



TC02293

Appeal number: TC/2012/00336

RESTORATION – whether decision not to restore forfeited goods was reasonable – mortar fuses forfeited because the relevant entry made did not correspond to the goods concerned – section 49(1)(e) CEMA – whether exceptional circumstances justifying departure from the general policy of not offering forfeited goods for restoration – found that the appellant was not culpable of or complicit in any attempt to evade duty or deceive – found that there was nothing which the appellant did not do which he ought necessarily to have done to establish that he had taken reasonable care to prevent the deception – decision in these circumstances was unreasonable – appeal allowed – further review directed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN CAIELS

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE JOHN WALTERS QC
GILL HUNTER**

Sitting in public at Bedford Square, London on 13 September 2012

The Appellant did not appear and was not represented

**Rupert Jones, Counsel, instructed by the Solicitor for HM Revenue & Customs,
for the Respondents**

DECISION

1. The appellant, Mr Darren Caiels (“Mr Caiels”) appeals against a decision by a Review Officer of the UK Border Agency (Mr Raymond Brenton, who made a Witness Statement and gave oral evidence at the hearing), which was communicated to Mr Caiels by a letter dated 25 November 2011, to uphold on review a decision of the UK Border Agency dated 10 October 2011 not to restore to Mr Caiels two mortar shell fuses which were seized at Gatwick Airport on 5 September 2011. Mr Caiels had paid US\$100 for the fuses and US\$45 for shipping costs, total US\$145 converted to sterling as £90.75. This amount was paid from Mr Caiels’s PayPal account.

2. Mr Caiels was neither present nor represented at the hearing. However he had been notified of it and we have seen a letter sent by the Tribunal Centre and dated 21 June 2012 in which it is stated that Mr Caiels had advised that he would not be in attendance at the hearing of the appeal.

3. In these circumstances (and on a formal application by Mr Jones in this regard) we decided to proceed with the hearing of the appeal pursuant to rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, considering that it was in the interests of justice to do so.

4. We were provided with a bundle of documents, including Officer Brenton’s Witness Statement and exhibits, and we find the facts above and following from the documents and Officer Brenton’s oral evidence.

The facts

5. Mr Caiels was notified of the seizure by a ‘warning’ notice dated 8 September 2011 sent to him by the UK Border Agency at Gatwick Airport. He responded to this notice in a letter dated 19 September 2011 addressed ‘to whom it may concern’ in which he requested the return of the items, namely the two mortar shell fuses. In his letter, he stated as follows (and we find facts accordingly):

‘I am writing to request the return of my items which have been seized, reference number: E2527451.

- The two fuzes [*sic*] that have been seized although causing safety concerns on the day were later found to be inert and FFE (Free From Explosives) with no threat to the public, this is mentioned in DC Ellarby’s (warrant no – CE471) report (139 – 5th September), in fact these particular fuzes never contained any explosive at all as they were made as “factory inert classroom training aids”. These were never made to be used.
- The fuzes were purchased legitimately from the well-known online auction website eBay. The fuzes were purchased for my own personal Militaria collection.
- I am a researcher/collector of inert military ordnance, although I collect all sorts (inert grenades, shells, mortars, etc.) my main area of collecting and interest is shell fuzes. I have around 80 inert fuzes in my collection. I have been collecting for some years now and I am very passionate about my hobby. Ordnance collecting is now considered a serious hobby within the UK among many. I am a member of an online forum/resource

for ordnance collectors called BOCN (British Ordnance Collectors Network) at www.bocn.co.uk.

- On the 5th September 2011 I had a visit from the police and the military EOD, throughout the day my entire collection was checked over and there were no issues at all. Both the police and the military EOD were happy that my collection was inert, safe and legal to own within the UK. Police reference number for the visit – 139 – 5th September (PC Mark Ellarby). This report details the whole incident.
- The fuzes are for my personal collection and are considered an important addition, the fuzes are also of historical importance.
- The fuzes are inert, FFE (Free From Explosives) and therefore legal to own in the UK, as far as I am aware I have broken no laws by importing these items for my collection. I see no reason why I should not have my property returned to me.

I look forward to hearing from you regarding the return of my property. I would also like to ask what I can do/precautions I can take to prevent situations like this happening again in the future when importing these type of goods.'

6. Mr Caiels sent a statement by a Mr Martin Kay MIExpE AISEE, in support of his request. That statement was with our papers. Mr Kay states that he is a professional explosives engineer currently employed within the GB Firearms and Explosives enforcement sector. He supports Mr Caiels's request for the return of the fuses to him.

7. We also have with our papers a letter dated 24 September 2011 from Mr Steve McLean, Detection Manager, Gatwick Cargo to the UK Border Agency post-seizure unit in Plymouth, detailing the circumstances of the seizure. The letter states (and we find facts) as follows:

'A mail parcel travelling under reg number CP532U17292UA arrived at Gatwick Airport on 4th September 2011 on flight PS 501 from Kiev, Ukraine. The goods were described on the attached CN23 Customs declaration as 'Auto detail'. The package was addressed to [Mr Caiels at his address at Southampton].

Officer Ryan Hibbitt selected the package for examination and found the box contained 2 items he didn't recognise as 'auto detail or car parts'. He therefore referred the parcel to the Gatwick Freight Special Branch Officer, Mark Ellarby.

DC Ellarby examined the package and found "2 x military detonators wrapped in aluminium foil and placed inside two cut open beer cans, in turn these two items were wrapped in foam. The package was then put inside a box that used to contain a water pump for a car. This was then sealed and had the original unmarked ordinance [*sic*] box taped to the outside of the water pump box". DC Ellarby's view was that these were packed in a way that is 'indicative with attempts to avoid security screening'.

Once DC Ellarby had removed the first item and realised it was a military detonator for a bomb/missile he immediately evacuated the UKBA offices and British Airways Cargo sheds. During the next hour he had the Gatwick Airport Senior Security manager and Gatwick Division Police Inspector in attendance whilst the service roads were closed. This involved utilising a large number of Police and Gatwick Security Officers and caused disruption to the normal business of the airport while a full examination of these detonators were conducted. They were ultimately found to be void of any explosive materials.

The goods had been misdeclared on form CN23 and had been 'packed in such a manner appearing to be intended to deceive an officer'. They were considered to be parts of explosive devices and were therefore seized by UKBA and seizure paperwork was posted to the importer. (The goods are currently stored locally at Gatwick.)

We have subsequently received a letter from Mr Caiels asking for the goods to be restored to him.

Please find enclosed copies of all associated paperwork.

Submitted for your consideration.'

8. On 28 September 2011 the UK Border Agency National Post Seizure Unit (Officer Ms D Richards) wrote to Mr Caiels acknowledging his letter dated 19 September 2011 and stating that before consideration could be given to his restoration request, she required proof of ownership of the goods, including an invoice and evidence of payment. This was provided by Mr Caiels under cover of a letter dated 3 October 2011. It appeared from the eBay pages copied to the UK Border Agency that the fuses were used World War II Russian projectile fuses model ДTM-75, 42-M, sold via eBay by a seller referred to on the pages as 'chrysler300c10', with an email address: euro@westernbid.com. The payee was stated to be 'Western Bid Europe', which might be the name of the selling entity.

9. On 10 October 2011, Mr Caiels wrote again stating that he did not wish 'to continue' with condemnation proceedings in the magistrates' court and asking that 'that appeal' be withdrawn, but confirming his request 'for my property to be restored'.

10. This letter may have crossed a letter of the same date from the UK Border Agency (Officer G A Wood) to Mr Caiels giving a decision not to restore the goods. After stating that the fuses had been seized under section 139 Customs & Excise Management Act 1979 ("CEMA") and were liable to forfeiture under section 49(1)(e) CEMA 'because they did not correspond with the entry made thereof', the officer stated that the general policy for the restoration of seized goods was that 'goods seized because of an attempt to evade duty' should not normally be restored but that each case was examined on its merits to determine whether or not restoration would be offered exceptionally. The officer concluded that there were no exceptional circumstances that would justify a departure from the policy of refusing restoration. He offered a departmental review of his decision.

11. Mr Caiels wrote on 17 October 2011, a letter that was taken by the UK Border Agency as a request for a review of Officer Wood's decision. Mr Caiels's letter contained the following:

'The seizure notice states that my property was seized due to the sender writing a different description on the customs declaration to the contents of the parcel. While I appreciate that this caused concern, I had absolutely no control on what was written. The items in the parcel were purchased by me (please see receipts attached) legitimately from the auction website eBay. I did not know the seller personally.

The items in the parcel that have been seized were purchased for my personal Militaria collection to complete part of a set. These items are a pretty rare addition to my collection and the chance of me being able to get a set of these again is pretty much none.

I had no control over what description was written on the customs declaration. I would not have known that the description was different to what was in the parcel until the parcel had arrived with me in the post. I feel that I am being wrongfully punished for something that was completely beyond my control.'

12. This letter was acknowledged by the UK Border Agency (Officer J Lewis) by a letter dated 25 October 2011. He stated that an independent Review Officer would conduct a review by examining and considering 'all the information we have about this case' and would write with a fresh decision. The Review Officer would not have been involved in either the seizure or the original decision. Officer Lewis's letter went on to request that any further evidence of information should be sent and that this was Mr Caiels's last opportunity to provide the Review Officer with such information, and that if he did not provide it 'now' it could not be taken into account in the review.

13. Review Officer Brenton's decision letter to Mr Caiels was (as mentioned above) dated 25 November 2011. He summarised the UK Border Agency's restoration policy for seized goods as follows:

'The general policy is that seized goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.'

14. Review Officer Brenton stated in his letter that he was guided by the restoration policy but not fettered by it and that he considered every case on its individual merits. He had taken into account all the representations and other material available to the UK Border Agency both before and after the time of the (original) decision (of 10 October 2011).

15. Review Officer Brenton explained in great detail that he had not considered the legality or correctness of the seizure itself, giving citations from *Commissioners for HM Revenue & Customs v Jones and Jones* [2011] EWCA Civ 824.

16. Review Officer Brenton's letter insofar as it concerned the matter of his consideration of restoration of the goods stated that he had looked at all of the circumstances surrounding the seizure and was of the opinion that the application of the policy in this case treated Mr Caiels no more harshly or leniently than anyone else in similar circumstances and that he had not found sufficient and compelling reasons to deviate from policy. He invited Mr Caiels to send any fresh information that he would like the Review Officer to consider and included information about an appeal to this Tribunal.

17. In response, Mr Caiels wrote again on 3 January 2012. He gave additional information (which we accept and find facts accordingly) as follows:

'The seizure notice states that the ONLY reason that my property was seized was "*because the goods do not correspond to the entry made by the sender*"

- The goods are of very low value, there was no intention of evading tax/duty, if there are any tax charges/holding fees I will be more than happy to pay those to have my property returned.
- The goods are not for re-sale, there was no intention of profiting from these goods. The goods were purchased for my own use to display in my personal hobby/collection.
- There was nothing to hide, after my online auction purchase I expected the goods to be safely packaged, correctly addressed and labelled with accurate information and sent to me with no issues.
- I am fully aware that it was my responsibility to make sure that the customs declaration was completed correctly, however I am sure that you will understand that it was not possible for me to physically be there to check this. The mistake was made by the sender, I had absolutely no control over what was written on the customs declaration.

I have since been in contact with the head office of the Ukraine postal service requesting information on their international posting policy and have had a reply by email. Reply received from: (I. Chumak, Head of Quality Control and Consumer *[sic]* Relations Department). In their reply email I have been advised that all mail being sent international (airmail) from the Ukraine MUST be presented at the post office counter open for inspection by the post office staff.

It is clearly at that point that the mistake/error has been made, the sender/postal staff are responsible for this mistake of customs information being incorrect. It was obviously not checked properly and overlooked.'

18. Review Officer Brenton acknowledged this letter on 20 January 2012. He stated:

'Having considered your further submissions I must inform you that my decision contained in the letter to you dated 25th November 2011 stands.

Appealing Against My Decision

If you had wished to contest my decision you had, 30 days from the date of that letter, to lodge an appeal with a Tribunal that is independent of Customs/UKBA ...

However, as the legality of the seizure of the goods can only be decided by the Civil Courts, should you appeal my decision to the Tribunal, the UKBA will request that that *[sic]* the appeal be struck out as the Tribunal has no jurisdiction to consider legality.

... ' (original emphasis)

19. Mr Caiels's appeal was in fact lodged on 6 December 2011 and thus in time. He stated the content of the bullet points appearing in his letter dated 3 January 2012 as his grounds for appeal in his Notice of Appeal.

20. There was also in evidence a letter dated 2 May 2012 from Mr Caiels, recapitulating the evidence set out above, adding further photographs of the fuses and enclosing a copy of the email sent by Mr I Chumak.

21. In his oral evidence, Review Officer Brenton stated that it was a buyer's responsibility to make sure that goods imported into the UK were declared properly. He suggested that Mr Caiels could, and should, have taken precautions to ensure that this was done. The need to do this was more pronounced when goods of a sensitive nature, such as the fuses in this case, were sought to be imported. Mr Caiels could and should have contacted the seller before purchasing the goods to ensure that they would be packaged and described in conformity with the requirements of UK law. There was no evidence that he had taken any such precautions.

22. Review Officer Brenton compared Mr Caiels's obligation to take such precautions to the obligation on a haulier to ensure that systems were in place to check and prevent the illegal importation into the UK of tobacco products by the drivers of the haulier's vehicles.

23. Review Officer Brenton said that there was no issue about evasion of duty because matters had not progressed to the point of any decision being made as to whether the importation attracted any duty or VAT. Therefore, he said, Mr Caiels's points about his not having intended to evade duty or VAT were irrelevant in his consideration.

24. Review Officer Brenton told the Tribunal that if the goods had been declared properly, they would have been inspected on importation and a decision taken as to what duty or VAT ought to be assessed and then they would have been delivered to Mr Caiels on payment of any amount(s) due.

25. Review Officer Brenton accepted that there was no evidence that Mr Caiels had been involved in any collusion to misdeclare the goods or to do anything else contrary to CEMA and that if there had been any such evidence there was a possibility that a prosecution would have been considered. He confirmed, however, that his evidence was not that a prosecution would have followed. A prosecution would (or might) have followed if the fuses had not in fact been inert.

The law

26. By section 49(1)(e) CEMA, if 'any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof' those goods shall be liable to forfeiture.

27. By section 49(1)(f) CEMA, if 'any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer' those goods shall be liable to forfeiture.

28. It is plain from the evidence that the fuses in this case were found not to correspond with the entry made of them, and that therefore, pursuant to section 49(1)(e) CEMA, they were liable to forfeiture. They may also have been liable to forfeiture pursuant to section 49(1)(f) CEMA. However, the issue of whether the goods were or were not liable to forfeiture is outside our consideration on this appeal as the Court of Appeal in *Jones and Jones* has made clear. Our function, as Mr Jones submitted, is to consider whether Review Officer Brenton's decision not to offer the

goods for restoration was reasonable in the sense that it was one which a reasonable Agency acting on a correct view of the law and taking into account all relevant matters known to it and not taking into account any irrelevant matters could have made.

Mr Jones's submissions

29. Mr Jones submitted that Review Officer Brenton's decision should be upheld on this basis. He submitted that the officer had acted reasonably in applying the general policy of non-restoration of goods liable to forfeiture and in concluding that there were no exceptional circumstances justifying a departure from the policy. He further submitted that if the evidence had been that Mr Caiels had checked, or attempted to check, with the seller that the declaration would be correct, then that would or might have been an exceptional circumstance justifying a departure from the general policy, but the evidence was clear that Mr Caiels had not done this.

Discussion and Decision

30. It is entirely reasonable for the UK Border Agency to have a policy on restoration of goods liable to forfeiture and for its officers to follow it. It is also entirely reasonable for the policy to be a general policy of refusal to offer such goods for restoration but for each case to be examined on its merits to determine whether or not restoration might be offered exceptionally.

31. The issue in this case is whether or not Review Officer Brenton's decision that no such exceptional circumstances arise in this case is unreasonable in the sense indicated above at paragraph 28.

32. We approach this question by seeking to establish the rationale for the general policy of refusal to offer goods liable to forfeiture for restoration and in this way seeking to establish the rationale for determining exceptional circumstances in which the general policy should not be followed.

33. We note that the general policy was in fact stated differently by Officer Wood in his letter conveying the original decision (see above, paragraph 10) and by Review Officer Brenton in his letter conveying the review decision (see above, paragraph 13).

34. Officer Wood described the general policy as one whereby goods seized *because of an attempt to evade duty* should not normally be restored (our emphasis), whereas Review Officer Brenton described the general policy as one whereby *seized goods should not normally be restored* (again, our emphasis).

35. Officer Wood's statement of the policy links the policy not normally to offer seized goods for restoration to an attempt to evade duty having been made, whereas Review Officer Brenton's statement indicates that the policy is not normally to restore seized goods whatever the reason for the seizure.

36. Section 49(1) CEMA provides for forfeiture in six different cases which all involve either attempted evasion of duty or of a prohibition or restriction on importation, or alternatively some specified form of deception in the manner of importation.

37. The evidence in this case establishes that there was no attempted evasion of duty or of any prohibition or restriction on importation, but that there was a form of deception in the manner of importation, which was perpetrated by the sender in the Ukraine and not by the UK importer (Mr Caiels), who had no knowledge of or collusion in the deception.

38. There is a clear reasonable basis for a policy of not offering goods for restoration to an importer who is in any way reasonably culpable for the evasion or deception which has given rise to the forfeiture.

39. But we consider that there is no obvious reasonable basis for a policy of not offering goods for restoration to any importer who is not in any way reasonably culpable for the evasion or deception which has given rise to the forfeiture.

40. Mr Jones did not suggest any reasonable basis for such a policy (which might perhaps, for example, have been a policy based on an aim of deterrence). Indeed, by accepting that if Mr Caiels had carried out the extra precautions which Review Officer Brenton suggested in evidence that he should have carried out (see above, paragraph 21), then the goods would or might have been offered for restoration on the basis of exceptional circumstances, it seems to us that the logic of the UK Border Agency's position is that restoration should be offered to importers who are not culpable in respect of the relevant evasion or deception and who have taken reasonable care to ensure that no such evasion or deception occurs.

41. We regard that formulation as covering at least some of the cases where it would be reasonable to recognise (or unreasonable not to recognise) exceptional circumstances in which the UK Border Agency should reasonably (or would act unreasonably if it did not) depart from its general policy of refusing restoration of goods liable to forfeiture. We also regard that formulation as relevant to the facts of this case.

42. The question for us, therefore, becomes whether Mr Caiels was culpable in respect of the deception(s) in issue – the evidence establishes that he was not – and whether he took reasonable care to ensure that the deception(s) in issue did not occur.

43. The issue of whether Mr Caiels intended to evade duty or VAT was therefore a relevant issue in determining whether there were exceptional circumstances in this case justifying a departure from the general policy of non-restoration and Review Officer Brenton's evidence (see above, paragraph 23) was that he had regarded it as irrelevant.

44. We regard the analogy drawn by Review Officer Brenton in his oral evidence with a haulier being required to ensure that systems were in place to check and prevent illegal importation of tobacco by the haulier's drivers (see above, paragraph 22) as a false analogy.

45. Such a haulier can reasonably be required to take steps to prevent an obvious danger of duty evasion by persons over whom he has some control.

46. The position here is not analogous to such a haulier's position in two respects.

47. First, the danger of the deception which in fact occurred was not, in our judgment, obvious. On the evidence before us we cannot see that Mr Caiels, or indeed the seller of the goods, can have derived or hoped to derive any advantage from the deception. If the goods had been properly declared, the evidence is that they would (after a search) have been delivered to Mr Caiels on the duty and/or VAT due being paid by him. We accept that Mr Caiels was at all times ready to pay such duty and/or VAT.

48. Secondly, we do not accept that Mr Caiels in any reasonable sense had any control over the seller.

49. We consider (and find as a fact) that Mr Caiels reasonably expected the goods 'to be safely packaged, correctly addressed and labelled with accurate information and sent to [him] with no issues' (compare the third bullet point in his grounds for appeal). We regard Mr Caiels's request in his letter dated 19 September 2011 (see above, paragraph 5) for advice as to what he could do/precautions he could take to prevent similar situations occurring in future as a further indication that there were no obvious relevant procedures which he might reasonably have been expected to carry out which he did not in fact carry out.

50. That being the position, we do not accept Review Officer Brenton's suggestion that taking reasonable care to ensure that the deception(s) in issue did not occur would have necessarily involved Mr Caiels communicating with the seller (either before or after the sale was concluded) to remind him of his obligation to make a correct declaration of the goods and not to conceal or pack them in any manner appearing to be intended to deceive an officer.

51. We find that there was no additional procedure which Mr Caiels could have adopted, over and above what he did in fact do, which was necessary to establish that he had taken reasonable care to ensure that the deception(s) in issue did not occur. We find that he took reasonable care to ensure that the deception(s) in issue did not occur.

52. We reject the suggestion that the nature of the inert mortar fuses in issue was of such sensitivity that any additional procedure, beyond what Mr Caiels actually did, was necessary to establish that he had taken reasonable care to ensure that the deception(s) in issue did not occur. We regard the nature of gauging the sensitivity of goods sought to be imported as too vague to determine the relevant question of what constitutes reasonable care.

53. In the result, for all the reasons given above, we find that Review Officer Brenton's decision was unreasonable in the matter of his conclusion that there were no exceptional circumstances in this case justifying a departure from the general policy of non-restoration. We allow the appeal and direct the UK Border Agency to conduct a further review of the original decision (of Officer Wood, dated 10 October 2011) taking what we have said in this Decision into account. A review officer hitherto not involved in this case should undertake the review. We make this direction pursuant to section 16(4) Finance Act 1994.

54. Finally, we point out that the text of Review Officer Brenton's letter dated 20 January 2012 (see above, paragraph 18) was ill-considered and potentially misleading. The passage in bold type suggested that any appeal to the Tribunal was liable to be struck out for want of jurisdiction, which is not, of course, the case. Care should be taken that in future letters from the UK Border Agency are not misleading in this way.

55. 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.

**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 19 September 2012