Neutral Citation: [2023] UKFTT 913 (TC)

Case Number: TC08978

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02121

CUSTOMS DUTY – application for restoration – previous appeal allowed requiring HMRC to undertake a further review – whether second reviewed decision reasonable – yes – appeal dismissed

Heard on: 24 October 2023
Judgment date: 30 October 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
JANE SHILLAKER

Between

FRENCH SOLE (MARYLEBONE) LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: No one appearing

For the Respondents: Charlotte Brown 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 a video hearing using the Tribunal video hearing system. A face-to-face hearing was not held because it was more expedient not to do so. The documents to which we were referred were contained in single bundle of 132 pages.

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. This is an appeal bought by French Sole (Marylebone) Ltd (**Appellant**) in respect of a decision by HM Revenue and Customs (**HMRC**) to refuse to restore, or pay compensation in respect of, 517 pairs of shoes (**Shoes**) imported into the UK on 11 October 2018 and subject to a notice of seizure on 25 October 2018.

4. The principal decision to refuse to restore the Shoes was made on 31 October 2018. That decision was reviewed and upheld by letter dated 22 November 2018. On appeal (**First Appeal Judgment**) against that review decision the Tribunal directed HMRC to undertake a further review taking account of matters not apparently previously considered by HMRC.

5. The second review, the review to which this appeal relates (**Review**), dated 11 November 2021 again upheld the refusal to restore.

6. For the reasons stated below we find that HMRC's decision, as contained in the Review, was reasonable and the appeal is dismissed.

ADJOURNMENT

7. Shortly before 10am, as the hearing was due to commence, an application was received from Mr Bunyard (director of the Appellant) seeking an adjournment of the hearing on the grounds that, due to a cancellation of his train from Paris, he would not be in a location convenient to join the video hearing.

8. We opened the hearing to determine the application. Ms Whittaker, an employee of the Appellant, was in attendance. She explained that she was a witness in the case but did not know the details of the Appellant's case and was not authorised as the representative to speak on its behalf. She could add no further information as to Mr Bunyard's unavailability or why Mr Hirst (who had completed the Notice of Appeal) was not in attendance.

9. We invited HMRC to indicate their position on the application. At our suggestion HMRC consented to a short adjournment to noon in order to facilitate Mr Bunyard arriving back in the UK but were clear that they would object to any further adjournment.

10. We determined to grant an adjournment to noon. The reasons for permitting only that adjournment were communicated to Mr Bunyard as follows:

(1) there has been repeated non-compliance by the Appellant in these proceedings (a failure to serve a list of documents or witness statements in accordance with the directions dated 29 June 2022 or at all);

(2) the Tribunal would have expected the Appellant to make arrangements that ensured attendance of the relevant and key individuals. Evidence may not be given from overseas without prior notice and authorisation being received from the relevant jurisdiction.

(3) it was our expectation that Appellants should take proceedings sufficiently seriously so as to make appropriate arrangements to facilitate and ensure their presence;

(4) it was in the interests of justice.

11. During the short adjournment there were further email exchanges with Mr Bunyard who indicated that he was prepared to provide any missing documents and that an adjournment to a later date was required because his attendance at the hearing was critical.

12. When the hearing resumed Mr Bunyard was not in attendance. Ms Whittaker was again in attendance, but she confirmed she had no authorisation to represent the Appellant. Mr Bunyard had confirmed by email that she was a member of staff and not management and could not represent the Appellant. The effect was that the Appellant was unrepresented at the resumed hearing. Ms Whittaker asked to be excused from further attendance. She was informed that it was her choice. She then withdrew from the hearing.

13. Rule 33 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may proceed with a hearing in a party's absence where satisfied the party was given notification of the hearing and where it is in the interest of justice to do so.

14. As indicated the Appellant was not represented at the resumed hearing. There was no question that the Appellant had been notified of the hearing. We considered whether it was in the interests of justice to proceed with the hearing and determined that it was.

15. We did so for the following reasons:

(1) The application for a substantive adjournment was made at the last minute. It was made on the basis that, due to storms, the trains from Paris had been cancelled on Monday 23 October 2023 precluding travel back to the UK. No direct evidence of the cancellation was produced. The weather in the UK and the near continent on 23 October 2023 was comparatively settled and there were no strikes in either the UK or France so far as an internet search was able to identify. There was also no evidence of the efforts made by Mr Bunyard to make alternative travel arrangements to ensure attendance.

(2) The Appellant had a history of non-compliance. The Appellant failed to serve either a list of documents or witness statements in accordance with the Tribunal directions dated 29 June 2022 or at all.

(3) The Tribunal's jurisdiction on an appeal of this type is limited. In summary, and as set out in more detail below, we are entitled to consider only whether HMRC's decision on review is unreasonable i.e. whether it takes account of irrelevant factors or fails to take account of relevant ones or is otherwise obviously unreasonable.

(4) The exercise of our jurisdiction is limited to considering the evidence available to us, in the form of documents and as set out in any witness statements provided by the Appellant, as to the factors considered by HMRC; and, by reference to such evidence, whether irrelevant factors have been considered or relevant factors ignored.

(5) The appeal concerns a second review of the original decision following the First Appeal Judgment which concluded that HMRC had failed to take account of identified relevant factors. In the First Appeal Judgment, Judge Newstead-Taylor had, in our view correctly, dismissed other factors as matters she (and HMRC) were not able to consider. Such factors (addressed below) did not therefore require us to hear from Mr Bunyard (with or without a witness statement having been served outlining any evidence he wanted to rely on).

(6) We considered the asserted prejudice to the Appellant, as articulated by Mr Bunyard in his emails, that he needed to give evidence but noted that no witness statements had been served and that the statements available to Judge Newstead-Taylor had been made available to us.

(7) Against that prejudice we considered that HMRC had prepared for the hearing. Mr Higginson (the officer responsible for the Review) was in attendance and we were able

to take evidence and thoroughly explore with him the factors he had considered and the reasonableness of his decision generally.

(8) Having taken account of all these factors we concluded that it was in the interests of justice to proceed.

THE FIRST APPEAL JUDGMENT

16. We attach as an appendix to this judgment the First Appeal Judgment. It sets out a full history to the importation, seizure of the Shoes and the original decision of HMRC refusing restoration of the Shoes.

17. At paragraphs 38 – 54 it sets out the applicable law. With thanks we adopt that summary.

18. The First Appeal Judgement set aside HMRC's original review of the decision to refuse restoration of the Shoes and directed HMRC to conduct a further review. That review required HMRC to retake their decision on restoration afresh considering all relevant matters including those identified in the First Appeal Judgement (at paragraph 55(3)).

THE REVIEW

19. We heard evidence from Mr Higginson, the reviewing officer, of the matters he had considered when undertaking his review.

20. As the Appellant was not in attendance, we adopted an inquisitorial position fully exploring with Mr Higginson the factors considered.

21. Through that process, and by reference to the documents contained in the bundle, including the grounds of appeal and the witness statements provided on behalf of the Appellant in respect of the First Appeal Judgment, we find the following facts:

(1) Mr Higginson undertook a fresh review of the decision to refuse restoration; he did not limit himself to considering the matters identified in the First Appeal Judgment; he considered all the relevant material. However, he expressly considered each of the individual factors identified in the First Appeal Judgment.

(2) Consistently with the legal framework, and as confirmed in the First Appeal Judgment, he was unable to take account of the Appellant's assertion that HMRC's conclusion that 96 pairs of shoes had been incorrectly classified was incorrect as the Appellant had not challenged seizure by way of condemnation proceedings.

(3) He did not consider that the inexperience of the previous owner when completing the relevant import documentation was a basis on which to restore the goods as it was the responsibility of the Appellant to ensure that the declaration was correct.

(4) He recognised and acknowledged that the Appellant had agreed to remediate the paperwork and pay both the duty and penalties.

(5) It was noted that there was no evidence that the misdeclaration had been deliberate.

(6) The Review confirmed that had the only error made in connection with the relevant import been the misclassification of 96 (of 517) pairs of the Shoes it would have been "difficult to make a compelling argument that [the Appellant's] actions would have seen [the Appellant] gain any significant commercial advantage over other traders, and when also taking into account there is no evidence that [the Appellant had] a poor compliance history, it would [have been] unreasonable and disproportionate to refuse restoration entirely".

(7) However, his decision to refuse restoration was grounded in the second error, the under valuation of the commercial value of the consignment. The C88 documents declared the commercial value of the goods as £5,408.50 whereas the commercial value

of the Shoes was, in truth, £24,076.00. He considered that any review of the accompanying documentation by the Appellant, or anyone acting on its behalf, would have revealed the error as each line item had been particularised. Whilst administrative it was such a basic mistake that it was at least careless. Had the consignment not been stopped for verification the error would have facilitated the Appellant with a significant commercial advantage over other importers of similar shoes.

(8) HMRC's policy is not to restore goods on which duty and the associated import VAT has not been paid unless there is an exceptional basis for doing so, including a humanitarian or financial circumstance justifying restoration. No such exceptional circumstance had been evidenced in this case.

(9) In response to questions put by us, Mr Higginson confirmed that whilst he had considered (and dismissed) partial restoration of the Shoes (by way of compensation as the Shoes had accidentally been destroyed) which had been correctly classified (see (6) above) he had not expressly considered partial restoration by reference to the payment of duty made (i.e. the duty and VAT associated with a commercial valuation of £5,408.50).

GROUNDS OF APPEAL

22. The Appellant's grounds of appeal contend that the failure to restore is an "excessive penalty for administrative errors".

23. The grounds note that the classification error was one which arose as a consequence of an error in identifying the textile composition of some of the Shoes and that the magnitude of the associated error was small.

24. It was claimed that the error in the declaration of the commercial value of the Shoes was purely administrative and not deliberate. The Appellant accepts that forfeiture is a reasonable and proportionate consequence of a deliberate error but considers that it is otherwise excessive and that a more lenient approach should have been adopted by HMRC as the Appellant has suffered financial hardship as a consequence of having lost the ability to sell the forfeited Shoes contributing to the Appellant having entered into a Company Voluntary Arrangement in February 2020.

25. The Appellant claims that there are exceptional circumstances as the duty calculations have not been clearly stated by HMRC or the Tribunal and that the correct classification position cannot be determined as a consequence of the accidental destruction of the Shoes by HMRC.

26. The magnitude of the error (£5,985.02) as compared to the commercial value of the Shoes should, in the Appellant's view, justify restoration (by way of compensation as the Shoes have been destroyed).

27. The Appellant also complains that the accidental destruction of the Shoes has, in effect, prejudiced their position.

DISCUSSION

28. As clearly explained in the First Appeal Judgment and briefly set out above, our jurisdiction is limited to considering the reasonableness of the Review. If the Review decision is reasonable then it must be upheld even were we to consider that we might have reached a different conclusion if taking the decision ourselves.

29. Not considered expressly in the First Appeal Judgment is the case of *John Dee v Commissioners of Customs & Excise* [1995] STC 941. In that case it was determined that where the jurisdiction of the Tribunal is to consider the reasonableness of an HMRC decision a finding that HMRC acted unreasonably (for instance in failing to take account of a relevant factor) does not necessarily result in the relevant decision being set aside and a direction that it

be remade. If HMRC can show, or the Tribunal are satisfied, that the decision being reviewed is one that would inevitably have been reached had HMRC not acted unreasonably the decision will not be set aside (see *John Dee* at pages 952 – 3).

30. We have carefully considered the terms of the Review and we questioned Mr Higginson on the factors he had considered and those he had not considered and the thought processes he went through.

31. The Appellant is aggrieved because they have lost the ability to sell stock with a commercial value of £24,076 for what it considers to be administrative errors. It contends that as a consequence of having lost £24,076 of stock financial hardship has been suffered. However, no evidence of the contributory cause of the forfeiture of the stock has been provided. Further, it will always be the case that forfeiture results in the loss of the goods in question unless there is a decision to restore. One is the simple and necessary consequence of the other. As such the direct loss associated with forfeiture cannot be an exceptional circumstance in and of itself justifying restoration of goods on which duty is mis-declared or unpaid and which are forfeit under section 49(1)(a) and (e)) Customs and Excise Management Act 1979 (**CEMA**). It might be a relevant factor when considering restoration of goods forfeit under section 141(1) CEMA i.e. those on which duty has been duly paid but which were "found, mixed or packed" with goods on which duty was not paid.

32. The Appellant's position on the incorrect classification of the 96 pairs of shoes is inconsistent. The Grounds of Appeal both appear to accept that there was an incorrect classification but also contend that this cannot be verified because of the destruction of the Shoes.

33. We can see that were it possible for us to consider the misclassification issue the destruction of the shoes may have been prejudicial. However, as has been explained in the First Appeal Judgment, we cannot consider whether there was, or was not, a classification error. That is a matter which was within the exclusive jurisdiction of the magistrate's court in condemnation proceedings. We must assume that the goods were misclassified.

34. The effect of such misclassification is that the 96 pairs were forfeit under section 49 CEMA i.e. they are goods on which the incorrect amount of duty was paid. HMRC's policy on the restoration of goods forfeit under section 49 CEMA is that they must not generally be restored. The decision to restore must be applied firmly but not rigidly and will usually only be permitted where there is a humanitarian or hardship reason warranting departure from the usual restoration criteria. HMRC's policy on restoration of goods forfeiture under section 141 CEMA as "found, mixed or packed" is marginally more relaxed.

35. The justification for this policy may be summarised as maximising the deterrent value of seizure, giving a proportionate response and to protecting legitimate trade.

36. Mr Higginson did consider whether it was proportionate to refuse restoration in whole or in part in consequence of the misclassification error. He noted that the under declared duty arising from the misclassification error was £440.00 and he considered that to have refused restoration "entirely" as a consequence would have been disproportionate. Having questioned him on this we understand that by "entirely" he meant that, applying the restoration policy to a situation similar to the present appeal and limited to the misclassification error, he would have been likely to consider it appropriate to restore (or pay compensation in respect of) the correctly classified shoes but refuse to restore those that had been incorrectly classified.

37. However, and as is clear from the terms of the Review letter, he decided that restoration was inappropriate because of the error which undervalued the consignment. As set out in the Review the commercial value of the whole consignment was £24,076 as compared to the declared value of £5,408.50. The customs valuation of the consignment was £26,518.78 (the

commercial valuation plus the correct duty). VAT on the consignment should therefore have been £5,303.75. The Appellant had paid duty of £419.56 and VAT of £1341.95.

38. Mr Higginson considered that the under payment was so significant that legitimate trade could have been affected had the error not been detected. Whilst he did not consider there to be any evidence that the error had been deliberate he considered that it was such an obvious error he could not comprehend how it could have gone unnoticed and he considered the deterrent effect of non-restoration was important in ensuring that the Appellant was not careless in its declarations and ensuring that legitimate trade was protected was equally important.

39. Mr Higginson confirmed that he had not considered partial restoration such that goods with a commercial value of £5,408.50 and on which duty and VAT had been paid might be restored.

40. We have carefully considered whether failing to consider partial restoration (and in this case compensation) by reference to the duty paid renders the Review unreasonable and justifies it being set aside. In the end we have concluded that the decision should not be set aside.

41. Ms Shillaker spent some time during the short adjournment trying to establish which of the various line items had been summed in order to total £5,408.50 and could not do so. Mr Higginson indicated that he too had sought (but not exhaustively) to identify how the £5,408.50 sum had been calculated and had failed to do so. At no point either before the First Appeal Judgment nor in relation to this appeal had the Appellant sought to explain the arithmetical error. We therefore conclude, as did Mr Higginson, that the whole consignment of Shoes was affected by this error. Each of the pairs of Shoes was thereby, and in effect, the subject of an under declaration of duty/import VAT such that each was liable to seizure under section 49 rather than section 141 CEMA. As such the more stringent policy applies.

42. We do not consider it necessary to determine whether Mr Higginson's failure to consider partial restoration was unreasonable because we are satisfied, by reference to the terms of the policy, that even were he to have done so he would inevitably have concluded that it was inappropriate to restore. This was on the basis that the duty/import VAT payment totalling £1,761.51 did not pertain to identified or identifiable goods within the consignment but to it generally.

43. Accordingly, we consider that HMRC's Review decision was reasonable, and we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date:

ANNEX

Customs and Excise Duties – – Shoes – Appeal Allowed

Restoration

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08231

BETWEEN

FRENCH SOLE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NEWSTEAD TAYLOR

The Tribunal determined the appeal on 3 August 2021 without a hearing, in accordance with Judge Allatt's direction dated 25 January 2021 that, bar objection, the appeal be determined on the papers pursuant to Rule 29 (a-b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, having first read the Notice of Appeal dated 20 December 2018 (with enclosures), HMRC's Statement of Case dated 5 April 2019 and the associated documents in the Hearing Bundle.

DECISION

INTRODUCTION

45. This is an appeal by French Sole Limited ("the Appellant") against the Commissioners for Her Majesty's Revenue & Customs ("the Respondents") review decision, dated 22 November 2018, upholding the Respondents' decision, dated 31 October 2018, not to restore to the Appellant a consignment of 517 pairs of shoes ("the Consignment") seized at London Heathrow Airport ("LHR") on 25 October 2018.

LITIGATION HISTORY

46. On 20 December 2018, the Appellant appealed against the Review Decision.

47. On 14 January 2019, the Consignment was destroyed.

48. On 4 February 2019, the Appeal was sent to the Respondents.

49. On 13 June 2019, the First-tier Tribunal (Tax) ("FTT") gave directions including that *"the respondents shall send or deliver to the appellant and the Tribunal a list of all documents which shall comprise all documents considered by the respondents' officer when reaching the decision at issue in this appeal together with any other documents on which the respondents intend to rely on connection with this appeal…"* ("Direction 1 (2)")

50. On 17 June 2019, the Respondents applied to set aside Direction 1 (2) of the directions dated 13 June 2019.

51. On 23 July 2019, the FTT refused the Respondents set aside application stating that *"an exploration of the innocence or otherwise of the errors is a matter which could well play into a consideration of the reasonableness of the decision not to restore along with a proper understanding of the amount of underdeclared duty….a rough approximation of the duty under declaration would be around £1,700. When deciding whether a decision could reasonably have been reached not to restore (even on condition of payment of a fee aimed at recovering the unpaid duty and levying an appropriate 'penalty') goods to a value of some £24,000 for an under declaration of this amount, the Tribunal is bound to want to explore fully how the officer reached his decision and the (presumably quite limited) file of papers upon which that decision was based."*

52. On 19 September 2019, the Respondents informed the Appellant that the Consignment had been destroyed.

53. On 5 March 2020, unless orders were made against the Appellant. The Appellant complied.

54. On 20 March 2020, the Appellant applied for an extension of time and for an order requiring the Respondents to provide disclosure concerning the destruction of the Consignment.

55. On 28 April 2020, the Respondents consented to the extension of time and objected to the disclosure concerning the destruction of the Consignment.

56. On 10 November 2020, the FTT directed the Respondents to provide further disclosure concerning the destruction of the Consignment.

57. On 25 January 2021, the FTT gave directions including:

(1) Hearing Bundle, in a specified form, by 19 February 2021.

(2) Skeleton Arguments by 5 March 2021.

(3) Replies to Skeleton Arguments by 19 March 2021.

58. On 11 May 2021, the Respondents emailed the FTT chasing the Appellant's Skeleton Argument, none having been provided.

59. On 24 May 2021, the FTT chased the Appellant for compliance with the direction for a Skeleton Argument.

60. On 3 June 2021, the Respondents informed the FTT that they considered that the appeal should be determined on the available documentation.

61. On or around 10 June 2021, the FTT emailed the Appellants confirming that a date had been set for the paper hearing and informing the Appellants that it would likely be to their detriment if they did not submit a Skeleton Argument.

THE EVIDENCE

62. I received a Hearing Bundle comprising 120 pages. The Hearing Bundle contained five witness statements as follows:

(1) Mr Myles Bunyard - A consultant to the French Sole group.

(2) Mr Philip Hirst - A consultant to the Appellant.

(3) Ms Lucy Whittaker – A general manager and deputy managing director of the Appellant.

(4) Officer Jordan Danks – the Review Decision maker.

(5) Mr Matthew Scholes - one of the Respondents' managers who provided evidence concerning the destruction of the Consignment.

63. I also received a Skeleton Argument from the Respondents, but, despite the FTT's directions and the email reminders detailed above, I did not receive a Skeleton Argument from the Appellant.

64. I have read the entirety of the Hearing Bundle and the Respondents' Skeleton Argument. I have also considered the Authorities Bundle as appropriate.

THE GROUNDS OF APPEAL

65. The Appellant has not submitted a Skeleton Argument. In the circumstances, I have approached the appeal by considering the Grounds of Appeal detailed in the Notice of Claim along with the witness evidence submitted by the Appellant. The Grounds of Appeal as discerned from these documents are summarised below:

(1) The Review Decision is unreasonable because:

(a) If an incorrect CC was used, it was an innocent mistake – as set out in the witness statement of Mr Bunyard..

(b) The incorrect CC affected only 17.5% (actually 18.5%) of the Consignment and resulted in an under declaration of duty of less than 10%.

(c) The error in the Excel calculation was a clear administration failure not a deliberate attempt to evade the appropriate liability.

(d) The Appellant has a previous good history of compliance, this being the first contravention.

(e) Forfeiture and failure to restore is an excessive penalty for administrative errors.

(2) The Appellant will suffer financial hardship through loss of stock valued at in excess of £24,000.

(3) The Appellant challenged the legality of the seizure, as set out in the witness statement of Philip Hirst.

(4) The correct CC was used, as set out in the witness statements of Myles Bunyard and Lucy Whittaker.

FINDINGS OF FACT

66. I make the following findings of fact from the witness statements of Mr Bunyard, Mr Hirst, Ms Whittaker, Officer Danks and Mr Scholes and the documents contained in the Haering Bundle.

67. In 2018, the Appellant sold ladies footwear to CDB Enterprises Ltd ("CDB"). CDB was based in Vancouver, Canada.

68. Around mid-August 2018, CDB was acquired by the French Sole group of companies. Pursuant to a commercial agreement a percentage of old stock held by CDB was returned to the Appellant and replaced by new stock, the aim being to boost sales. The stock list was prepared and appropriate items selected.

69. The previous owner, who had remained for a short period, prepared the export documentation. She had no prior experience exporting shoes. She used Commodity Code ("CC") 6403999800.

70. A commercial invoice, dated 26 September 2018, records that all shoes are *'100% Calfes Leather'*, but proceeds to specify the material used in the upper as either leather, nubuck, calf hair, suede, velvet, fabric or glitter. Therefore, on the face of the commercial invoice not all of the uppers of the 517 pairs of shoes were made of leather. Further, the total value of all 517 pairs was wrongly calculated at £5,408.50. This is not the correct total of each of the itemised values. The correct total is £24,076, being an undervaluation of £18,667.50.

71. On 11 October 2018, the Appellant imported the Consignment into the United Kingdom under entry 120-067495X and Airway Bill 125-4674023. The Consignment was declared under CC 6403999800 as '*footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather, other footwear, other for women'* with a duty rate of 7.0%. The entry was input onto the system by SEKO Logistics Solutions Ltd ("SEKO"), being the Appellant's agent. However, the Appellant remained responsible for the accuracy and completeness of the information given in the declaration, Article 15 (2) (a) of Regulation (EU) No. 952/2013 ("Union Customs Code")

72. On 16 October 2018, the Appellant authorised the Respondents to deal with SEKO in respect of all consignments selected for examination.

73. On 17 October 2018, the Respondents informed SEKO that the Consignment had been selected for examination.

74. On 25 October 2018, the Respondents examined the Consignment at Swift Arrow Site 2 LHR and discovered that 96 pairs of shoes had been mis-declared under CC 6403999800 because they had uppers consisting of material other than leather. This was further evidenced by the stickers on the soles of these shoes which stated the material used for the uppers and the invoice which specified the material for the uppers. The Respondents seized the Consignment. This was the first time that the Appellant's goods had been seized by the Respondents.

75. On 26 October 2018:

(1) The Respondents emailed to the Appellant a notice of seizure along with a schedule.

(2) The Appellant emailed to the Respondents a request for restoration of the seized Consignment offering to rectify the erroneous paperwork and pay the correct duties / taxes.

76. On 29 October 2018:

(1) The Respondents sent a Notice of Seizure and Seizure Information Notice to the Appellant. The Notice of Seizure stated that the misclassification would have resulted in an underpayment of duties and taxes amounting to £2,442.78. It also explained the process for challenging the legality of the seizure.

(2) At 09.38, the Appellant applied, by email, for restoration of the Consignment. The Respondents acknowledged this application by email at 13.53.

77. On 30 October 2018, the Respondents informed the Appellant that the Consignment would be stored for 45 days and if the Respondents had not heard from the Appellant in that time it would be destroyed.

78. On 31 October 2018, the Respondents refused the Appellant's restoration request ("the Decision.") Officer Wilmot, the decision maker, did not consider the legality or correctness of the seizure. Instead, he referred the Appellant to the correct procedure for challenging the legality of the seizure. In reaching the Decision, he considered all the circumstances surrounding the seizure including:

(1) The Consignment was being imported for a commercial purpose.

(2) An incorrect CC was used for some of the pairs of shoes in the Consignment.

(3) It is the Appellant's responsibility under Article 15 (2) (a) of the Union Customs Code to ensure that customs declaration are accurate, true and compliant with all obligations.

(4) The invoice value declared on entry was £5,408.50. The correct value was £24,076. This amounted to an undervaluation of £18,667.50.

(5) HMRC's Restoration Policy, being, in general, not to restore misdeclared goods albeit that each case is considered on its merits to determine if restoration may be offered and under what terms.

(6) There are no exceptional circumstances such as a humanitarian angle or hardship that justify a departure from the Restoration Policy. Notably, losing goods that were held for a commercial purpose, duty unpaid, does not qualify the Appellant to be considered for financial hardship.

79. I am satisfied that the Appellant did not, at any point in the month following the seizure of the Consignment or at all, serve a "notice of claim" for the purposes of paragraph 5 of Schedule 3 of CEMA which contested the legality of the seizure and required HMRC to take condemnation proceedings in the magistrates' court. Specifically, I have considered whether either of the Appellant's emails, dated 2 November 2018, could be read as a "notice of claim." I have concluded that they could not for the following reasons:

(1) The first email, timed at 12.19, had a subject of *"LHR 10-026 Request_for_Restoration 1"*. It attached a template form headed Request for Restoration of seized things – example letter. The template form is completed and requests restoration, albeit no explanation is given for why the Consignment should be returned. Further, the bottom of the form contained an *'Important Note'* informing the Appellant that *"If your only reason for asking for the return of seized things is that you think HMRC or Border Force had no legal right to seize them, including where you claim they were*

for your own use, you must challenge the legality of the seizure (see section 3 of this notice).” Therefore, the Appellant knew or ought to have known that this template form was a request for restoration and could not be used to challenge the legality of the seizure.

(2) The second email, timed at 12.27, had a subject of *“LHR 10-026 Request_for_Restoration 2”* and attached a letter. I note that the attached letter is inconsistent as to whether or not the correct CC was used. In the seventh paragraph, the author states *“ The fact that she used the incorrect code was purely a mistake and was not meant in any way to mislead. She had no gain from doing so as this was no longer her company”* However, in the next paragraph the author asserts that the CC was not incorrect. Nonetheless, the Appellant does not specifically challenge the legality of the seizure. I have concluded that this letter was not a “notice of claim”, but was a request for HMRC to review the Decision. In reaching this conclusion, I refer to and rely on the subject heading to the email and the last paragraph of the letter which states:

“We would ask if you could pass this on to your colleague, with the view that your initial decision (whilst being correct on the information to hand) may have been incorrect. We respect the Customs and the boarder control. With you there would chaos so I totally appreciate there needs to be order but as you mention in your emailed letter, the process is not rigid. Therefore I would please ask if you could put this appeal forward at your earliest opportunity as the lack of stock is having a serious detrimental effect of both businesses.” (sic)

80. I consider that both emails dated 2 November 2018 were renewed requests for restoration and the second email was a request for the Respondents to review the Decision. This is supported by the fact that on 5 November 2018 the Respondents emailed the Appellant confirming receipt of the emails of 2 November 2018 and stating that the matter had been passed to the Appeals team for review. The Appellant did not respond to this email questioning why the Respondents were undertaking a review as opposed to commencing condemnation proceedings.

81. On 22 November 2018, the Respondents upheld the Decision (“the Review Decision.”) Officer Danks, the decision maker, confirmed that he had considered the following:

(1) The circumstances of the seizure of the Consignment albeit not the legality or correctness of the seizure itself. However, I note that Officer Danks did, in fact, engage with the Appellant’s argument that CC 6403999800 was the correct CC. He concluded that it was not and gave reasons for this conclusion.

(2) The misdeclaration under an incorrect CC, as evidenced by the stickers applied to the shoes, resulting in a duty rate of 7% instead of 16.9%.

(3) The liability of the entire Consignment to forfeiture under s.49 (1) (e) and s.141 (a-b) of CEMA. The Consignment was seized under s.139 (1) of CEMA. Pursuant to s. 152 (b) of CEMA, the Respondents may restore, as they see fit, anything forfeited or seized under the customs and excise acts.

(4) The Respondents’ Restoration Policy which confirms that goods must not be restored where they have been misdeclared, but that each case should be considered on its own merits.

(5) The Appellant’s contention that the undervaluation was an Excel format mistake and the individual items’ values are all correct. Officer Danks accepted that the individual items are all listed with their appropriate values and the total is obviously significantly less than it should be, but stated that *“…the discovery of this ‘error’ alongside the*

classification issue demonstrates that sufficient care has not been taken when importing goods into the UK."

(6) The Appellant's argument of financial hardship, but concluded that the Appellant had not provided any evidence of such financial hardship.

(7) The absence of any exceptional circumstances to the case or any reason why restoration should be offered on humanitarian and/or hardship grounds.

(8) The seriousness and significance of the under declaration, which put businesses that correctly declare the same goods at a disadvantage, justified the decision not to restore.

THE LAW

82. Article 15 (2) (a) of the Union Customs Code states that:

"2. The lodging of a customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification by a person to the customs authorities, or the submission of an application for an authorisation or any other decision, shall render the person concerned responsible for all of the following:

(a) the accuracy and completeness of the information given in the declaration, notification or application;…"

83. S.49 (1) (e) of the Customs and Excise Management Act 1979 ("CEMA") states that:

"Forfeiture of goods improperly imported

(1) Where—...

(e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or…"

84. S.139 (1) of CEMA states that:

"Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

85. S.139 (6) of CEMA provides that:

"Schedule 3 to CEMA shall have effect for the purpose of forfeiture, and of proceedings for the condemnation of anything as being forfeited, under the customs and excise acts."

86. Paragraph 5 of Schedule 3 to CEMA provides as follows:

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

87. Pursuant to *The Commissioners for Her Majesty's Revenue and Customs v Jones & Jones* [2011] EWCA Civ 824 @ Para 71 (1 – 10) ("*Jones*"):

"5. The deeming process [contained in paragraph 5 of Schedule 3 of CEMA] limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports

illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use."

88. The Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs v Nicholas Race* [2014] UKUT 0331 (TCC) ("*Race*") and *The Commissioners for Her Majesty's Revenue & Customs v Liam Hill* [2018] UKUT 0045 (TCC) ("Hill"), confirmed that the Tribunal does not have the jurisdiction to consider the legality or correctness of the seizure itself.

89. Further, the Court of Appeal in *European Brand Trading v HMRC* [2016] EWCA Civ 90, para 31 & 37 ("*EBT*") stated:

"31. The decision to restore or not to restore is a different issue which was not raised in the condemnation proceedings. HMRC must make its decision on restoration in the light of all relevant factors, which will include the duty paid status of the goods in question. If I have understood this argument what is said is that in deciding whether or not to exercise the discretionary power to restore things seized or forfeited HMRC must consider the question (if it is raised by the applicant) whether excise duty was in fact payable and, if so, whether it had in fact been paid. But HMRC's decision is only one part of the overall process. If HMRC refuse to restore them the applicant can appeal to the FTT. If HMRC have refused to restore on the ground that excise duty was payable and has been deemed not to have been paid, then the clear effect of HMRC v Jones is that the FTT cannot investigate that question. It would make for an incoherent system if HMRC was required to investigate the question whether duty had been paid, but any appeal against its decision had to be conducted on the basis of a different set of assumed facts. The answer to this argument is, in my judgment, to be found in two passages from the judgment of Mummery LJ in HMRC v Jones. First, at [71] (5) he said:

"In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use."...

90. However, in the light of HMRC v Jones, the question of proportionality must be considered on the assumption that the goods on which excise duty was payable (and any vehicle in which they were carried) have been validly and lawfully forfeited and that the excise duty has not been paid. In our case EBT wishes to advance the argument that the excise duty has in fact been paid on the very goods that have been forfeited. In my judgment HMRC v Jones plainly prevents that argument from being raised once the goods have been condemned, either by the magistrates or by the deeming provision."

91. S. 141 (1) (a-b) of CEMA provides that:

"where any thing has become liable to forfeiture under the Customs and Excise Acts –

(a) any ... vehicle ... which has been used for the carriage, handling, deposit ... of the thing so liable to forfeiture

(b) any other thing mixed, packed or found with the thing so liable

shall also be liable to forfeiture."

92. S.152 (b) of CEMA provides that *"the Respondents may as they see fit restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized…."*

93. Section 14 (2) Finance Act 1995 permits a person to require a review of the Respondents' decision to refuse restoration of seized goods as follows:

"(2) Any person who is -

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, on his application, such a decisions has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

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

94. Section 15(1) Finance Act 1995 sets out the procedure to be followed on such a review:

"Where the Commissioners are required in accordance with this chapter to review any decision, it shall be their duty to do so and they may, on that review, either:

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate."

95. Section 16 (4-6) Finance Act 1995 provides appeal rights to the FTT in relation to a review decision refusing restoration of seized goods as follows:

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

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

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

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

(5) In relation to other decisions, the powers of an Appeal Tribunal on an appeal under this section shall also include a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

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

(a) the matters mentioned in sub-section (1)(a) and (b) of section 8 above.

(b) ...

.... 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.".

96. Therefore, the question for my consideration is whether or not the Review Decision was reasonable. Pursuant to *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 2312, I can only conclude that Review Decision was one that could not reasonably have been arrived at if the decision maker took into account material he should not have taken account of, ignored material he should have taken into account, or reached a decision which no reasonable decision-maker could have reached. Further, as conceded by the Respondents in *Commissioners of Customs and Excise in Gora v CCE* [2003] EWCA Civ 525, para 38 (e) & 39 and confirmed in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), para 11, the reasonableness of the decision-maker's decision is to be judged against the information available to me at the date of the hearing, even though in some cases this may include information which was not available to the decision-maker when the decision was taken. Notably, I am not allowed to remake that decision were I to have decided differently but the initial decision was reasonable. If I decide the decision was unreasonable, my power is limited to requiring a further review.

97. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* at 663 I consider that I must address the following questions in order to assess the reasonableness or otherwise of Officer Danks' decision:

(1) Did Officer Danks reach a decision which no reasonable officer could have reached?

(2) Does the decision betray an error of law material to it?

(3) Did Officer Danks take into account all relevant considerations?

(4) Did Officer Danks leave out of account all irrelevant considerations?

98. I note Judge Hellier's comments in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), para 6:

"It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough us to declare that a conclusion reached by UKBA should be set aside."

DISCUSSION

99. In considering whether or not the Review Decision was reasonable, I refer to and rely on the following points:

(1) I have found that the Appellant did not challenge the legality of the seizure and, accordingly, Ground 3 of the Grounds of Appeal, fails.

(2) Since the Appellant did not challenge the legality of the seizure, the effect of paragraph 5 of schedule 3 of CEMA and *Jones* (as upheld by the Upper Tribunal in *Race* and the Court of Appeal in *EBT)* is that I must proceed on the basis that the Consignment was legally seized. The effect of this is that any facts necessary to the legality of the seizure must be assumed to be proved and those points cannot be re-opened. Specifically, I must assume that 96 pairs of shoes were misdeclared under CC 6403999800 and, accordingly, were liable to forfeiture. I note that the Appellant has adduced evidence seeking to show that, in fact, the correct CC was used. However, this point cannot be re-opened and I cannot consider Ground 4 of the Grounds of Appeal.

(3) As to Ground 1 of the Grounds of Appeal, I note that the Review Decision does not take into the following considerations:

(a) The Appellant's explanation for use of the incorrect CC, contained in the letter attached to the second email dated 2 November 2018 and repeated in the witness statement of Mr Bunyard. Namely that the export documentation was prepared by the former owner of CDB who had no remaining interest in CDB, no experience of exportation and mistakenly used the wrong CC. The Appellant contends that, in these circumstances, the use of the wrong CC on the export documentation was an innocent error. This has not been considered. However, I note that this explanation does not cover the use of the wrong CC on the import documentation prepared by SEKO, the accuracy and completeness of which the Appellant remained responsible for under Article 15 (2) (a).

(b) The fact that the Appellant had a previous good history of compliance, this being the first contravention.

(c) On 26 October 2018, the Appellant was informed of the seizure and immediately offered to rectify the paperwork and pay the correct duties/taxes.

(d) The Review Decision states that the under valuation is significant. There is no further analysis. Specifically, there is no consideration of the fact that the incorrect CC affected only 18.5% (not 17.5% as contended by the Appellant) of the Consignment or that it resulted in an under declaration of duty of less than 10% of the value of the Consignment.

(e) As to the undervaluation issue, I note that in the Review Decision Officer Danks' accepted that the individual items are all listed with their appropriate values and the total is obviously significantly less than it should be, but stated that *"…the discovery of this 'error' alongside the classification issue demonstrates that sufficient care has not been taken when importing goods into the UK."* Therefore, it is clear that Officer Danks' conclusion on the undervaluation issue is intrinsically linked to his conclusion on the CC issue. In failing to consider the relevant matters detailed at paragraph 53 (3) (a-d) above, Officer Danks failed to consider the impact of the same on the undervaluation issue.

(4) I have considered the Appellant's allegation of financial hardship caused by loss of stock valued at in excess of £24,000, Ground 2 of the Grounds of Appeal. I note that financial hardship was considered both in the Decision and the Review Decision. In the Decision, Officer Wilmott stated that losing goods that were held for a commercial purpose, duty unpaid, does not qualify the Appellant to be considered for financial hardship. In the Review Decision, Officer Danks noted that the Appellant had not provided any evidence of financial hardship. In all the circumstances, I consider that the lawful seizure of goods is likely to have an adverse financial impact on the person from whom the goods are seized, but, without more, this does not amount to financial hardship making the refusal to restore unreasonable.

DECISION

100. In light of the facts available to me, I am satisfied, for the reasons detailed above, that the Review Decision was not open to a reasonable officer because it failed to take into account all relevant considerations specifically:

(1) The Appellant's explanation for use of the incorrect CC.

(2) This was the first time the Appellant had been detected making a misdeclaration and the Appellant immediately offered to rectify the paperwork and pay the duties/taxes.

(3) The incorrect CC affected only 96 of the 517 pairs of shoes, being around 18.5% of the Consignment.

(4) The underdeclared duty of £2,442.78 is less than 10% of the value of the Consignment.

(5) The impact of paragraph 55 (3) (a-d) on the undervaluation issue.

101. The Respondents must carry out, within 6 weeks of release of this Decision, a further review of the original decision.

102. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

103. 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.

JUDGE AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 30th OCTOBER 2023