



TC03319

Appeal number: TC/2013/04748

VAT –importation of silver bullion without payment of VAT –seizure of bullion by UKBA - decision not to restore – was decision reasonable – no – decision set aside and matter remitted to UKBA for fresh decision

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**RYAN SAMSON
SAM OTTEY**

Appellants

- and -

**THE DIRECTOR OF BORDER
REVENUE**

Respondent

**TRIBUNAL: JUDGE ALISON McKENNA
GIL HUNTER**

Sitting in public at Bedford Square on 4 February 2014

The Appellants appeared in person

**Will Hays of counsel, instructed by the Home Office Cash Forfeiture and
Condemnation Legal Team, for the Respondents**

DECISION

1. This appeal concerns the Appellants' application to the United Kingdom Border Agency ("UKBA") for restoration of a quantity of silver bullion. Customs officers at Poole in Dorset had searched their vehicle and found it to contain approximately £10,000 worth of silver bullion. The bullion had been purchased in Guernsey so that VAT was due upon its importation to the UK, but the Appellants had not declared it.

2. UKBA's decision not to restore the silver bullion was reviewed by UKBA Officer Collins on 5 July 2013 and it follows that this was an appeal against the review decision of that date. The Tribunal's jurisdiction in such an appeal is derived from s 16 (4) of the Finance Act 1994 which provides that, in order to succeed, the Appellant must satisfy the Tribunal that the reviewer could not reasonably have arrived at the review decision. If the Tribunal decides that the decision was unreasonable it may direct that the reviewer's decision ceases to have effect and/or require UKBA to conduct a further review of the decision not to restore.

3. The legality of the seizure of the silver was not challenged by the Appellants in the Magistrates Court. Consequently it was deemed to have been duly condemned as forfeited. The legality of the seizure and the deemed forfeiture was not an issue before us in these proceedings.

4. At the hearing of this appeal, it transpired that the appeal had been logged by the Tribunal as one made by Mr Samson only, although the seizure was of property belonging to both Mr Samson and Mr Ottey and Officer Collins' decision related to both gentlemen's property. The Tribunal accordingly directed, pursuant to rule 5 (3) (c) and rule 9 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that the Notice of Appeal be amended to include Mr Ottey as the second Appellant to the appeal.

The Facts

5. On 24 April 2013 the Appellants were stopped in the Green Channel at Poole Harbour. When questioned by Officer Meade they volunteered that they had purchased some cigarettes and alcohol within the limits of their allowance, but did not mention the silver bullion.

6. Officer Meade seized the silver bullion but she took the view that the Appellants could pay the VAT due and have the bullion returned to them. She told them this and recorded it in her notebook. She explained that she had no facilities for taking the payment at Poole and so told them to write to the National Post Seizure Unit. She handed them various leaflets telling them their rights.

7. The Appellants duly wrote to NPSU (letter received on 26 April) but in reply received a letter dated 20 May 2013 which informed them that the silver would not be restored. By the time this reply was received, the Appellants were close to the time limit for challenging the legality of the seizure in the Magistrates Court. The

Appellants did not challenge the seizure but asked for a review of the decision not to restore the silver, which resulted in Officer Collins' decision of 5 July 2013. A solicitor acting on their behalf made a number of complaints about the manner of the seizure.

5 8. In his decision letter Officer Collins concluded that the Appellants had been
evasive in (i) entering the Green Channel (ii) in not being candid about the purchase
and importation of the silver when questioned by Officer Meade and that in these
10 circumstances he did not consider it appropriate to exercise his discretion to restore
the silver. He concluded that the Appellants had known that VAT was due but had
tried to evade payment. The Appellants had previously written to UKBA stating that
they had not tried to evade payment, that they had not been given a chance to make a
15 declaration and that they had been waved into the Green Channel. They also
complained that they had been misled by Officer Meade's advice and had reasonably
believed that the silver would be returned to them on payment of the VAT. They
complained that they had not been interviewed before the silver was seized. Officer
Collins' letter of 5 July referred to his consideration of the correspondence but
concluded that there was no reason to depart from the usual policy in this case.

9. The Appellants wrote back to Officer Collins and requested a "re-review".
Officer Collins did as they asked but informed them he had reached the same
20 conclusion. The Appellants appealed to the Tribunal on 16 July 2013.

The Evidence and Submissions

10. Officer Collins made two witness statements for the Tribunal proceedings. The
first, dated 6 August 2013, describes the background to this matter and exhibits the
correspondence and his decision letter. The second, dated 16 October 2013, concerns
25 the "procedural error" made by Officer Meade in giving the advice to the Appellants
that they would have the silver restored on payment of the VAT due. Mr Collins'
second witness statement states that he had ascertained that a formal restoration offer
had not been made by Officer Meade and that he was not bound by the frontline
officer's findings because his function was to review the NPSU decision not to restore
30 the goods.

11. The Tribunal heard evidence from Officer Meade and Officer Collins. Officer
Meade's statement was based on her notebook entry. She confirmed that it was
correct. She told the Tribunal that she had not considered the question of whether the
Appellants had been evasive in their dealings with her. She said she was aware of a
35 previous case in which goods had been restored on payment of VAT. The Appellants
did not challenge the accuracy of the contents of her notebook, her statement or her
oral evidence, but said that a wrong inference about their conduct on the day of the
seizure had been drawn by Officer Collins.

12. Officer Collins told the Tribunal that he had been aware of all the facts,
40 including the procedural error made by Officer Meade, at the time he had made his
decision of 5 July 2013. He confirmed that procedural errors made by frontline
officers should be considered as possible exceptional circumstances for restoration of

seized goods, and accepted that his decision had not expressly referred to this point. He accepted in response to a question from Mr Samson that if Officer Meade had followed the correct procedure then the Appellants would have been offered an interview at the point of seizure. In response to a question from the Tribunal, Officer
5 Collins said that he was already aware of the procedural error when he wrote the decision letter and that, although he could have been more specific in his letter, he thought that taking it into account would not have affected his decision.

13. Mr Hays, on behalf of the Respondent, submitted that Officer Collins' decision of 5 July 2013 was a reasonable decision on the facts before him. He accepted that
10 Officer Collins' decision could have been fuller with respect to the procedural error but submitted that there was no basis for deciding that the decision was unreasonable.

14. The Appellants submitted that if the facility for payment of VAT had been available at Poole, the VAT would have been paid and the silver restored to the Appellants there and then. They considered that the silver had been seized under false
15 pretences in view of Officer Meade's advice. They submitted that the failure to follow the correct procedure for seizure and to have been given the opportunity to explain themselves in an interview should amount to exceptional circumstances for restoration.

The Law

20 15. UKBA has discretion under s 152(b) of the Customs and Excise Management Act 1979 to restore anything that has been forfeited or seized. The Finance Act 1994 provides a mechanism for appealing against an exercise of discretion not to restore. As noted above, s 16(4) of the Finance Act 1994 provides that

25 (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 [HMRC] 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 –

30 (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 [HMRC] to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

35 (c) in the case of a decision which has already been acted upon 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 [HMRC] as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable
40 circumstances arise in the future.

16. UKBA's policy is that seized goods should not normally be restored but that each case is considered on its merits to determine whether restoration may be offered exceptionally.

17. The test of reasonableness is one essentially derived from *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, namely that the Tribunal must ask itself whether the reviewer's decision was one that no reasonable reviewer could have come to because the reviewer had taken irrelevant matters into account, had not taken relevant matters into account, or had made an error of law.

Conclusion

18. We have considered all the evidence in this case carefully. We have concluded that the appeal should be allowed and that UKBA's decision of 5 July 2013 should be set aside and UKBA directed to make a fresh decision.

19. We consider that a reasonable decision maker expressly takes into account all the known facts and we find that Officer Collins' decision letter does not refer to material matters which he told the Tribunal were in his mind when he made his decision. In particular, the decision letter does not refer to any consideration of the fact that there had been a procedural error by Officer Meade which led to the Appellants being given misleading information and not being given an opportunity to explain themselves at interview. In these circumstances we cannot be satisfied that the decision of 5 July 2013 was reasonable because there is no indication on the face of the letter that Officer Collins considered whether the accepted procedural errors by UKBA amounted to exceptional circumstances for restoration.

20. 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.

**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 10 February 2014