



Neutral Citation: [2022] UKFTT 187 (TC)

Case Number: TC08512

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/01855

RESTORATION – Appellant imports mobile phones –Appellant claims that the phones were returned to seller for repair and then reimported – goods seized and condemned – seizure not challenged in Magistrates Court - whether same mobile phones were reimported – whether outward processing relief ought to have been claimed – was decision of Border Force officer to refuse restoration unreasonable – yes – appeal allowed, and further review ordered

Heard on: 3 May 2022

Judgment date: 16 June 2022

Before

**TRIBUNAL JUDGE ALEKSANDER
LESLIE HOWARD**

Between

AMAR FRAZ

and

THE DIRECTOR OF BORDER REVENUE

Appellant

Respondent

Representation:

The Appellant in person

For the Respondent: Daisy Koll-Jones, of counsel, instructed by the Cash Forfeiture and Condemnation Legal Team, Immigration Law Enforcement, Home Office Solicitor.

DECISION

INTRODUCTION

1. This is an appeal against a review decision letter dated 21 April 2021 (and updated on 27 May 2021) by the Border Force not to restore 30 iPhone model XS which had been seized on importation at Stanstead Airport.
2. The form of the hearing was V (video) using HMCTS's video hearing service. A face-to-face hearing was not held because 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.
3. At the hearing, Mr Fraz represented himself and the Director of Border Revenue was represented by Ms Koll-Jones.
4. Contrary to the Tribunal's directions released on 2 November 2021, Mr Fraz did not provide a witness statement in respect of his own evidence, but we decided that he should be permitted to give oral evidence - on which he was cross-examined. A witness statement was provided in respect of the evidence of Mark Collins, the Border Force officer who conducted the review. We admitted the statement as his evidence in chief, and he was cross-examined by Mr Fraz.
5. Mr Fraz submitted a witness statement from Arthur Bronfman dated 6 January 2022. The Tribunal's directions of 2 November 2021 provided that any party seeking to rely on a witness statement must call that witness to be available for cross-examination (unless notified in advance by the other party that the evidence of that witness is not in dispute). Ms Kell-Jones told us that the Border Force had not given any notification to Mr Fraz in respect of Mr Bronfman's witness statement. As no notification had been given by the Border Force that Mr Bronfman's evidence was not in dispute, Mr Fraz should have secured the attendance of Mr Bronfman at the hearing so that he could be cross-examined on his statement. But, having heard the submissions of the parties, we decided to admit Mr Bronfman's witness statement as evidence but only to give it such weight as we thought appropriate.
6. On the day after the hearing, Mr Fraz wrote to the Tribunal applying to admit additional evidence, being an exchange of emails with FedEx on 4 December 2020 relating to the customs clearance of the phones that are the subject of this appeal. The Border Force strongly objected to the admission of this evidence as it had been provided out of time and was not available to be examined and addressed before us. We decided that it was in the interests of justice that this evidence should be admitted as it was material to the credibility of Mr Fraz's submission that the seized phones were being reimported into the UK following their export for repair. We were satisfied that the objections of the Border Force could be met by directing that Mr Fraz provides the attachments to the email, and giving the Border Force the right to make written submissions in respect of the new evidence. We therefore directed that Mr Fraz provided copies of the attachments to FedEx's email, that the Border Force should be able to make written submissions in respect of this evidence, and that Mr Fraz should have an opportunity to file a written reply to such submissions. This decision takes account of the new evidence and the written submissions of the parties.

BACKGROUND FACTS

7. For the most part, the background facts are not in dispute, and we find them to be as follows.
8. At the relevant time, Mr Fraz was in business on his own account selling used or second-hand mobile phones. He regularly imported mobile phones (his evidence was that in 2020 he

was importing three or four batches each month – although in lesser quantities than the phones under appeal), which are then sold through the internet.

9. At the beginning of October 2020, Mr Fraz purchased 30 iPhones from ARA Global Group in Florida, USA. The invoice dated 5 October 2020 describes the phones as “Apple iPhone X 64GB Grade B”. The invoice price was US\$10,950, with shipping of US\$60 - making a total price payable of \$11,010. Included in the bundle of evidence was a confirmation of payment issued by World First UK Limited, evidencing the payment of US\$11,010 via SWIFT to ARA Global Group’s bank account in Florida. The value date for the payment is 5 October 2020. Also included in the bundle are (a) a copy of FedEx’s consignment note stating that the goods were shipped on 14 October 2020, the weight of the goods was 5kg, and the customs value of the goods was £8000, and (b) FedEx’s duty and tax invoice dated 21 October 2020 showing import VAT paid of £1600 plus FedEx’s fee of £12. Also included in the bundle is a print-out of transactions on Mr Fraz’s business bank account for 30 October 2020, which shows an electronic payment of £1612 being made to FedEx on that date. It is not disputed that Mr Fraz imported these mobile phones and paid import VAT on them.

10. Mr Fraz’s evidence is that when he inspected these phones on arrival, their batteries were degraded. He contacted ARA Global Group, and they agreed to replace the batteries for a total fee of US\$450. Mr Fraz says that he couriered the mobile phones back to ARA Global Group, who replaced the batteries. Included in the bundle was a copy of a FedEx consignment note stating that the goods were shipped by Mr Fraz to ARA Global Group on 2 November 2020. The description of the goods was “iphones sent for repair”, the weight of the goods was 5kg, and the customs value was £300. As the consignment note travels with the goods (indeed, it states on its face that it is to be placed in a pouch and affixed to the shipment), we asked Mr Fraz about the provenance of the copy included in the bundle. He explained that a copy of the consignment note was available from his online account with FedEx, and he had just printed it.

11. Following repair, Mr Fraz’s evidence was that the phones were then shipped back to him. Included in the bundle is a copy of ARA Global Group’s invoice dated 4 November 2020 with a description “Apple iPhone X 64GB – Battery change service” for a total price of US\$450. The FedEx consignment note affixed to the parcel (a copy of which was included in the bundle) described the contents as “Repaired Cell Phones”. The ship date was 3 December 2020, the weight of the goods was given as 4.98kg, and the customs value was given as £10 each, making a total of £300. Mr Fraz said that the customs value was the repair costs, not the value of the goods, and in marking the parcel as containing “repaired cell phones” and showing the costs of repair (not the market value of the phones), he was following guidance.

12. On 4 December 2020 FedEx emailed Mr Fraz as follows:

FedEx Express is carrying your shipment which will be arriving into the UK, (details attached), and will require a valid reason for import for this shipment.

Reason for import must include, but are not limited to, the following:

- Why the goods are entering the UK e.g. home use, repair, exhibition, GB returns, etc...;
 - GB Returns must be within 3 years – evidence of export required
 - Exhibition – dates, importer EORI, place etc.,
- Clear description and tariff heading if available;
- Confirmation of fair market value.

Please note: Undervalued items risk seizure or detention by HMRC

Please provide us with your reason for import, via email or Fax using the contact details below. Please ensure you quote your Air Waybill number on any correspondence.

13. Mr Fraz replied later that same day as follows:

The goods are entering the UK due to GB Returns. The proof of export is FedEx tracking number 7895 4316 2468. Should you require the FedEx shipping label then this can be provided.

We note that the tracking number given by Mr Fraz is the same number as appears on the FedEx consignment note of 2 November 2020. During the course of the hearing, Mr Fraz attempted to find the tracking information for this tracking number on his computer, but he told us that because of the time that had elapsed between the shipment date and the date of the hearing, the tracking information was no longer available on FedEx's website.

14. Mr Fraz's evidence is that FedEx subsequently informed him that the duty status of the goods had been clarified and checked with customs, who were happy with the explanation, and that customs had cleared the import of the phones.

15. On 6 December 2020, the Border Force intercepted a parcel addressed to Mr Fraz at the FedEx depot at Stansted Airport. A Border Force officer inspected the parcel and made some open-source checks on the likely value of the phones. These indicated that the true value of a "B grade" phones was between £350 and £450 per phone, so the total value of the consignment was between £10,500 and £13,500.

16. As the phones appeared to be undervalued and accompanied by an untrue declaration, the parcel was seized on 6 December 2020 pursuant to s139 of the Customs and Excise Management Act 1979 ("CEMA") as liable to forfeiture under ss 49(1)(e) and 167(1)(a) CEMA. A Notice of Seizure dated 16 December 2020 was sent to Mr Fraz. The Notice set out Mr Fraz's right to challenge the seizure by condemnation proceedings in the Magistrates Court. As Mr Fraz did not challenge the legality of the seizure by condemnation proceedings, the phones were deemed condemned as forfeit to the Crown under paragraph 5, Schedule 3, CEMA, and the phones were deemed to have been improperly imported.

17. Mr Fraz wrote to the Border Force on 6 January 2021 requesting restoration of the mobile phones. In his letter he said:

I kindly ask for the restoration of the 30 x Apple iPhone X's. These goods were coming into the UK for repair and the true customs declaration was made. If customs require the export documents then these can be provided once the goods are repaired. We did advise Fedex at the time for the reason of importation and they cleared the goods on our behalf. I am unsure if they made this clear to the UK Border Force.

18. Mr Fraz also completed Form 12A (request for restoration) giving the following reasons for restoration:

I believe the items listed above should be returned to me because the goods were coming in for repair and the true declaration was made. This was not made clear on the customs invoice and something we admit in error. If customs would like to see the export documents when the goods have been repaired then this is something we can provide.

19. The Border Force acknowledged receipt of this letter on 11 January 2021.

20. During the course of his evidence, Mr Fraz said that shortly after he wrote this email, he realised that his “initial wording was confused”. He explained that at the time he was “having personal circumstances” and did not give the email full attention. He therefore telephoned the Border Force’s National Post-Seizure Unit (“NPSU”) in order to clarify the statement in the letter – that the phones were returning to the UK following repair, rather than coming into the UK for repair. The Border Force telephone lines are only open for one hour each day, and he was left on hold for a long time. Eventually he managed to speak to a Border Force officer, who told him that no one had yet looked into his case, but once someone had, they would get in touch with him about his case, and he would then have an opportunity to explain what had happened. Mr Fraz telephoned the NPSU again a few days later and was assured that his case would be looked into. Mr Fraz thought that someone would telephone him, and he would then have the opportunity to explain what had happened.

21. On 1 March 2021, the Border Force wrote to Mr Fraz noting that the goods were coming into the UK for repair and advising that the Border Force would only consider restoring goods to the legal owner. He was therefore asked to confirm ownership of the phones. He was also asked for his VAT registration number, and:

If you have any other documentation relating to the goods with support the claim for restoration, please forward a copy to the above address as soon as possible. This is your opportunity to bring to our attention any information that you would like us to consider in support of the request for restoration.

22. On 2 March 2021, Mr Fraz emailed the Border Force as follows:

I am sorry if it was not made clear but the goods were being returned after repair. As you can see they were purchased on 5 October and were then exported out for repair before being returned in December.

Attached to this email were copies of ARA Global Group’s invoice of 5 October 2021 and the World First UK payment confirmation.

23. On 10 March 2021, the Border Force wrote to Mr Fraz refusing restoration. The reasons given for the refusal were:

There are discrepancies in your account concerning where the phones were to be repaired. In your letter of 06/01/2021 you state that the goods were coming into the UK for repair. However in your email received on 02/03/2021 you state that the goods were being returned to the UK AFTER repair

The accompanying paperwork and labelling suggests the phones were being imported for retail in the UK and to this end they had been substantially undervalued. The true value of each unit is likely to be between £350 and £450 but the accompanying paperwork valued the phones at £10 per unit

Furthermore, this is not your first seizure in the last 12 months. On 24/08/2020 you had 200 Samsung phone chargers seized by Border Force. The chargers were later destroyed as they were found to be counterfeit.

I conclude that there are no exceptional circumstances that would justify departure from the Commissioners’ policy and I can confirm on this occasion that **goods will not be restored.**

The letter went on to set out Mr Fraz’s right to have the decision reviewed by an impartial review officer. The letter stated that any request for a review should set out the reasons for the request and provide any information or evidence that Mr Fraz required to be considered. There then followed an exchange of emails between Mr Fraz and the Border Force on 10 March in

which Mr Fraz stated that he had not been allowed to give any evidence about the importation (having only been asked previously to provide evidence of his ownership).

24. In the end, the Border Force treated Mr Fraz's correspondence as a request for a review, and the review team wrote to Mr Fraz on 10 March 2021 stating that they would conduct a review. The letter stated:

If in the meantime you have any further evidence or information that you would like us to provide in the support of this request then please send it to the Review Officers at the address shown on the top of this letter. This is your last opportunity to provide the Review Officers with such information; if you do not provide it now it cannot be taken into account in the review.

25. Mr Fraz's then representatives, Altion Law, wrote to the review team on 18 March 2021 making the following points in support of restoration:

It is noted that your restoration decision refers to three points, being 1) a discrepancy in the background, 2) your assessment that these items have been undervalued, and also 3) reference to a previous scenario where phone chargers being imported by our client were destroyed. We will address each of these in turn.

Firstly re suggested discrepancies in relation to the background. We have not seen all communication in this matter, however we can clarify the position. We can confirm that our client, a UK based sole trader, imported 30 used iPhone X's from USA at a value of \$11,010. These phones arrived in the UK on or around 19 October 2020. On receipt it was noticed that the battery health of the phones were very low, being below 85%, which our client had not noticed when making a purchase online. Our client then returned all 30 phones to United States for new batteries to be installed, actions which were carried out at a cost of £300. The phones were then returned to the UK, the background position was checked and clarified by FedEx, at which point we understand that the phones entered the UK and passed through clearly without issue, but were picked up and assessed by UK Border Force.

The second reference in your restoration letter refers to the phones being vastly undervalued, referring to a cost of £10 per unit. We would advise that this is incorrect, and it appears that UK Border Force are considering the repair invoice in coming to this conclusion, rather than the original purchase invoice dated 5 October 2020. We know that our client has included a copy of the purchase invoice with the letter dated 11 March 2021, however we wanted to highlight this point to ensure that this point is clear. We understand that UK Border Force contacted our client to request evidence of ownership, and that an invoice was provided to you showing ownership at this point. Our client believes that he has provided the original purchase invoice showing the value of \$11,010, however it is possible on considering your letter that you received the repair invoice in error, based on your calculations. A copy of the original purchase invoice is attached for your information. A copy of the repair invoice for £300 is also attached, and as you will see this clearly refers to repaired phones.

We have today carried out a currency conversion to understand the UK value of \$11,010. The website xe.com gives a value as at today's date of £7,899.70, for the purchase of 30 iPhones. This equates to £263.32 per phone, and not the £10 suggested in restoration letter dated 10 March 2021.

We further note your suggestion that the phones should be valued at £350 - £450. Please note that these phones are a series which it is approximately 3.5

years old, they have been bought in bulk, they were bought from the United States rather than the UK, and these phones are used arriving at in relatively poor health regarding the battery to the point that the batteries all needed to be replaced. Taking into account all the circumstances the value that our client has paid, approximately £263.32 per phone, seems about right however we do understand that there may have been a misunderstanding in relation to the invoices.

Finally we note that you refer to previous seizure where phone chargers were detected as counterfeits and destroyed. Our client has advised that he was not aware that any goods purchased by him were counterfeits, and when contacted by you he readily agreed to the destruction of these counterfeit goods. We understand that our client cooperated with you entirely, we do not feel that this should be held against our client in relation to this matter.

26. A review decision refusing restoration was issued by Mr Collins on 21 April 2021. In his letter Mr Collins stated that the policy of the Border Force was not normally to restore seized goods especially if there are aggravating factors such as a failure to declare the goods. However, each case is considered on its merits to determine whether restoration can be offered exceptionally. The following were given as the reasons for Mr Collins deciding not to restore the goods:

I have initially examined the differing accounts you have put forward concerning the importation of these goods. Initially you stated the following:-

- *“These goods were coming into the UK for repair”*
- *“The true customs declaration was made”*
- *“If customs require the export documents and these can be provided once the goods are repaired”*

Your account was clear and precise. The goods were being imported into the UK for repair. Once the repairs had been carried out you would provide the export documentation.

Following this you were written to by BF as there appeared to be an ownership issue. If you were simply repairing the goods for someone else, it would follow you don't hold legal title. Your next correspondence was therefore surprising. Your account had changed, and you now stated the following:-

“I'm sorry if it was not made clear, but the goods were being returned after repair.” You also stated they were purchased on the 5th October, exported out for repair before being returned in December. Included within this correspondence was an invoice from ARA Global Group to you for 30 (no) Apple iPhone 64GB Grade B at a cost of \$11,010.00. You also sent a payment confirmation from Worldfirst outlining the details of the payment dated 5th October 2020.

Examining the two different versions tendered by you, I have the following observations. You initially stated that the goods were being imported to be repaired and then being exported. You additionally offered to tender the export documents when this took place. On the balance of probabilities, I consider that this first account was not true or correct. This was put forward in order to justify the large scale misvaluation that occurred at import. Only at the stage that BF requested proof of ownership were you then forced to change your story and tender the invoice and payment documents to satisfy legal title. The outcome of you having to send BF those documents was to reveal the actual amount you had paid for the goods you were attempting to import. The total

was in fact \$11,010.00. Comparing this to the declared value of £300 this was clearly incorrect under misdeclaration.

The final part of your second version of events states that the goods were purchased by you in October 2020, sent back for repair and re imported into the UK. Although you have submitted the invoice and payment for the purchase of the phones, you have not tended any documents to support the re export of the items.

Moving on to the legal declaration of the item and its valuation the following of is a note. The parcel was declared with the customs value of £300. As we are now aware, this declaration was false. The value, according to your invoice and payment was \$11,010.00. It was your responsibility to ensure that the goods were declared correctly.

[...]

If the goods had not been intercepted and the misdeclaration of value not being detected by the Officers, it is reasonable to assume that correct UK duty would have remained unaccounted for. I have read the mitigation put forward by you Mr Fraz. In order for me to alter the decision I have to be satisfied that exceptional circumstances have been demonstrated over and above importations and seizures of a similar modus operandi.

I have read your letters carefully to see whether a case has been presented for departing from the policy and whether there are any exceptional circumstances for doing so: I have found no reason for departing from the policy and no exceptional circumstances.

Finally, it would be remiss if me not to examine your recent dealings with Border Force. From records available to me I know you are no stranger to importing items of mobile phone paraphernalia. On the 24th August 2020 a consignment of Samsung phone charges was imported by you. Border Force intercepted these goods and following liaising with the rights-holder they were confirmed as counterfeit and subsequently destroyed.

27. As Mr Collins decision did not appear to have taken Altion Law's letter into account, Altion Law wrote to Mr Collins on 28 April 2021 asking him to reconsider his decision. With this letter was enclosed Altion Law's first letter of 18 March, together with copies of the many documents already mentioned.

28. In addition, a document headed "Invoice for Customs Purposes" was included. This is dated 3 December 2020 and described the goods as "Repaired cell phones Country of Manufacture USA", with a unit value of £10 and total value of £300. The tariff code is 8517 (since the hearing, we have looked up this heading in the UK Integrated Tariff, and this heading is for telephone sets, including smartphones). The document gives as the "Reason for Export" "Repaired Cell Phones". The declaration at the foot of the document is signed by A Fraz.

29. Mr Collins replied with his updated review decision by letter dated 27 May 2021. In the letter, Mr Collins states that this letter is to be read in conjunction with his previous letter. He gave the following as the reasons why he decided to uphold the decision to refuse restoration:

I have considered the fresh information and additional submissions and have the following observations

You are a sole trader in the business of importing mobile phones and the associated paraphernalia into the UK. I do not consider it unreasonable to assume that over the period of time that you state the situation took place, between October and December, you were involved in further movement of goods into and potentially out of the UK. It is therefore important that the

documents you have provided to support your second version of events are able to be attributed to the under valued goods that the Border Force seized. The FedEx document dated 21/10/2020 is for the sum of £1,612.00. You state that this is the proof you originally paid the customs charges on the seized goods. The duty and tax invoice has no description of what this relates to therefore I am unable to attribute this to the seized goods.

You have further produced an invoice from ARA Global Group dated 4/11/2020 which you state is the charge for the batteries being replaced. This is for the sum of \$450.00. You have not produced a document showing the payment being made. The FedEx export document that you state is the 30 phones being sent back to the USA for repair dated the 02/11/2020, details the customs value as £300. This is not the customs value. This is the amount you state was paid for the battery replacements. This is a similar modus operandi to the import of 06/12/2020 when Border Force intercepted the goods and the only documentation available declared them as “*repaired cell phones*” with a customs value of £300.00. The actual value was \$11,010.00

The fresh documents aside, as I outlined in my original review I have concerns over the movement of goods into the UK and your differing versions of events. Your letter of 6th January 2021 to Border Force is very clear:-

“I kindly ask for the restoration of the 30 x Apple iPhone X's. These goods were coming into the UK for repair and the true customs declaration was made. If customs require the export documents, then these can be provided once the goods are repaired.”

Your submission was specific and held no ambiguity. You were importing the phones for repair that had yet to take place. Once it was completed you would supply the export documents. Everything you have put forward since does not support that version of events. Without a credible explanation this was changed to you originally importing the phones in October 2020, sending them back to the USA for the batteries to be replaced and re-exploiting them into the UK when they were seized by Border Force.

I have read your letters carefully to see whether a case has been presented for departing from the policy and whether there are exceptional circumstances for doing so: I have found no reason for departing from the policy and no exceptional circumstances stop my decision of non restoration stands.

30. Mr Fraz now appeals against that review decision.

THE EVIDENCE

31. In addition to the documentary evidence described above, we heard oral evidence from Mr Fraz and Mr Collins. Mr Fraz also submitted a witness statement from Arthur Bronfman dated 6 January 2022.

32. We find Mr Collins’ evidence to be credible and reliable. He was measured in the evidence that he gave, and his evidence was consistent with the documentary evidence before us.

33. We found Mr Fraz’s oral evidence to be troubling. In part this might well be due to being a litigant-in-person, and his unfamiliarity and understandable nervousness with proceedings in a Tribunal. However, even taking this into account, his evidence was not always consistent, and some of his evidence was not credible. We agree with Mr Collins, and find, that the clear meaning of Mr Fraz’s letter of 6 January 2021 is that the phones were being imported for the purposes of repair and would be exported from the UK following repair. Our finding in this regard is reinforced by the language used by Mr Fraz in Form 12A which, in our view, is even

clearer. We also agree with Mr Collins, and find, that Mr Fraz was an experienced businessman, and fully understood the difference between import and export. We do not believe Mr Fraz's evidence that he was confused when he wrote this letter of completed Form 12A because he was suffering from "personal circumstances" – he never told us what those circumstances were, nor why they had the effect of confusing him. We find that Mr Fraz was not confused when he wrote that letter and completed the form, and fully intended the letter and form to have the meaning that they carry. The language of both is clear. The fact that they state that Mr Fraz will provide the Border Force with proof of the export once the phones have been repaired demonstrates that Mr Fraz was well aware of what he was saying and meant.

34. In these circumstances, we find that Mr Fraz is not a credible and reliable witness, and we therefore place little weight on Mr Fraz's oral evidence, save to the extent that it is corroborated by other evidence before us.

35. Mr Bronfman is a director of ARA Global Group. In his witness statement, Mr Bronfman says that he can confirm that on 3 December 2020 he returned 30 Apple iPhone Xs to Mr Fraz following the batteries being changed. Mr Bronfman states that as Mr Fraz was not happy with the health of the batteries, he agreed to accept a return of the phones for repair at a price of \$450 – being \$15 per battery change (at the time equating to £300).

36. As Mr Bronfman did not attend the hearing and could not be cross-examined on his witness statement, we place little weight upon it.

THE LAW

37. Section 49 CEMA provides for the forfeiture of goods which are found (prior to their release from a customs procedure) not to correspond to information provided in respect of their import under Part 1, Taxation (Cross-border Trade) Act 2018. Goods may be forfeit under s167(1) CEMA if a person makes an untrue declaration or statement to a Border Force officer in respect of those goods.

38. Items liable to be forfeit can be seized by a Border Force officer under s139(1) CEMA. Schedule 3, CEMA provides for appeals to the Magistrates Court against decisions by the Border Force to seize items. If no such appeal is made, then on the expiry of one month from the date of seizure "the thing in question shall be deemed to have been duly condemned and forfeited" (paragraph 5, Schedule 3, CEMA). In its decision in *HMRC v Jones et al* [2011] EWCA Civ 824, the Court of Appeal held that these deeming provisions apply for all purposes. As Mr Fraz did not challenge the seizure of the phones in the Magistrates Court, we are bound by the deeming provisions of Schedule 3 and have to treat the mobile phones as having been imported in breach of the requirements of ss49 and 167 CEMA.

39. The important point to note is that the effect of paragraph 5 means that we are bound to treat the import as in breach of the law, even if Mr Fraz could prove that he would have been successful before the Magistrates Court had he pursued condemnation proceedings there.

40. Section 152(b) CEMA gives the Border Force power to restore goods that they have seized. This power is exercised at the discretion of the Border Force and may be subject to conditions. However, the Border Force must act reasonably and proportionately in exercising their discretion. Appeals against restoration decisions (including decisions following a review) are made to this Tribunal under s16, Finance Act 1994 ("FA 1994"). Section 16(4) FA 1994 provides that:

(4) [...] 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 review or further review as appropriate 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 review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

41. Our powers in respect of these kinds of appeal are therefore limited. If we find that the Border Force's decision was one that could not have been reasonably arrived at, then we have the power to require the Border Force to conduct a further review of their decision. In deciding whether the Border Force's decision was unreasonable we can take into account all the evidence placed before us (even if such evidence was not made available to the Border Force at the time they made their decision) - but we do not have power to substitute our own view for that of the Border Force – we can only direct that the Border Force conduct a further review of their decision.

42. The burden of demonstrating that the Border Force's decision was unreasonable lies with the appellant – in this case Mr Fraz.

43. Section 36, Taxation (Cross-border Trade) Act 2018 makes provision for relief from import taxes where goods are exported from the UK for repair or processing and are then imported back into the UK. For the relief – known as outward processing relief – to apply, the “outward processing procedure” must be followed.

SUBMISSIONS

44. The bases on which Mr Collins decided to refuse restoration can be summarised as follows:

- (1) Mr Fraz was in the business of importing mobile phones and was not new to importing.
- (2) Two different and inconsistent accounts had been put forward by Mr Fraz.
- (3) The declaration that the customs value of the seized phones was £300 was demonstrably false in the light of the 5 October 2020 invoice showing the true value of the phones to be \$10,950. There was a further misdeclaration of the customs value of the phones as in the FedEx consignment note of 2 November 2020.
- (4) There is no evidence to show that the phones that were seized were exactly same phones that had been imported in October 2020 but having had their batteries replaced.
- (5) If the phones had not been intercepted by the Border Force, then the correct UK duty would not have been paid.
- (6) There were no mitigating circumstances to justify a departure from the Border Force's normal policy of not restoring seized goods.

45. Ms Kell-Jones submits that we should not place any weight on the exchange of emails between FedEx and Mr Fraz on 4 December 2020. These had not been provided to Mr Collins during the process of reviewing whether the decision to not restore the goods was reasonable. They had only been provided at a late stage, after the hearing, and without Mr Collins having the opportunity to comment on them in open court. Further, these additional documents do not

take Mr Fraz's appeal any further, as they do not expressly link the phones that were seized to the phones that had previously been imported in October (and on which duty had been paid) – for example by giving details of serial or IMEI numbers of the phones. In addition, the fact that the phones cleared FedEx's checks does not mean that they would automatically clear the Border Force's checks. FedEx's email dated 4 December 2020 states "Please note: Undervalued items risk seizure or detention by HMRC".

46. Mr Fraz submits that the decision not to restore the phones was unreasonable for the following reasons:

(1) The phones seized in December 2020 were the same phones that had been imported in October 2020, and on which import duty had been paid.

(2) There was no reason why he would want to evade import VAT as he was a VAT registered trader at the time and was able to claim credit for any import VAT he suffered.

(3) The documents relating to the December 2020 import all stated that the phones had been repaired, and the amount declared on import represented the cost of those repairs. The reason the amount declared was the cost of the repairs was in accordance with guidance.

(4) The goods were eligible for outward processing relief. Mr Fraz was not aware of the special procedures that apply when claiming outward processing relief, and when he previously had to return goods for repair, the only issue was that he had to provide proof of the export – which he did in this case.

(5) This was not the first time that Mr Fraz had to return goods to an overseas seller for repair and had never previously had an issue with the seizure of such goods on their reimportation to the UK.

(6) He had checked (through FedEx) the correct import status of the phones with customs, and they had confirmed that they were happy with the manner in which the phones were declared to customs for import.

(7) FedEx had cleared the importation of the phones with customs, and the phones were only subsequently seized by the Border Force.

(8) Mr Fraz does not himself have access to CHIEF system (the computerised system used to manage the declaration and payment of taxes on import), so he had to rely on FedEx to deal with customs on his behalf.

(9) The Border Force should themselves have checked directly with ARA Global Group about the status of the phones before seizing them.

(10) The previous seizure of counterfeit Samsung phone chargers is an entirely separate matter that has no bearing on this case. Mr Fraz's unchallenged evidence was that he was not aware that these chargers were counterfeit at the time he purchased them, and as soon as he was informed that they were counterfeit, he did not challenge their seizure and condemnation.

(11) The process for challenging seizure in the Magistrates Court is not clear.

FINDINGS

47. The main issue of disputed fact is whether the phones that were seized had previously been imported by Mr Fraz in October 2020 (on which import VAT had been paid), but were returned to the seller in the USA for repair, and were then reimported (and seized) in December.

48. Mr Collins, in his evidence, said that he had wanted to see evidence that showed that the phones imported in October were the very same phones that were seized. And there was nothing in any of the documentation provided to him by Mr Fraz that linked the two imports – in particular none of the documentation referred to the serial or IMEI numbers given to the phones. Although Mr Fraz had provided evidence showing that he had paid for the phones imported in October, and had paid import VAT on those phones, he had not provided any evidence of having paid for the repairs, or the return shipping. Nor had he provided copies of any of his correspondence with ARA Global Group complaining that the batteries were dead and needed to be replaced.

49. Mr Fraz submitted that he had no reason to want to evade import VAT – as he was VAT registered at the time, and therefore could claim an input credit for any VAT suffered on import. Mr Collins’ evidence was that he was aware of VAT registered traders underdeclaring values on import, as they intended to sell the imported goods outside their legitimate business, and not declare the profits that they had made. So, the fact that Mr Fraz was VAT registered at the time did not wholly eliminate the possibility that he was indifferent to the VAT charged on import.

50. We agree with Mr Collins that the evidence linking the two imports is thin, but there is documentary evidence to support Mr Fraz’s case. In particular, the email exchange between Mr Fraz and FedEx on 4 December is corroborative of Mr Fraz’s account. Whilst we recognise that the documentation does not identify the particular phones by reference to serial numbers or IMEI numbers, we note that the tracking number given in Mr Fraz’s email to FedEx is the same as the tracking number given on the FedEx consignment note for 2 November. Although we place limited weight on Mr Bronfman’s witness statement, it does support Mr Fraz’s account.

51. There is also documentary evidence that Mr Fraz had sent phones to ARA Global Group for repair. This includes the FedEx consignment note dated 2 November 2020 evidencing that phones had been sent by Mr Fraz to ARA Global Group, ARA Global Group’s invoice dated 4 November 2020 with the description of having provided a “battery change service”, and the FedEx consignment note accompanying the return with the description “repaired cell phones”.

52. Taking all of this into account, we find that it is more likely than not that the phones that were seized by the Border Force were the same phones that were imported by Mr Fraz in October 2020.

53. Could Mr Fraz have claimed outward processing relief? Ms Koll-Jones submits that even if the phones were eligible for this relief, Mr Fraz could not have claimed it, as he was not appropriately authorised. However, it appears to us that as it was FedEx that were dealing with the import formalities for Mr Fraz (his unchallenged evidence was that he had no access himself to the CHIEF systems), perhaps it would be FedEx (and not Mr Fraz) that would require any authorisation.

54. We note that FedEx’s email of 4 December 2020 refers to “GB returns” as being a reason for import – in which case FedEx require evidence of export in the previous three years. The tenor of their email is that relief from import duty is available if the goods had been previously exported, and that the only requirement to claim that relief is to provide proof that the goods had been exported within the previous three years. The CHIEF records relating to the seized phones were not included in the bundle, and therefore we do not know if FedEx sought to claim outward processing relief on Mr Fraz’s behalf. It appears to us that Mr Fraz would have been eligible to claim outward processing relief – but in view of the fact that he did not challenge the seizure in the Magistrates Court, we are bound by the deeming provisions in paragraph 5, Schedule 3, CEMA, which have the effect in this case of deeming such relief not to have been claimed, and that the relief did therefore not apply to the import of the seized phones.

55. Although Mr Fraz is an experienced businessman who has regularly imported goods, we find that this does not mean that he is knowledgeable about import formalities. In common with many other businesses, he relies upon customs agents (in this case FedEx) do deal with these formalities on his behalf. To the extent that there was a failure in complying with the formalities needed to claim outward processing relief, we find that this should not be held against Mr Fraz in determining whether the phones should be restored.

56. Notwithstanding the effect of paragraph 5, Schedule 3, CEMA, which deems the seized phones did not benefit from outward processing relief, we find that the fact that (i) duty had been paid on the phones when they were previously imported in October 2020; and (ii) were potentially eligible for outward processing relief when re-imported in December 2020 is a mitigating factor which might justify departure from the Border Force's normal non-restoration policy. For this reason, we find that the decision of the Border Force not to restore the phones was unreasonable and disproportionate.

57. As the Border Force will need to undertake a further review of their decision, we address the various factors raised by Mr Collins and Mr Fraz, and make the following findings which the Border Force will need to take into account when reaching their decision. We find that:

(1) Mr Fraz imported 30 mobile phones in October 2020, and paid duty on them. Following import, he found that the phone batteries were degraded. He arranged with the supplier for the phones to be returned to have their batteries replaced at a cost of US\$450 in total.

(2) The phones were seized by the Border Force on 6 December 2020 on their return to the UK. The seized phones were the same phones that were imported by Mr Fraz in October 2020, and on which duty had been paid.

(3) Mr Fraz was in the business of importing mobile phones and was not new to importing. However, he was not directly connected to the CHIEF system, he was not experienced and familiar with import formalities, and it was reasonable for him to rely upon FedEx to deal with these (including claims for reliefs) on his behalf. Mr Fraz had previously returned faulty goods to suppliers outside the UK, and FedEx had dealt with the import formalities following their repair for him without any problems.

(4) Mr Fraz gave two different and inconsistent accounts for the December 2020 import. The first account was incorrect, and Mr Fraz knew at the time that it was incorrect. Although he subsequently corrected this account, he has not given a satisfactory explanation as to why he made the first (incorrect) account.

(5) Although Mr Fraz was VAT registered at the time, it was legitimate for the Border Force to be concerned about the risk that he might not want to declare the true market value of the phones on import as the Border Force are aware that some traders do not account for UK income tax on any profit he made when he sold them. There is no evidence before us which might indicate that Mr Fraz does not account for UK income tax on his profits.

(6) The open market value of the seized phones was US\$11,010.00. As outward processing relief had not been properly claimed on the importation of the phones in December 2020, the £300 declared on their import in December 2020 was wrong. If, however, outward processing relief had been properly claimed, then the import VAT payable in December 2020 would be levied on the repair costs plus FedEx's charges for transporting the phones to the US for repair and transferring the phones back to the UK.

(7) If Mr Fraz had properly claimed outward processing relief, as he was entitled to do, then the correct UK duty would have been paid.

(8) Mr Fraz had informed his customs agent (in this case FedEx) that the goods were being reimported following repair and had provided the tracking number of the export to evidence the export. Mr Fraz was relying on FedEx's expertise to correctly claim outward processing relief, and it was not unreasonable for him to do so. To the extent that there was a failure to comply with the formalities needed to claim outward processing relief, we find that Mr Fraz's own ignorance of these formalities, and his reliance on FedEx to deal with them on his behalf, should not be held against him in determining whether the phones should be restored.

(9) The previous seizure of counterfeit Samsung chargers is not relevant to the decision whether to restore the phones, as Mr Fraz was unaware that those chargers were counterfeit, and did not dispute their seizure and condemnation on being informed that they were counterfeit. Mr Fraz has not previously been involved with any contraventions relating to import duty.

58. We make the following further observations. Mr Fraz has asserted that the Border Force should have made enquiries of ARA Global Group before seizing the phones, as they would then have ascertained that the phones were being returned by him following repair. The obligation is on Mr Fraz to correctly describe the goods being imported, and to ensure that the relevant evidence of the prior export is provided to the Border Force on reimportation. It is not for the Border Force to search for this evidence for him. There is no duty on the Border Force to make enquiries of the seller before seizing goods.

59. Mr Fraz does not appear to be aware that HM Revenue and Customs no longer undertake checks on goods entering the UK. Customs controls on goods entering the UK are undertaken by the Border Force.

CONCLUSION

60. We find that the decision of the Respondent to refuse restoration of the phones is one that could not have been reasonably arrived at for the purposes of s16(4) FA 1994.

61. We direct that the Respondent conducts a further review of its original decision in accordance with the following directions:

- (1) The review shall be conducted by an officer of the Border Force who has had no previous involvement with this case; and
- (2) In conducting the review, the reviewing officer shall have regard to the findings of this Tribunal including those set out in [56] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 17 JUNE 2022