Rider knew that its classification was wrong at the time of importation; again, HMRC accept that E Rider was not acting dishonestly.

PROPORTIONALITY

Submissions

E Rider

53. Mr Ferguson submitted that the non-restoration would have an adverse impact upon E Rider's business as the money already paid by customers would have to be returned. Mr Ferguson also made the point that what was said in the review to be an under-declaration of £20,318.54 was not an accurate analysis as this was not all anti-dumping duty; Mr Ferguson asserted that this included VAT and duty other than anti-dumping duty, which would have been payable under the classification declared by E Rider.

HMRC

54. Miss Bains submits that the non-restoration is fair, reasonable and proportionate. Adopting what was said in the review, she submits that the duty involved was over £20,000, there has been a commercial advantage over traders who had paid the correct taxes and there were no exceptional circumstances. She further submits that whilst it is to E Rider's credit that it is prepared to pay the duty, it would not further HMRC's objectives if importers were given the opportunity to pay once errors are identified as there would be no incentive for an importer to fulfil its obligations if all that was required was to pay the amount outstanding should an error come to light.

Discussion

55. In *Lindsay* (see above), Lord Phillips MR set out the need for proportionality as follows (albeit in the different policy context of the smuggling of goods):

> "[40] However, the principal issue before the tribunal, was whether the commissioners' decision not to restore Mr Lindsay's car to him was one that they 'could not reasonably have arrived at'—within the meaning of those words in s 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998, there can be no doubt that if the commissioners are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention). Quite apart from this, the commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters — see *Customs and Excise Comrs v JH Corbitt* (*Numismatists*) *Ltd* [1980] STC 231 at 239, [1981] AC 22 at 60 per Lord Lane. It was argued before the tribunal that the commissioners' decision fell at both hurdles. It violated the convention in that it involved depriving Mr Lindsay of his rights under art 1

of the First Protocol to the convention to the peaceful enjoyment of his possessions in circumstances which were disproportionately harsh. By the same token, because of the policy which was applied, the decision ignored the relationship that the value of the car bore to the duty that should have been paid, although this was a highly relevant matter.

…

Human rights

[52] The commissioners' policy involves the deprivation of people's possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *Air Canada v United Kingdom* (1995) 20 EHRR 150, para 36). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable.

European Community law

[53] It does not seem to me that the doctrine of proportionality that is a well established feature of European Community law has anything significant to add to that which has been developed in the Strasbourg jurisprudence. There is, however, a passage in *Paraskevas Louloudakis v Elliniko Dimisio* (Case C-262/99) (2001) Transcript 12 July, which is helpful in the present context in that it is of general application. I quote from para 67:

> 'Subject to those observations, it must be borne in mind that, in the absence of harmonisation of the Community legislation in the field of the penalties applicable where conditions laid down by arrangements under such legislation are not observed, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality.'

[54] There are then references to Strasbourg authority. The judgment continues:

> 'The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty.'

Conclusions

[55] Broadly speaking, the aim of the commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under art 1 of the First Protocol to the convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim. More specifically, did it have that effect in the case of Mr Lindsay?

…

> [64] The commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified.
>
> [65] I do not think that it would be impractical to distinguish between the truly commercial smuggler and others. The current regulations shift the burden to the driver of showing that he does not hold the goods 'for commercial purposes' when these exceed the quantity in the Schedule. In a case such as the present the driver importing for family or friends should be in a position to demonstrate that that is the case if called upon to do so (see the comments of Lord Woolf CJ in *Goldsmith v Custom and Excise Comrs* [2001] 1 WLR 1673 at 1679–1680)."

56. In applying the general policy and refusing to restore the Bicycles and the Film HMRC has not considered whether or not a lesser sanction than non-restoration (such as, for example, restoration for a fee in addition to the payment of the duty and other applicable taxes) will still fulfil its aims in the present case. It is clear that there has been no such consideration because it is not mentioned in the original decision, the review decision, the witness statements, or Miss Bains' submissions. As such, I find that the review decision was unreasonable because by not considering in the present case whether or not a lesser sanction would still meet HMRC's aims it cannot be said that HMRC considered proportionality properly. This failure to consider proportionality properly is sufficient to require HMRC to reconsider the decision.

57. In any event, I also find that the refusal of restoration in the present case was disproportionate. First, HMRC accepted that E Rider had not had goods seized or ever been involved in such matters previously. Secondly, I agree with Mr Ferguson that the amount *underdeclared* as distinct from the total amount of duties and taxes was not the full £20,318.54 of the review decision (or the full £21,170.74 recalculated by Officer Matthews) as the classification declared by E Rider would still have involved the payment of applicable duties and taxes, albeit not anti-dumping duty. This does not appear to have been taken into account when considering the amount involved and has a bearing upon both the seriousness of the misclassification and the relationship between the under-declaration and the value of the goods (although I note that I have not been given any monetary value for the goods, the anti-dumping duty is, according to Officer Matthews, at a rate of 83.6%). Thirdly, the policy as applied in the present case does not distinguish between misclassification where a declarant considers that the CN Code entered is correct as against concealment or deliberate attempts to evade duty. As set out above (and as accepted by HMRC) there was no concealment or deliberate attempt to evade duty in the present case. Fourthly, whilst it is correct that E Rider may have gained a commercial advantage over traders who paid the correct taxes, this commercial advantage could be reversed as regards the Bicycles by requiring payment of the correct taxes. Fifthly, HMRC rightly refers in the review decision to the need to ensure that traders comply and make truthful declarations. However, for the reasons set out above (and as accepted by HMRC) E Rider was not acting dishonestly; as such, restoration would not interfere with the legitimate

aim of incentivising truthful compliance. Sixthly, in such circumstances, a lesser form of sanction (such as, for example, restoration for a fee in addition to the payment of the duty and other applicable taxes) would still achieve HMRC's legitimate aims in the present case. Seventhly, although there has not as a matter of fact been any assessment for, or payment of, the duties and tax yet, the refusal to restore has not been made on the proviso that there will be no such assessment.

58. It follows that, as set out in *Lindsay*, the decision not to restore the Bicycles and the Film was disproportionate having regard to HMRC's legitimate aims and so was unreasonable.

DISPOSITION

59. It follows that I allow the appeal.

60. I direct that HMRC must carry out a further review of its original decision having regard to the requirement to act proportionately and the matters set out in paragraphs 55 to 58 above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

RELEASE DATE: 09 JUNE 2021