Neutral Citation: [2023] UKFTT 87 (TC)

Case Number:TC08715

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/06721
TC/2017/07507

Excise Duty, restoration of vehicles – *refusal of application for the restoration of vehicles forfeited as they were being used for the transportation of goods on which duty had not been paid – was refusal unreasonable - No*

Heard on: 3-4 November 2022
Judgment date: 06 January 2023

Before

TRIBUNAL JUDGE VIMAL TILAKAPALA
MEMBER JOHN WOODMAN

Between

EDYTA SOWA (TRADING AS NEFARIA TRANS)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Wiencek of EuroLexPartners LLP

For the Respondents: Jonathan Metzer of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and the remote platform the Tribunal video hearing system. The documents to which we were referred were included in a 557 page hearing bundle and skeleton arguments were submitted by the Appellant and Respondent. The Appellant also produced a written closing statement at the end of the hearing.

2. 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. These appeals concern challenges against two HMRC decisions to not restore to the Appellant vehicles seized at the Port of Dover by Border Force officials.

4. The first appeal (TC/2017/06721) relates to a decision refusing restoration of a tractor unit and tanker trailer seized together with a load of oil on 1 August 2015 (the **First Appeal**).

5. The second appeal (TC/2017/07507) relates to a decision refusing restoration of a tractor unit and tanker trailer seized together with a load of oil on 22 June 2015 (the **Second Appeal**).

6. There is a complicated history to these appeals.

7. The original HMRC decision relating to the 1 August 2015 seizure was appealed and due to be heard by the First Tier Tax Tribunal (**FTT**) (TC/2016/01353) and TC/2016/011351). That appeal was, however, withdrawn following the Appellant's separate appeal against the HMRC decision relating to the 22 June 2015 seizure which was heard by the FTT (*Nefaria Trans Edyta Sowa v The Commissioners For Her Majesty's Revenue & Customs [2017] UK FTT 0844 (TC) (TC/2015/06845*) (the **FTT Decision**).

8. Following the FTT Decision, HMRC remade their decision in relation to both the 22 June 2015 seizure and the 1 August 2015 seizure (on 7 June and 28 July 2017 respectively) and it is those remade decisions which are being appealed. The Appellant claims that the Respondent's decision in each case to not restore the seized vehicles were unreasonable.

9. It is also relevant to note that:

(a) The seizure of oil in June 2015 from the tanker controlled by the Appellant was the subject of an unsuccessful appeal to the FTT by the oil purchaser (*Vybigon v HMRC [2016] UK FTT 476 (TC)* (TC/2015/006842).

(b) The tanker trailers seized in June 2015 and August 2015 were eventually restored not to the Appellant but to the leasing companies which owned them.

10. Both the First and Second Appeal had been stayed behind the *Commissioners for Her Majesty's Revenue & Customs v Perfect [2022] EWCA Civ 30* concerning liability for excise duty in circumstances where a person has no right or interest in the good being transported.

The law

11. We have not set out in detail the law relating to the charging of excise duty on hydrocarbon oil or the power of the HMRC to seize goods or vehicles since our jurisdiction is confined to considering the reasonableness of HMRC's decision to refuse to restore and is circumscribed by the decision in *HM Revenue & Customs v Jones and another [2011] EWCA Civ 284* as to which see further below.

12. In summary, the key relevant provisions are as follows:

i. Section 6 of the Hydrocarbon Oil Duties Act 1979 which imposes a charge to excise duty on hydrocarbon oils including heavy oil

ii. Section 49 of CEMA which provides for the forfeiture of goods that are imported without duty being paid

iii. Section 139 of CEMA which gives HMRC the power to seize goods that are liable to forfeiture

iv. Section 141 of CEMA which provides for vehicles or other things which have been used for the carriage of goods which are liable to forfeiture to also be liable to forfeiture

v. Schedule 3 of CEMA which sets out a number of provisions connected with the seizure of goods which, so far as material are as follows;

Notice of claim

vi. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give

notice of his claim in writing to the Commissioners at any office of Customs & Excise [paragraph 3]

Condemnation

vii. If on the expiration of the relevant period under paragraph 3 above, for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, …… the thing in question shall be deemed to have duly been condemned as forfeited

viii. Section 152 of CEMA which provides that:

The Commissioners may, as they see fit –

[….]

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

ix. Section 14 of Finance Act 1994 (**FA 1994**) which permits a person to require a review of a decision by HMRC to refuse to restore seized goods and section 15 of FA 1994 which sets out the procedure to be followed on a review under section 14

x. Section 16 of FA 1994 which sets out rights of appeal to the FTT in relation to matters concerned with a refusal to restore goods and provides so far as relevant as follows:

(4) In relation to any decision as to 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 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.

(5) ……

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

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

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

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 1970 (use of fuel substitute or road fuel gas on which duty not paid),

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

xi. For completeness, the combined effect of section 16(9) FA 1994 and paragraph 2(1), Schedule 5 FA 1994, is that the decisions to refuse restoration of goods which are the subject of this appeal are decisions as to ancillary matters.

xii. As these appeals concern challenges to review decisions upholding refusals to make restoration under section 152(b) of CEMA 1979, the provisions of section 16(6)(c) FA 1994 do not apply – as they relate to penalties under HODA 1979. The burden of proof lies, therefore, with the Appellants and it is the civil standard (the balance of probabilities) which applies; see *Golobieswka v Commissioners of Customs & Excise [2005] EWCA Civ 607*.

xiii. Although CEMA and FA 1994 refer to "the Commissioners" and to "HMRC" the legislation is to be read as applying currently to the Border Force (see Part 1 of the Borders, Citizenship and Immigration Act 2009).

THE FACTS

11. For the purposes of the Appeals we set out below the key facts only. The detailed facts of the Second Appeal are set out in in the earlier decisions referred to above and in the parties' skeleton arguments.

12. In addition to the facts found in the previous appeals, we have also had the benefit of hearing evidence from Edita Sowa (via a Polish translator) and from Sharon Clydesdale the officer who prepared both of the HMRC responses which are now being appealed.

The First Appeal TC/2017/06721

13. On 1 August 2015 Officers of the Border Force officers stopped at Dover Docks a vehicle registered ST4803F with a tanker trailer attached.

14. The CMR (or consignment note) showed a shipment of 25,580 kilos of Oil commissioned by Hantlom Enterprises Limited, Florinis, 7 Greg Tower, 6th Floor, PC 1065 Nicosia, Cyprus, which was destined for Om Intertrade Limited, Williams Trick Centre, Pingwood Lane, Simonewood, Kirby, Liverpool, L33 4XZ. The Appellant's client was the purchaser of the goods, a Czech entity called Vybigon SRO.

15. The Oil was shown under UN code "3082 Environmentally Hazardous Substance, Liquid N.O.S (fuel diesel, number 2), 9, III, (E))". The CMR stated that the transportation of the oil was provided by Nefaria Trans, Edyta Sowa, ul. Zawadzkiego 17B, 43-229 Cwiklice, PL.

16. The accompanying Multimodal Dangerous Goods Form showed the commissioner as Hantlom Limited, Florinis, 7 Greg Tower, 6th Floor, Pc 1065 Nicosia, Cyprus with the consignee shown as Om Intertrade Limited, Williams Trick Centre, Pingwood Lane, Simonewood, Kirby, Liverpool, L33 4XZ. The oil was described as Lubricant Oil Hantlom LOH Bulk.

17. Border Force officers carried out a search on the vehicle and broke the seal of two of the five pots in the tanker as they believed that the oil being transported was consistent with diesel fuel.

18. The Road Fuel Testing Unit (**RFTU**), a unit within HMRC, was contacted by Border Force and was advised to detain the Vehicle, including the tanker and the oil, and not to allow the Vehicle to continue on its journey until the RFTU could attend the site where the vehicle had been stopped. The two pots in the tanker that had been opened by Border Force were resealed by Border Force, as was the cab of the vehicle.

19. On the same day, officers from the RFTU attended Dover Docks. All paperwork obtained earlier that day from the cab of the vehicle, including the CMR and dangerous goods notice, were passed to the RFTU.

20. Samples of the oil in all 5 pots contained in the tanker attached to the vehicle were drawn and witnessed by a Mr Paul Hards of D&G recovery. The driver of the vehicle who arrived in Dover Docks earlier that day was no longer present at the scene of the seizure. A specific gravity test was carried out on the sample drawn from the pots in the tanker, which indicated that the fuel was consistent with diesel. This led to the conclusion that no UK duty had been paid on the oil.

21. The vehicle, tanker trailer and the oil were seized. The oil was liable for forfeiture under section 49 (1) (c) CEMA 1979 and was seized pursuant to section 139 (1) CEMA 1979. The vehicle and tanker trailer were also liable to forfeiture under s. 141 of CEMA, as they were used to carry things that were liable to forfeiture and they were seized under s.139 (1) of CEMA.

22. Further samples were taken from nearside and offside running tanks. The samples taken from the pots in the tanker trailer and the samples taken from the nearside and offside running tanks were sent to the Local Government Chemist (**LGC**) for further analysis. As the driver of the vehicle was no longer present at the site the seizure, RFTU could not carry out an interview or issue the driver with a seizure information notice.

23. On 10 August 2015, a Notice of Seizure was sent to the Appellant, stating that the vehicle, the tanker trailer and the oil had been seized. On 24 September 2015, LGC released the results of the tests carried out on the pots of oil samples drawn from the tanker trailer. All seven of the pots, five drawn from the pots in the tanker trailer and two drawn from the running tanks, produced a similar analysis when tested by the LGC, with the LGC stating on each sample that the results were consistent with “designer oil”.

24. No challenge was made within the appropriate time limits to the lawfulness of the seizure and the oil, vehicle and tanker trailer were accordingly condemned as forfeit under Schedule 3 of CEMA 1974.

25. On 28 August 2015 the Appellant submitted a request for a restoration of the vehicle and trailer which was received by Border Force on 3 September 2015. Border Force advised the Appellant to make the restoration request to HMRC and on 8 September 2015 the Respondents received a letter from the Appellant dated 1 September 2015, requesting restoration of the vehicle, oil and the tanker trailer. Enclosed with the letter addressed to the Respondents were the letters sent to the Border Force. The Respondents accept that this request was made in time. On 9 September 2015, the Respondents wrote to the Appellant requesting further information regarding the ownership of the tanker trailer, as it appeared to be leased and not owned by the Appellant.

26. On 8 October 2015 the Appellant provided the Respondents with more information. On 20 October 2015, the Respondents requested further information: more clarification of the ownership status was required before a decision could be made. On 22 October 2015, the Appellant provided the required information.

27. On 27 October 2015 the Respondents agreed to restore the tanker trailer to the leasing company but refused to restore the vehicle, oil and tanker trailer to the Appellant.

28. On 2 February 2016 the decision to refuse restoration of the vehicle, oil and tanker trailer to the Appellant was upheld by HMRC. That decision was subject to an appeal before the FTT (references TC/2016/01353 and TC/2016/01351). However, the appeal was withdrawn following an appeal by the Appellant against another refusal to restore a separate vehicle which is the subject of the Second Appeal detailed below. The decision of 2 February 2016 was withdrawn on 21 June 2017 and the Respondents undertook a further review of the decision not to restore the vehicle.

29. On 28 July 2017 the Respondents made the relevant review decision which upheld HMRC's original decision to refuse restoration of the Vehicle, oil and tanker trailer. It is this decision which is one of the two decisions under challenge.

The Second Appeal

30. On 22 June 2015 a driver working for the Appellant collected goods in Ghent, Belgium. As with the First Appeal, the Appellant's client was the purchaser of the goods,

Vybigon SRO. The seller of the goods was a Cypriot entity, Kayla Limited, apparently based in Nicosia. The instruction was to take the goods to an address in West London.

31. The CMR described the goods in the following terms:

> *LOK ["Lubricant Oil Kayla" (Kayla being the supplier's name)] 24,040 KG 28,929 m3 bij 15C*
>
> *UN 3082 ENVIRONMENTALLY HAZARDOUS SUBSTANCE, LIQUID, N.O.S (fuel diesel, number2) MARINE POLUTANT, 9, , , III , (E) ,*

32. The accompanying dangerous goods form described the goods as follows:

> *BULK LUBRICANT OIL – LOK 1B 24040 KG 28,929 [m3]*
>
> *UN 3082 environmentally hazardous substance, liquid N.O.S (FUEL DIESEL, NUMBER) 9, III, (E) OFFICIAL*

33. The "Material Safety Data Sheet" which is stated to relate to "Kayla 'LOK' Lubricant Oil" indicated that the mixture contained 75-95% "No.2 fuel oil- Diesel engine fuels", 5-25% "heavy, paraffin distillates processed with hydrogen (petroleum), base oil" and 2-3% "refined rape oil". It also contained detailed safety and handling instructions.

34. The documentary evidence included analytical reports, apparently prepared for Kayla Limited by a third party (SGS) in April 2015, which appear to have formed another part of the paperwork accompanying the load. These showed that the percentage volume recovered at 250°C and 350°C was 37% and 82.5% respectively. The FTT Decision noted (at para 16) that "*apart from modest temperature differences used in the test, this appears to correlate to the definition of gas oil in s 1(5) of HODA […] This is perhaps not surprising given the proportion of diesel stated to be included.*"

35. The FTT Decision also noted (at para 16) that the Appellant had carried loads for the same client on previous occasions, including in April and May 2015.

36. On 22nd June 2015 the vehicle was stopped at Dover Docks. Border Force suspected the oil to be consistent with diesel and detained the vehicle and contents. Notes from one of the officers indicate that the product "was a green coloured liquid that smelt like diesel" (Officer Phillips' Notebook [161]). Notes from another officer also indicate that the driver gave an affirmative answer to the question whether the product was diesel (although we note

here that further information indicates that the driver did not understand English and so his answer must be seen in that context). The Notice of Goods Detained was issued to the driver.

37. Roadside testing was carried out the next day, with samples being taken from the five separate containers in the trailer. The specific gravity shown by the roadside test indicated that the product was diesel. 28,500 litres of fuel were subsequently removed from the vehicle.

38. Formal notification of the seizure, which also explained the need for any claim that the goods were not liable to forfeiture to be made within one month and referred to Notice 12A (the public notice about steps may be taken following a seizure), was sent by letter dated 3 July 2015 although we note here that the FTT found that this letter was wrongly addressed and so not received by the Appellant.

39. Laboratory testing was later undertaken of the five samples, along with samples from the vehicle's two running tanks. Six of the seven samples appear to have produced the same result, with the sample from one running tank showing a slightly different result. The laboratory reports for six samples dated 16 July 2015 noted that each:

"SAMPLE CONTAINS MIXTURE OF GAS OIL/DERV, LUBRICATING OIL FRACTION AND VEGETABLE OIL".

40. The report of one of the samples also refers to bio-diesel. The Respondents concluded that given that all the results were similar, and in fact appeared to be the same for one of the running tanks as for the load carried, this strongly indicated that all the Oil was diesel fuel on which duty should have been paid.

41. There was no indication that the Oil contained any UK or EU fiscal markers, or that it had been 'laundered' to remove any such marking. In Vybigon's appeal, the FTT found in relation to the same oil.

"*On 16 July 2015, the results of the LGC tests became available. Those tests indicated that all of the samples contained diesel… our review of the LGC forensic reports suggests that this was true of all of the samples.*"

42. The Appellant's representative applied on 14 July 2015 for restoration of the trailer and tractor unit, claiming that the oil was classified as "metal-working compounds, mould release oils, anti-corrosion oils" under the Common Customs Tariff and was not subject to fuel duty on that basis. The application also maintained that the Oil had been transported in compliance with rules governing carriage of dangerous goods, that the units were vital

business assets and that no wrongdoing had been committed since the load was legitimate. The application was refused on 7 August 2015 on the basis that the Oil met the distillation requirements for diesel and so payment of duty was therefore required. Vybigon made an application in similar terms for the restoration of the fuel.

43. The Appellant's request for review dated 17 September 2015 made similar points about the product, maintaining that Gas Oil was classified differently under the Common Customs Tariff, under sub heading 27101941, whereas the product in question was classifiable under sub-heading 27101991 (as metal-working compounds, mould release oils, anti-corrosion oils). The letter also stated that the Lubricant Oil in question was a composite product with irretrievably mixed components, was not 100% hydrocarbon and would not meet the distillation specifications for Gas Oil. It further stated that the classification had not been questioned by any other EU customs authority. The FTT observed in the earlier appeal (at para 22) as follows: "*Given the points raised in the application to restore and the fact that the application was made within one month of seizure it is not clear why this was not expressed as a notice of claim challenging the legality of the seizure, rather than as an application for restoration. However, neither party treated it as such and of course such claims are not within the jurisdiction of this Tribunal.*"

44. On 27 October 2015 a review decision was made. It confirmed that Officer Donnachie had considered the correspondence, information from colleagues, the legislation and HMRC's restoration policy and that, having examined the information available, the officer could not find "*any exceptional circumstance or reasonable excuse*" which would result in restoration.

45. The tractor unit has since been restored on the grounds that it is owned by a finance company. The trailer remains subject to the review decision and has not been restored.

46. As set out above, the Appellant appealed to the FTT against the review decision of 27 October 2015 in appeal TC/2015/06845. The appeal was heard by FTT Judge Falk and Mr John Robinson on 1 December 2016. The Tribunal's decision was promulgated on 20 December 2016, allowing the Appellant's appeal. The decision was given the citation [2017] UKFTT 844 (TC). The Respondents were required to undertake a further review of the decision not to restore the vehicle of 27 October 2015. Following this determination, the Respondents sought permission to appeal, which extended the time for the making a fresh decision. The FTT refused permission to appeal on 9 March 2017. The Respondents then

sought permission to appeal to the Upper Tribunal, but withdrew that application on 26 April 2017.

47. On 7 June 2017 the Respondents made the relevant review decision. This decision upheld HMRC's original decision to refuse restoration and is the second of the two decisions now under challenge.

48. For completeness, the seizure of 28,500 litres of oil from Vybigon on 23 June 2015 was challenged in separate proceedings before the Tribunal (TC/2015/006842). The appeal was heard on 27 June 2016 by FTT Judge Richards and Ms Ruth Watts-Davies. The Tribunal's dismissed the appeal by a determination promulgated on 5 July 2016 and given the citation [2016] UKFTT 476] (TC).

DISCUSSION

49. The issue for the Tribunal to determine for each appeal is relatively simple and it is whether HMRC's decisions to not restore the Appellant's vehicles are reasonable or not. Ms Sowa argues that the HMRC decisions to not restore her vehicles are not reasonable, HMRC argues that they are reasonable.

50. We begin by noting that our jurisdiction in relation to these appeals is limited. This is for two reasons.

51. First, section 16(4) FA 1994 allows us to interfere with HMRC's decision only if we are satisfied that the person making the decision "*could not reasonably have arrived at it*".

52. In making this determination we must take into account principles of judicial review including principles of reasonableness and proportionality.

53. The general test of reasonableness in this context is whether the decision was so unreasonable as to be irrational or perverse such that no reasonable authority could have reached that decision (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223*). We note in this regard Lord Lane's statement in in *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd [1980] 2 WLR 753* that a decision would not be "reasonable"

> "*if it were shown [the decision maker] had acted in a way in which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight.*"

54. It is also clear from the Court of Appeal's decision in *Lindsay v Commissioners of Customs and Excise [2002]EWCA Civ 267* that in exercising its decision, HMRC must take account of all relevant factors, disregard irrelevant factors and that its action must strike a fair balance and be proportionate (in order to comply with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as set out in the Schedule 1 to the Human Rights act 1988).

55. We should add that the reasonableness of the decision maker's decision is to be judged against the information available to us at the date of the hearing. This jurisdiction derives from the wording of section 16(4) FA 1994 and the Tribunal's fact finding power as shown in *Gora and Others v Commissioners of Customs and Excise; Dannatt v Same [2003] EWCA Civ 525* and it is possible, therefore, as noted by Judge Hellier in *Harris v Director of Border Revenue [2013] UKFTT 134 (TC)* for us to find that a decision is "unreasonable" even if the officer had been by reference to what was before him perfectly reasonable in all senses.

56. To summarise, we cannot conclude that the HMRC decisions in question were unreasonable simply because we might reach different conclusions. We can conclude that the decision maker was unreasonable only if she took into account material she should not have taken into account, ignored material she should have taken into account or reached a decision which no reasonable decision maker could have reached or which was not proportionate.

57. Second, it is not within our jurisdiction to revisit questions as to the legality of the seizures and forfeitures or whether the oil should in fact have been subject to duty. The effect of paragraph 5 of Schedule 3 to CEMA 1974 is that unless notice of a claim that an item seized was not liable to forfeiture is lodged within one month, the seizure must be treated as valid and it is not possible to claim subsequently that it was not duly condemned as forfeited; see *HMRC v Jones and Jones [2011] EWCA Civ 824*. In short, any facts necessary to the legality of the seizures must be assumed to be proved and those points cannot be re-opened. No such claim was lodged in either of these cases.

The FTT Decision

58. The FTT Decision in relation to HMRC's refusal to restore set out comprehensively the applicable legal principles applicable to both appeals.

59. The FTT concluded [at paragraph 65], having ascertained the facts of the case, that the review decision should cease to have effect as it did not properly take into account all relevant factors and appeared to take into account an irrelevant factor – and therefore could not have properly been arrived at.

60. The FTT set out [at paragraphs 65 and 66] in some detail those matters which the HMRC decision maker (Mr Donacchie) improperly left out of account and the one which he ought not to have taken into account. We set these paragraphs out below;

"*the matters not taken into account include considerations relating to the degree of blameworthiness and specifically that in this case the appellant was a carrier not aware that the load was subject to duty and that it is by no means clear that she should have been prompted to conduct further enquiries. In more detail;*

(1) We have found that the appellant believed that the product carried was lubricant oil of which diesel was only a component, that it had a different classification code and that it was not subject to duty on that basis. This point was effectively ignored by Mr Donnachie in reaching his review decision, who regarded the appellant's submissions on this subject as relevant only to whether the goods were dutiable (which was not relevant to the restoration decision). Mr Donnachie appeared not to consider that the appellant's understanding of the position and lack of knowledge that the goods were dutiable was highly relevant to the restoration request.

(2) The review decision did not appear to take account of the fact that the appellant was a carrier, presumably rewarded at most by a modest fee – in the words of the House of Lords a 'modest contributor" – rather than a smuggler making a profit directly from duty evasion. There was no suggestion that the appellant was paid anything other than a normal carrier rate to carry the product in question (if indeed she was paid at all on this occasion). The maximum amount paid by Vybigon on previous journeys was 2,400 Euros, and that appears to have covered a journey to Liverpool rather than (as in this case) London. There was no indication that the appellant would have benefitted from a share of any profit made from smuggling the goods. So even if the appellant should have been prompted to make further checks (as to which see below) it would not follow that non-restoration was proportionate. As the cases discussed

above illustrate there is a distinction in principle between someone who profits from duty evasion and a carrier who, although conducting a commercial business, is unaware that an illicit load is being carried and makes only the modest return that a haulier might be expected to make.

(3) The terms of the CMR Convention (discussed above) are of some relevance. As noted there the appellant's understanding that she was not required to check the Customs position is understandable and appears reasonable in the light of the terms of that Convention. If HMRC expect carriers to take a different approach then, at the least, it should be clearly flagged to carriers entering the UK. There was however no suggestion that HMRC had clearly publicised its approach to carriers and it appears that, at least until the review decision was issued, the appellant was not informed of it.

(4) More generally (and disregarding any protection afforded to the carrier by the CMR Convention) it is far from clear to us that the reference to diesel fuel on the CMR meant that the appellant should have carried out further checks, even by any standards set by HMRC. It appears, based on HMRC's own published guidance, that lubrication oil may well contain hydrocarbons without being liable to duty. Although Mr Donnachie rightly accepted that a carrier is not to be expected to carry out checks on the chemical composition of a load, he clearly placed significant reliance on the reference to diesel in the CMR. In our view he should not have done this without also taking proper account of the legislation and practice that govern the duty position of composite products discussed at [56] to [58] above. Effectively Mr Donnachie appears to have concluded that the reference to diesel meant that the carrier should have picked up that the goods would be subject to duty. However, it is clear from the legislation and practice that this is not the case and furthermore that HMRC practice specially states that, except where intended for an additives package, lubricating oils are not chargeable.

(5) There also appears to have been nothing other than the reference to diesel fuel on the CMR that might have alerted the appellant to make further checks. The collection point was a substantial business and the driver was not (for example) diverted elsewhere. The paperwork appeared properly to reflect the fact that a hazardous

substance was being dealt with and included detailed safety and handling instructions, The load was not concealed in any way and the CMR made clear on its face that the product contained diesel fuel, If there was a deliberate attempt to evade duty (by anyone) then it seems unlikely that that description would have been included.

(6) There was also no suggestion that the product was being carried in an unsafe manner or otherwise than in accordance with relevant regulations. HMRC's guidance specifically refers to health and safety issues arising from smuggling. Those considerations will clearly be relevant when fuel is concealed or carried in an unconventional manner but in this case the detention report refers to both the tractor unit and trailer being in a fair condition, suggesting that nothing was untoward and also suggesting that one of the rationales behind the guidance is not in fact relevant in this case. Essentially the guidance (and therefore by following it Mr Donnachie) appears to have taken account of a factor that is not relevant in this case.

(7) Mr Donnachie was clearly right to take account of the fact that the lab test for one of the running tanks appeared to produce the same result as the five samples from the storage tanks holding the goods. However, the lab results do not appear to us to provide full information, and in particular do not show the proportions of "gas oil/DERV" and lubricating oil fraction". Mr Donnachie appears to have concluded that all the tests showed that 93% or 94% was diesel, but that is not what the results actually state. Any possibility that the proportions of diesel and lubricating oil varied between the samples taken from the loan and the sample taken from the running tank appears to have been disregarded.

(8) *There is no indication that the value of the trailer or the impact of its loss on the appellants business (see [26] and [27] above) or the fact that this was the first time that the appellant had had a vehicle intercepted were taken into account in determining whether non-restoration was proportionate.*"

61. The FTT Decision directed HMRC to conduct a further review by an officer not previously involved in the case. It provided specifically for the further review to take full

account of the facts founds and the conclusions reached by the Tribunal and "*in particular the points set out at [65] and [66] above*".

62. It is against this background that we have reviewed the two HMRC decisions which are the subject of these appeals.

HMRC's decision in relation to the Second Appeal

63. We have taken the "Second Appeal" first, as this was the subject of the FTT Decision and the decision being appealed is the decision made following HMRC's reconsideration of the matter as directed by the FTT.

64. In her decision letter dated 7 June 2017, Ms Clydesdale acknowledged that she was carrying out a second review of the earlier HMRC decision following the FTT Decision. Specifically she stated that:

> "*Under the direction of the FTT I have considered whether it is reasonable and proportionate to refuse to restore the tanker trailer, both in terms of HMRC's Policy, in light of the admitted facts and findings of fact made by the FTT. I have now considered all of the evidence presented to me.*
>
> *In particular I have considered the issues that the FTT highlighted at points 65 and 66 of its decision and I have responded to each point below.*"

65. She concluded that the original decision should be upheld for the reasons given in her letter. She also set out in her letter her responses to the specific points in the FTT Decision that she was required to take into account.

66. We consider her responses in detail below, setting out, for convenience each of the FTT points that she was directed to address, her response to each point and our view of her response.

67. We have also taken into account in our consideration the additional evidence that we heard from Ms Clydesdale and Ms Sowa and the additional information provided to the Tribunal by the parties in advance of the hearing.

FTT Point 1 – the original decision did not consider that the appellant's understanding of the position and lack of knowledge that the goods were dutiable were highly relevant to the restoration request.

68. Ms Clydesdale made a number of points in response.

69. First, she noted that Ms Sowa had provided no evidence of the "*due diligence or reasonable steps taken*" to confirm that the goods were in fact lubricating oil and that there was no risk of duty evasion.

70. Second, she pointed out that the UN Codes and Common Customs Tariff referred to by Ms Sowa which state that lubricating oil is not subject to excise duty are subject to a proviso that UK Excise duty applies if they are intended for use as substitutes for, or additives to, road fuel. She says that this would have been apparent had Ms Sowa checked the Tariff. There is not, therefore, an absolute exemption from duty.

71. Third, Ms Clydesdale referred to the Common Customs Tariff point raised by Ms Sowa's agents, specifically their belief that the goods should not be dutiable as they belonged to the group of "*metal working compounds, mould release oils anti corrosion oils*". Ms Clydesdale remarked that their point was applicable only for Customs Duty and not for Excise Duty.

72. She referred also to section 2.6 of "*Excise Notice 184a; mineral oil put to certain use – Excise Duty relief*". Section 2.6 of this notice is headed "*When relief is allowed on oil used as a lubricant*". It states that some lubricating oils are liable to excise duty if they meet gas oil or fuel oil excise definitions and that in these circumstances relief is allowed only if they are used for eligible purposes. This notice recommends writing to the Mineral Oils Reliefs Centre for help or advice if there is doubt as to whether relief is allowed. We note here that Ms Clydesdale's letter expressed this differently as follows "*If you are in any doubt you should contact the Mineral Oil Relief Centre for further advice*". The misquoting here conveys an impression that a response from the Mineral Oil Relief Centre is something that could be sought more easily than it could in reality – and we have taken this into account.

73. Ms Clydesdale's key point here was that it was not sufficient, in her view, for Ms Sowa simply to assume that lubricant oil which contained diesel as a component was not subject to excise duty. Ms Clydesdale focused on the fact that Ms Sowa nor her driver had taken any steps at all to check the actual duty position despite some flags that should have prompted her to. Her conclusion was that it would have been prudent for Ms Sowa to have checked the position.

74. In her oral evidence Ms Clydesdale explained that in making her decision she had considered carefully what she would have expected a reasonable carrier to do in Ms Sowa's circumstances. She would in particular have expected more due diligence to have been carried out on the customer, for example a check equivalent to a "companies house check", for letters of reference to have been sought and for financial checks to have been done. She would also have expected at the very least to have seen evidence of queries being raised by Ms Sowa at the time of the first seizure in order to give her comfort that the goods she was transporting were in fact not dutiable.

75. Ms Sowa did not produce any material new evidence in relation to these points. She reiterated her point that she had relied on the documentation received and that, as far as she was concerned, there was no reason for her as a haulier to carry out further checks. She stressed again the point that the CMR did not show the load as "Fuel Diesel No.2" but as lubricant oil with the reference to diesel as a component of that load.

76. We did hear from Ms Sowa that the checks carried out on her clients were limited to using a programme tool that checked whether they were existing companies and whether they were registered for VAT. The Appellant did not, however, keep any print-outs of the searches that she carried out.

77. We find Ms Clydesdale's position here to be within the bounds of reasonableness.

FTT Point 2 - the original decision did not appear to take account of the fact that the appellant was a carrier presumably rewards at most by a modest fee. It failed to appreciate the distinction in principle between someone who profits from duty evasion and a carrier who although conducting a commercial business is unaware that an illicit load is being carried and makes only the modest return that a haulier might be expected to make.

78. Ms Clydesdale's response here was to note that evidence showed that the Appellant had carried loads for the same customer on several occasions. She extrapolated from the facts of the appeal and computed how much duty would have been evaded had all the loads transported by the Appellant for that customer also contained fuel subject to excise duty. She stated in conclusion that "*Whether or not you have profited from the evasion you have still smuggled non-duty paid diesel in to the UK*" and "*Also I think it is reasonable to believe that you did profit from the duty evasion as you have delivered 10 loads for the client and were paid between 2,200 and 2,400 euros for each delivery*".

79. Leaving aside the reasonableness of the extrapolation, we consider that Ms Clydesdale did not appreciate fully the point raised by the FTT. The FTT point invited HMRC to make a comparison between the profits received by a haulier unaware of duty evasion and the profits that could be expected to have been made by a haulier complicit in duty evasion. Non restoration being more proportionate in the case of a non-complicit haulier.

80. Here Ms Clydesdale looked to the number of the deliveries carried out by the Appellant rather than the fees received by the Appellant for those trips. Rather than focusing on the level of fees received she focused instead on the frequency of the activity. She did not therefore comply strictly with the Tribunal's direction.

81. However, we consider that the FTT direction must be seen in the context of paragraph 52 of the FTT Decision. Here the background to this direction (which was drawn from, *inter alia*, the first tier decision in *Martin Glen Perfect [2015] UK FTT 639 (TC)* and the House of Lords decision in *R v May [2008] UKHL 28)* is explained as follows:

> "*[the cases] illustrate what should in any event be obvious; in making restoration decisions HMRC are required to take all relevant factors into account' and if the owner of the property is in fact an innocent carrier rather than trading in smuggled goods then that must be a relevant factor*"

82. In her evidence to the Tribunal, Ms Clydesdale made it clear that she had taken Ms Sowa's purported lack of knowledge fully into account. She emphasised that her decision was driven by what she saw as the "flags" which, in her view, should have alerted Ms Sowa to carry

out commensurate due diligence checks on her customer and on the loads that she had been carrying.

83. We find therefore that the "innocent carrier principle" was considered by Ms Clydesdale with her concluding that in the circumstances Ms Sowa was not an entirely innocent carrier. Although not necessarily "complicit", she had, in Ms Clydesdale's view, failed to take the steps that a reasonable carrier ought to have done and this combined with the relatively high number of potentially duty evading deliveries made by Ms Sowa in the course of her business were factors that in Ms Clydesdale's opinion outweighed any lack of actual knowledge as to what she was transporting. The amount of fees earned in aggregate as a result of the multiple deliveries was therefore a legitimate factor in her determination.

84. We note also that no additional evidence was provided to HMRC by Ms Sowa as to the level of fee received by her for the delivery in question. This was despite the direction by the FTT allowing her to do so within 10 business days of the release of the FTT decision. Further, no other information was provided to rebut HMRC's presumption.

85. Again, we find Ms Clydesdale's position to be within the bounds of reasonableness.

FTT Point 3 - The terms of the CMR Convention are of some relevance and the Appellant's understanding that she was not required to check the Customs position is understandable and appears reasonable in the light of the terms of that Convention. If HMRC expects carriers to take a different approach then it should be clearly flagged to carriers entering the UK. There was no suggestion that HMRC had clearly publicised its approach to carriers and it appears that at least until the review decision was issued the appellant was not informed about it.

86. Ms Clydesdale's response was, in essence, a confirmation that she had acknowledged the CMR Convention but that, in her view, times had changed and its significance had reduced accordingly. She noted that it was signed in 1956 and amended in 1976 and did not take into account the "*greatly increased risks of international carriage since its introduction*". She made the point that: "*any conscientious business would ensure that they carried out due diligence on their customers and the foods that they were hired to transport*" adding that "*it is also reasonable to assume that hauliers know that when transporting goods into the UK Customs Duty is not the only consideration for HMRC or Border Force*".

87. In her oral evidence Ms Clydesdale referred also to the other factors present in the circumstances which in her view should have prompted further investigation. These factors (which she mentioned several times in relation to the other FTT points and also generally) included; the Material Safety Data Sheet accompanying the goods which indicated that the load contained "75%-95% "No.2 fuel oil – diesel engine fuels". We also note in this regard the additional analytical reports prepared for Kayla Limited by SGS Belgium which formed part of the documentation for the load and which showed that the percentage volume recoveries for the oil correlated to the definition of "gas oil" in section 1(5) of HODA. Further, we note the multi modal dangerous goods form which although describing the goods as "bulk lubricant oil – LOK IB" referred to the goods as "Fuel Diesel".

88. The Appellant's arguments in relation to this point remained the same and were based on reliance on the headline description of the goods in the CMR and multi modal dangerous goods form which described the load as "Bulk Lubricant Oil". The Appellant also relied on the fact that the SGS analytical reports and the Material Safety Data Sheet showed that the oil was a mixture. We note also a reference in Ms Sowa's evidence to an assurance from the consignor that the load was not dutiable but we were shown no further evidence of that. The Appellant confirmed that beyond reviewing the documents no further questions were asked or checks made in relation to the goods.

89. Although we agree with the FTT that HMRC should have published its approach to the CMR Convention to carriers entering the UK we agree that in this case there were additional factors present to justify an expectation of further investigation. We find Ms Clydesdale's position here to be within the bounds of reasonableness.

FTT Point 4 - more generally (and disregarding any protection afforded to the carrier by the CMR Convention) it is far from clear to us that the reference to diesel fuel on the CMR meant that the appellant should have carried out further checks, even by any standards set by HMRC. It appears, based on HMRC's own published guidance, that lubrication oil may well contain hydrocarbons without being liable to duty. Although Mr Donnachie rightly accepted that a carrier is not to be expected to carry out checks on the chemical composition of a load, he clearly placed significant reliance on the reference to diesel in the CMR. In our view he should not have done this without also taking proper account of the legislation and practice that govern the duty position of composite products discussed at [56] to [58] above. Effectively Mr

Donnachie appears to have concluded that the reference to diesel meant that the carrier should have picked up that the goods would be subject to duty. However, it is clear from the legislation and practice that this is not the case and furthermore that HMRC practice specially states that, except where intended for an additives package, lubricating oils are not chargeable.

90. Ms Clydesdale's response here was to point to two additional factors which in her view (and in addition to the reference to diesel on the CMR) should have led the driver to check the composition of the goods. The first was the fact that the running tanks contained the same fuel and there was therefore an inference that the tractor was filled at the same time as the tanker trailer (which would have been an indicator that the tanker trailer contained road diesel). The second was the fact that the delivery address for the oil was incomplete as it did not contain a postcode and could, therefore, according to Ms Clydesdale's checks have been one of several addresses in London. It was consequently not clear how the driver would have known which address he was delivering to.

91. In her evidence to the Tribunal it was also explained to us that the percentage of diesel oil in lubricant oil is expected to be around 3-4%. The fact that the MDS referred to a "fuel oil" content of between 75-95% was, therefore, regarded by Ms Clydesdale as a clear indicator that Ms Sowa should have carried out further enquiries particularly when combined with the other factors.

92. Ms Sowa did not provide any evidence to the Tribunal to displace HMRC's contention that the vehicle running tanks were likely to have been filled at the same time as the tanker. She simply told the Tribunal that she expected that the driver would have taken on fuel in Belgium. She added that his bank card history might show this. However, no bank card details were provided to the Tribunal and no further information was given.

93. Ms Sowa was also unable to provide much colour on the incompleteness of the delivery address, although she said that she thought that a postcode was not essential. She admitted that it was not her usual practice to check the delivery addresses provided by her clients and noted that in some cases she was prohibited from doing so. She said that she assumed that any problems could be resolved between the client and the driver – as the client would have the driver's details and could contact him if necessary.

94. We find Ms Clydesale's position to be within the bounds of reasonableness.*FTT Point 5 - there also appears to have been nothing other than the reference to diesel fuel on the CMR that might have alerted the appellant to make further checks. The collection point was a substantial business and the driver was not (for example) diverted elsewhere. The paperwork appeared properly to reflect the fact that a hazardous substance was being dealt with and included detailed safety and handling instructions, The load was not concealed in any way and the CMR made clear on its face that the product contained diesel fuel, If there was a deliberate attempt to evade duty (by anyone) then it seems unlikely that that description would have been included.*

95. Ms Clydesdale refers back here to her response to FTT Point 4, that the CMR description was not the only factor that prompted the need for further checks – referring specifically to the fact that the vehicle was running on the same fuel that it was transporting.

96. We agree that Ms Clydesdale's response to FTT Point 4 also addresses FTT Point 5.

FTT Point 6 - there was also no suggestion that the product was being carried in an unsafe manner or otherwise than in accordance with relevant regulations. HMRC's guidance specifically refers to health and safety issues arising from smuggling. Those considerations will clearly be relevant when fuel is concealed or carried in an unconventional manner but in this case the detention report refers to both the tractor unit and trailer being in a fair condition, suggesting that nothing was untoward and also suggesting that one of the rationales behind the guidance is not in fact relevant in this case. Essentially the guidance (and therefore by following it Mr Donnachie) appears to have taken account of a factor that is not relevant in this case.

97. Ms Clydesdale confirmed that this was not a factor that she considered relevant as part of her review. We have no reason to reason to conclude otherwise.

FTT Point 7 - Mr Donnachie was clearly right to take account of the fact that the lab test for one of the running tanks appeared to produce the same result as the five samples from the storage tanks holding the goods. However, the lab results do not appear to us to provide full information, and in particular do not show the proportions of "gas oil/DERV" and lubricating oil fraction". Mr Donnachie appears to have concluded that all the tests showed that 93% or 94% was diesel, but that is not what the results actually state. Any possibility that the

proportions of diesel and lubricating oil varied between the samples taken from the load and the sample taken from the running tank appears to have been disregarded.

98. Ms Clydesdale's response was that as the vehicle and goods were deemed to have been duly forfeited, the composition of the fuel samples was no longer relevant as the tanker contents must be deemed to be road diesel.

99. Whilst it is correct that the facts required to support the seizure must be deemed to be correct (as per *Jones*), that assumption does not however deal with the issue addressed by the FTT in point 7. That issue was Mr Donnachie's apparent disregard of the possibility of the samples taken from the running tanks having different proportions of diesel and lubricant oil from those taken from the trailer.

100. Ms Clydesdale's decision takes into account, as a key factor, the fact that the oil used in the running tanks was the same as the oil in the tanker. It is this which enables her to postulate the likelihood of the tanker and the trailer being filled up at the same time (so alerting the driver to what he was carrying). She states in her decision letter that;

"*The analysis of the fuel sample taken from the pots on the tanker trailer and the running tank of the tractor unit show that it is the same fuel.*" and "*Given the fact that the vehicle was fuelled with the same "lubricating oil" that it was transporting it is reasonable to conclude that the driver should have questioned the goods he was carrying and he should have contacted you.*"

She did, however, acknowledge that there was a difference in the composition in one of the samples. In her decision letter to Ms Sowa she states (on page 2) that;

"*On 16 July 2015 the Laboratory of the Government Chemist analysis of the seven fuel samples taken showed that the samples contained a mixture of gas oil/DERV, lubricating oil fraction and vegetable oil. The vegetable oil and ester content of the samples was 3% in six of the samples and 4% in the seventh sample. The analysis showed that the samples were predominantly gas oil/DERV.*"

101. Notwithstanding her response to FTT point 7, she had therefore made an assumption that notwithstanding the discrepancy in the test results, the oil in the running tanks was the same as the oil in the tanker trailer (and that it was predominantly diesel).

102. We heard from the Respondent's counsel that the oil samples taken from the tanker trailer and the running tanks were materially different from "standard" or "normal" road diesel. We also heard from the Appellants that the running tanks of the tractor unit were connected and the composition of fuel in each tank should therefore be the same. It was also not disputed that the oil in one of the running tanks did appear to have the same composition as the oil in the tanker. In addition it was made clear that the results were sufficiently similar and the difference between the composition of the samples and the composition of normal diesel so great as to enable the conclusion to be drawn that the oil in the running tanks and tanker trailer was the same. These facts were not disputed by the Appellant.

103. Taking these factors into account and taking into account the relevant standard of proof (the balance of probabilities as per *Golobieswka v Commissioners of Customs & Excise [2005] EWCA Civ 607*) we find Ms Clydesdale's assumption to not be unreasonable.

FTT Point 8 - there is no indication that the value of the trailer or the impact of its loss on the appellants business (see [26] and [27] above) or the fact that this was the first time that the appellant had had a vehicle intercepted were taken into account in determining whether non-restoration was proportionate."

104. In her response Ms Clydesdale acknowledged the value of the tanker trailer and the financial impact of its loss on the Appellant's business. She stated that in addition she had considered whether there were "humanitarian grounds" for restoration. She also set out her estimate of the likely amount of excise duty that in her opinion been evaded based on the current seizure and the nine other jobs that the appellant had carried out for the same client (based on the invoices shown). Her conclusion was that in the circumstances not restoring the vehicle was proportionate "*in consideration of the evaded duty and the potential for further evasion*" – although she added that she had also considered all of the evidence presented. She also made it clear in her witness statement that she had "*examined all of the available information to ascertain if there were any exceptional circumstances that might lead [me] to conclude that the seized vehicles should be restored.*"

105. We have also taken note of Ms Clydesdale's confirmation that had Ms Sowa taken what Ms Clydesdale regarded as reasonable steps to check the goods that she was carrying and her customer, she would have restored the vehicles. Her overall conclusion was that given the circumstances and the lack of any material due diligence carried out by Ms Sowa it was hard for her to see Ms Sowa as an entirely innocent party. There was, therefore, in her opinion no basis to depart from HMRC's standard restoration policy which was to refuse restoration other than in exceptional circumstances or where the property was owned by a finance company.

106. We find Ms Clydesdale's position to be within the bounds of reasonableness.

HMRC's decision in relation to the First Appeal

107. Ms Clydesdale's decision to refuse restoration in respect of the August 2015 seizure was very broadly similar to the decision in relation to the Second Appeal.

108. In her decision letter Ms Clydesdale specifically referenced the first seizure noting that the current seizure was for Ms Sowa the second seizure of fuel consistent with road diesel within a two month period. Ms Clydesdale referred also to HMRC's own checks on the consignee shown on the CMR and Dangerous Goods form, which revealed that the consignee did not in fact trade from the premises given as their address and that the consignee was actually a haulier itself. In addition she mentioned that the company operating at the purported delivery site confirmed to HMRC that they had no knowledge of the consignee, had no fuel on site and were not expecting a fuel delivery. She added that some of these discrepancies would have come to light had basic internet checks been carried out by Ms Sowa.

109. Ms Clydesdale referred to having considered all of the circumstances of the case before deciding not to restore. She referred specifically to her consideration of whether any humanitarian grounds existed for restoration (they did not) and whether there were any exceptional circumstances justifying restoration including a consideration of whether non restoration would be reasonable and proportionate. She stated also that her considerations included the economic effect of non restoration on Ms Sowa's business and confirmed that although bound by HMRC's restoration policy she was not bound by it

110. Her conclusion was that the decision to not restore was reasonable and proportionate adding that on the balance of probabilities the oil was wrongly described in order to mislead HMRC.

111. Ms Sowa has not provided any material evidence to rebut HMRC's conclusions. We note in this regard that she mentions in her witness statement that OM intertrade (the consignee) may have traded from addresses other than its registered address but nothing further was mentioned or provided. As with the Second Appeal her main contention is her lack of knowledge and the fact that she should not be expected to have carried out more diligence than she had done in respect of the matter.

112. As with the decision in relation to the Second Appeal, we find Ms Clydesdale's decision to be within the bounds of reasonableness.

OUR DECISION

113. In the light of the relevant legislation and authorities described above it is clear that the jurisdiction of the Tribunal in these appeals is limited and the issue for us to determine is not whether the vehicles which are the subject of each appeal should be restored to the Appellant but whether, having regard to the facts as we have found them, the decisions taken by HMRC not to restore are decisions that could reasonably have been reached. It is not sufficient that we might have reached different conclusions nor is it open to us to consider any challenge to the basis or legality of the seizure or the underlying facts necessary to the conclusion that vehicles were condemned as forfeit.

114. Having considered all of the facts available to us including the FTT Decision and the facts found therein, the evidence provided to us by Ms Sowa and Ms Clydesdale and having examined Ms Clydesdale's responses to the specific points raised in the FTT Decision, we have concluded that the decisions to refuse restoration were in each case reasonably arrived at within the meaning of section 16(4) of the Finance Act.

115. We, therefore, dismiss both of the Appellant's appeals.

116. We would emphasise here that the fact that we have dismissed the appeals does not mean that we have determined that Ms Sowa knowingly smuggled goods into the United Kingdom. We appreciate that she has strenuously denied knowing that the goods she transported were subject to excise duty and has stressed her belief that she was carrying non dutiable lubricant oil. We have no reason to disbelieve this and are comfortable that her lack of knowledge has been taken into account by HMRC in arriving at their decisions. It is instead Ms Sowa's lack of any material due diligence which HMRC say could reasonably have been expected in the circumstances, combined with the multiplicity of transactions for the same customer, which have been particularly relevant. In addition we note that she has provided very limited evidence to rebut HMRC's contentions, despite the burden of proof in these appeals lying with her as Appellant.

Effect of the Perfect decision

117. For completeness we note that the decision in *Commissioners for Her Majesty's Revenue & Customs v Perfect [2022] EWCA Civ 220* behind which these proceedings had been stayed did not have any material impact on the Appellant's case. That decision which took into account the CJEU's judgment on Article 33 of Council Directive 2008/118/EC (and therefore Regulation 13 of the 2010 Excise Goods (Holding Movement and Duty Point) Regulations 2010) confirmed that a person need not be aware that excise duty was being evaded to be regarded as "*holding" or "making ..delivery of*" goods for the purposes of Article 22 or Regulation 13.

The Appellant's procedural argument

118. We note that in relation to Appeal TC/2017/07507 the Appellant asserted that the Respondent's decision was received late and so did not comply with the FTT Decision timing requirement to make a fresh decision within six weeks. The specific assertion was that the decision although dated 7 June 2017 (the last day of the six week period) was received only on 16 June 2017 by the Appellant. We note also the Respondent's contention (which has not been disputed by the Appellant) that the Appellant was notified on 5 June 2017 that the decision was going to be issued on 7 June 2017. We do not consider that the delay in receipt should have any impact on these proceedings, it is not material in the context of the proceedings nor does it appear to have caused any material disadvantage or loss to the Appellant.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

119. 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 Proceedings (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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release Date: