



**TC03443**

**Appeal number: TC/2013/01971**

*EXCISE DUTY – restoration – reasonableness of decision not to restore tractor and trailer seized in the course of smuggling cigarettes into the UK – decision confirmed as reasonable – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GRZEGORZ LAWRYNOWICZ**

**Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE**

**Respondent**

**TRIBUNAL: JUDGE JOHN CLARK  
MRS GILL HUNTER**

**Sitting in public at 45 Bedford Square, London WC1A 3DN on 30 January 2014**

**The Appellant did not appear and was not represented**

**David Sawtell of Counsel, instructed by the Director of Border Revenue, for the Respondent**

## DECISION

1. Mr Lawrynowicz appeals against a decision by UK Border Force, upheld on  
5 review, not to restore a DAF tractor unit and a Curtainsider trailer seized at Dover on  
30 August 2012.

2. On the morning of the hearing, Mr Lawrynowicz was not present. We reviewed  
Mr Lawrynowicz's letter dated 6 December 2013 (written from his Polish address), in  
which he indicated that he had provided all the information that he considered  
10 necessary for the purposes of his appeal. We concluded from the wording of that letter  
that Mr Lawrynowicz expected the hearing to go ahead in his absence. Mr Sawtell  
considered the wording of the letter, and agreed with our conclusion. We therefore  
decided that it was in the interests of justice for the appeal hearing to proceed in Mr  
Lawrynowicz's absence.

### 15 **The background facts**

3. The evidence before us consisted of a bundle of documents, which included a  
witness statement given by Raymond Brenton, a Higher Officer of Border Force. Mr  
Brenton also gave oral evidence. From the evidence we find the following  
background facts; we consider other questions of fact later in this decision.

#### 20 *The first tractor and trailer*

4. On 30 August 2012 at Dover Eastern Docks, Mr Lawrynowicz was intercepted  
by Border Force while driving a Scania lorry tractor unit with Polish registration  
index ZS8947T pulling a trailer with Polish index FG92499 through Dover ferry port.  
The officer asked for his passport and any CMR documents. Mr Lawrynowicz handed  
25 over two CMRs. The first, which was printed, was for machinery. The second was  
handwritten, and referred to ten Euro pallets. The trailer was inspected and found to  
contain a total of nearly 2.4 million cigarettes. These were found in the ten pallets  
listed in the handwritten CMR; they were in unmarked white shrink-wrapped boxes.  
The cigarettes were in blocks of 200. They had no tax stamps and the writing on the  
30 boxes was in Spanish.

5. During a search of the cab, Border Force officers found a piece of paper bearing  
the vehicle registration FG7702A. This vehicle, a DAF tractor unit being driven by  
Mr Mariusz Koroś, Mr Lawrynowicz's employee, was intercepted on the next sailing  
and its Tilt trailer (Polish registration number ZS9831A) was found to contain  
35 approximately 2 million cigarettes. It was established that this tractor unit was also  
owned by Mr Lawrynowicz.

6. The first CMR related to a German shipment of machinery to be delivered from  
Wiedenmann GmbH to Wiedenmann UK Ltd, at an address in the Windsor area. The  
other CMR showed the sender as "Import-Export", and gave an address in Berlin. The  
40 "Consignee" box gave an address in Northwich, and referred to "Manchester

Columbus". The place of delivery was given as "Manchester Anglia". The goods were shown as taken over in Berlin on 28 August 2012.

5 7. Mr Lawrynowicz was interviewed with an interpreter present. At the end of the interview, Mr Lawrynowicz agreed that the officer's notes were a true and accurate account, and signed the notes to confirm this.

8. In the course of the interview, the information which he gave included the following points:

(1) He had arranged the transport of the machinery loads carried by each of the vehicles through a long-standing agent.

10 (2) The arrangement for transporting the pallets [ie those containing the cigarettes] had been made over the internet with a man whom he named as Henry or Henui. Mr Lawrynowicz said that he did not know this man, or what the load contained.

15 (3) He had arranged that he and his driver (Mr Koroś) would collect ten pallets each from an address in Germany, as 20 pallets would not fit into one vehicle.

(4) He stated that he and the driver met up in Germany after loading and travelled together to Holland, where they split up again before meeting again in Dunkirk.

20 (5) He stated that he did not give Mr Koroś any instructions relating to the delivery of the pallets.

(6) He said that he was to deliver the pallets to an address in Northwich, Cheshire.

25 9. When Mr Koroś was interviewed subsequently, he said that the first time he had met Mr Lawrynowicz on the trip was in Dunkirk. He also said that Mr Lawrynowicz had supplied him with the delivery instructions, which he had then written on the CMR. This address had been confirmed to him by the men who had loaded the pallets. Mr Koroś also said that he was to deliver the pallets to an address in Northwich, Cheshire.

30 10. The officer was satisfied that excise goods were held for a commercial purpose but that none of the proper methods of removing excise goods to the UK had been used. He therefore seized the goods under section 139(1) of the Customs and Excise Management Act 1979 ("CEMA") as being liable to forfeiture under both regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and s  
35 49(1)(a)(i) CEMA. The vehicles were seized under s 139(1) CEMA as being liable to forfeiture under s 141(1)(a) because they had been used for the carriage of goods liable to forfeiture.

11. Mr Lawrynowicz and Mr Koroś were arrested and bailed to appear at Folkestone police station on 28 February 2013.

12. As Mr Lawrynowicz did not challenge the legality of the seizure, the items seized were condemned as forfeit to the Crown by the passage of time under paragraph 5, Schedule 5 CEMA, and any excise goods were confirmed as improperly imported.

5 13. On 4 September 2012 Mr Mariusz Ratajczak, an Advocate in the firm Kancelaria Adwokacka, wrote to the Post Seizure Unit at the UK Border Agency (“UKBA”) to request restoration of the Scania tractor unit and the trailer FG92499 seized on 30 August 2012 at Dover. He enclosed a letter of authorisation signed by Mr Lawrynowicz.

10 14. On 18 September 2012, Border Force replied with a request for various items of information concerning the tractor unit and trailer, including proof of ownership or a copy of the lease hire agreement.

15 15. In his reply dated 21 September 2012, Mr Ratajczak stated that Mr Lawrynowicz was a “leaseholder” of the seized tractor unit and the owner of the seized trailer. (Mr Ratajczak enclosed a translated copy of the lease agreement and a “take-over certificate”, and the registration decision relating to the trailer, together with various other documents.) Since 10 June 2009, Mr Lawrynowicz had been an entrepreneur running his business under a trade name. He had received a transportation order, and had decided that the goods were to be transported by this tractor unit and this trailer. Subsequently he had received a telephone call from a company named Import-Export from Berlin; the caller asked whether Mr Lawrynowicz had a free vehicle to take some pallets. As there was space in this trailer, Mr Lawrynowicz had decided to make a deal with this company. Under the terms of the transportation order, Mr Lawrynowicz was required to deliver ten pallets to NK Spedition in Northwich.

16. Mr Ratajczak included the following comments in his letter:

“According to the CMR Convention the carrier is not authorized to open the packed commodity. He is only supposed to check the [*sic*]:

30 a) The accuracy of the consignment note with the number of packages and their marks and numbers;

b) The apparent condition of the goods and their packaging.

All of these checks were made by my client who was the driver of the seized car. The cigarettes were however not possible to notice.”

35 17. On 23 October 2012 the Border Force National Post Seizure Unit wrote to Mr Ratajczak setting out the decision relating to the tractor unit and trailer. The conclusion was that there were no exceptional circumstances that would justify a departure from the Border Force’s policy; on this occasion the tractor unit and trailer would not be restored. The letter continued:

40 “This seizure formed part of two separate seizures on the same day from vehicles belonging to your client. Your client was the driver of the vehicle in this case and his version of events was contradicted by

the driver in the other vehicle. There were no adequate checks in place on the consignee and from the information before me I consider the haulier to have been complicit and/or reckless in this case.”

18. By his letter dated 21 November 2012, Mr Ratajczak, acting on Mr  
5 Lawrynowicz’s behalf, asked for a review of the decision dated 23 October 2012, and requested restoration of tractor unit ZS8497T and attached trailer FG92499. Mr Ratajczak repeated various points previously made in his letter dated 21 September 2012.

*The other tractor and trailer*

10 19. As indicated above, the other tractor and trailer were seized on 30 August 2012; however, no separate evidence was provided concerning this seizure. To the extent necessary for our decision, we find facts relating to the tractor and trailer driven by Mr Koroś.

15 20. On 4 September 2012, Mr Ratajczak wrote on behalf of Mr Lawrynowicz to request restoration of tractor unit DAF XF95430, registration number FG7702A and the attached trailer Koegel SNC024P, registration number ZS9831A seized at Dover on 30 August 2012.

20 21. Apart from that letter from Mr Ratajczak and a subsequent letter requesting a review (considered below), no further correspondence concerning the other tractor and trailer was included in the bundle. We consider the implications later in this decision.

*The review decision*

25 22. In his review decision letter dated 8 January 2013, Mr Brenton, the Review Officer, referred to two letters from Mr Ratajczak received on 27 November 2012 requesting a review of the decisions not to restore the Scania tractor unit and Curtainsider trailer and the DAF tractor unit and Tilt trailer. Mr Brenton’s conclusion was that the vehicles should not be restored. He set out the background to the case and summarised the Border Force restoration policy for the restoration of commercial vehicles. He then explained the reasons for his decision, and set out information  
30 relating to further rights of appeal. He indicated that as Mr Lawrynowicz was currently on bail and could still face criminal prosecution, the Border Force would request that any appeal should be stood over until all criminal action or proceedings had been concluded.

35 23. By Notice of Appeal dated 20 March 2013, Mr Lawrynowicz appealed against the review decision. He referred to it as dated 11 January 2013; we assume that this was the date on which he received it. (As the appeal hearing has now taken place, we assume that the question of possible criminal proceedings has already been resolved.)

### **Arguments for Mr Lawrynowicz**

24. In his letter dated 21 November 2012 requesting a review of the decision relating to the tractor and trailer driven by his client, Mr Ratajczak argued that claims that Mr Lawrynowicz as haulier had been complicit and/or reckless “were not based  
5 on the evidence of the case”. His client had submitted all the documents and had given explanations making clear that he had not been involved in the smuggling and that he had taken measures to prevent smuggling.

25. Mr Ratajczak gave details of his client’s business trade name and his licence to perform the international carriage of goods. He set out the history of the orders for the  
10 goods; we consider that history later in this decision.

26. Mr Ratajczak argued that according to the CMR Convention, the carrier was not authorised to open the packed commodity; he was only supposed to check (a) the accuracy of the consignment note with the number of packages and their marks and numbers, and (b) the apparent condition of the goods and their packaging.

15 27. His client was trying to enter into contracts only with reliable companies. He always required written transport orders. It was appropriate to take into account the fact that neither the vehicles seized on 30 August 2012 nor any other vehicles owned or used by his client had ever been seized on any previous occasion because of carrying goods liable to forfeiture.

20 28. Restoration of the vehicle was necessary for his client to continue his commercial activity.

29. Mr Ratajczak’s letter dated 21 November 2012 relating to the DAF tractor unit owned by his client and driven by Mr Koroś, pulling the Tilt trailer leased by Mr Lawrynowicz, was in largely similar terms to the other review request letter, but  
25 emphasised that Mr Koroś had been orally instructed to make the relevant checks and to inform Mr Lawrynowicz immediately of any inconsistencies; all such checks were supposed to be made by the driver.

30. Mr Ratajczak explained that Mr Lawrynowicz had hired Mr Koroś on 15 May 2011, and had demanded employment certificates from Mr Koroś’s previous jobs.  
30 The documents provided enabled Mr Lawrynowicz to establish that Mr Koroś had the experience to work as a driver, as well as showing that the respective employment relationships had been terminated by mutual agreement.

31. In a letter dated 8 March 2013, Mr Ratajczak set out details of his client’s financial problems. He explained that restoration of the two vehicles was necessary  
35 because of his client’s situation of exceptional hardship. The two vehicles were his whole property. He was now bankrupt, and had had to suspend his business. His debt amounted to the equivalent of just over £29,000. He had found a job but had to spend all the money that he earned on the debt. He had two children aged 6 and 8 years, and his wife was unemployed. Mr Ratajczak enclosed various untranslated documents  
40 relating to the debt; his client needed time and money to pay for translation, but had

neither at that time. Mr Ratajczak indicated that as soon as possible he would translate all the required documents and send them to the Review Officer.

5 32. In a separate letter of the same date, Mr Ratajczak asked for documentary evidence to confirm that the DAF tractor unit and the Curtainsider trailer had been seized in the UK. This evidence was necessary to deregister these vehicles and show that they were not in use in Poland. Deregistration would mean that Mr Lawrynowicz would not have to pay road tax, and reduce his debt.

10 33. The grounds of appeal set out in the Notice of Appeal were arguments which appear to us to be identical to the points raised by Mr Ratajczak in the course of the correspondence.

### **Arguments for the Respondent**

15 34. Mr Sawtell referred to the way in which the cigarettes had been brought into the UK, the description on the CMR document, and the inconsistency between the answers given by Mr Lawrynowicz and those given by Mr Koroś. It all cried out for explanation. The burden of proof fell on Mr Lawrynowicz to show that the officer had been unreasonable in the way in which he had arrived at his decision. There were glaring issues, and there was no reasonable explanation for the presence of the seized goods. Mr Sawtell submitted that the appeal must fail.

20 35. Mr Sawtell made submissions on the facts; we consider these below. In relation to the applicable law, he referred to Article 3 of the Convention on the Contract for the International Carriage of Goods by Road (known as “the CMR Convention”), which imposed responsibility on the carrier for the acts and omissions of his agents and servants and any persons whose services he used for the performance of the carriage. Article 4 of the Convention required the contract of carriage to be confirmed  
25 by the making out of a consignment note (ie a CMR document). Article 6 of the CMR Convention set out the particulars which were required to be contained in the CMR document.

36. Article 8 of the CMR Convention provided:

“

- 30 1. On taking over the goods, the carrier shall check:
- (a) The accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and
  - (b) The apparent condition of the goods and their packaging.
- 35 2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and their packaging, such reservations shall not  
40 bind the sender unless he has expressly agreed to be bound by them in the consignment note.

5 3. The sender shall be entitled to require the carrier to check the gross weight of the goods or their quantity otherwise expressed. He may also require the contents of the packages to be checked. The carrier shall be entitled to claim the cost of such checking. The result of the checks shall be entered in the consignment note.”

37. These requirements should be considered in the context of the facts in the present case.

10 38. The Customs and Excise Management Act 1979 (“CEMA”) contained various provisions relating to forfeiture of goods imported in particular circumstances without payment of customs or excise duty. Section 152 CEMA gave power to the Commissioners (now exercised through the Border Force) to restore anything forfeited or seized under the Customs and Excise Acts, subject to such conditions (if any) as they thought proper.

15 39. Mr Sawtell referred to ss 14 to 16 of the Finance Act 1994 (“FA 1994”) relating to review decisions and appeals against such decisions, in respect of which the powers of tribunals were limited. He emphasised s 16(6), which stated that it was for the appellant in such an appeal to show that the grounds on which that appeal was brought had been established.

## **Discussion and conclusions**

20 *The tribunal’s powers in restoration appeals*

40. There is one general matter which we should deal with before we arrive at any conclusions on the evidence; it is something of which all applicants for restoration should be aware when bringing appeals against refusals to restore items. Mr Sawtell referred to the powers of tribunals in such appeals being limited. As this is not set out in Border Force review decision letters, we think it important to explain the position for the benefit of Mr Lawrynowicz. As a detailed explanation of the terms of the legislation would be complex, we attempt to describe the position in simple terms.

30 41. Mr Lawrynowicz did not seek to challenge the legality of the seizure, nor did he question the way in which it was carried out. In such circumstances, it is not open to this tribunal to consider the legality of the seizure. This has been confirmed by the Court of Appeal in the case of *Revenue and Customs Commissioners v Lawrence and Joan Jones* [2011] EWCA Civ 824. Although there have been various tribunal decisions demonstrating that there may still be situations in which a tribunal is not precluded from considering the question of the seizure, none of those tribunal decisions applies in the present case.

40 42. As a result, the only question which this tribunal can consider is the decision not to restore the relevant vehicles. Under s 16 FA 1994, the tribunal can only intervene where it is satisfied that Border Force could not reasonably have arrived at that decision. If the tribunal concludes that Border Force could reasonably have arrived at that decision, the tribunal has no power to do anything other than to dismiss the appeal.

43. If the tribunal is satisfied on the evidence that the decision not to restore the vehicles is one which Border Force could not reasonably have arrived at, it can do one or more of the following:

5 (1) It can direct that the relevant decision is to cease to have effect from such time as it may specify;

(2) It can require the Respondent (ie Border Force) to conduct a further review of the original decision, taking into account directions made by the tribunal, which may include the tribunal's findings made on the basis of the evidence;

10 (3) If the relevant decision has already been acted on or taken effect and cannot be remedied by a further review, it can declare the decision to have been unreasonable and make directions to prevent repetitions of the unreasonableness.

15 44. The practical effect of these restrictions is that a tribunal does not have power to reverse a decision by Border Force to refuse restoration of items such as vehicles or excise goods. All that the tribunal can do in practice is to order a further review, subject to any particular findings of fact that the tribunal has made. Put starkly, if after considering the detailed evidence we reach the conclusion that Border Force could not reasonably have arrived at the decision, we cannot simply order Border Force to  
20 restore the tractor or trailer to Mr Lawrynowicz; in such circumstances, the only course would be to order a further review.

#### *Consideration of the evidence*

25 45. As Mr Sawtell submitted, the burden of proof in this appeal falls on Mr Lawrynowicz, to satisfy us that the decision to refuse restoration was unreasonable. Mr Ratajczak argued that the evidence did not support claims that Mr Lawrynowicz had been complicit and/or reckless.

30 46. Mr Sawtell questioned the basis for Mr Ratajczak's argument; he referred to the CMR documentation. The CMR document relating to the machinery was typed; Mr Lawrynowicz had carried goods for that German company on previous occasions. In contrast, the CMR for the other goods was handwritten. The name "Import - Export" showed no description of the sender. Checks of the address made by Border Force had found no trace of that "entity". In his interview, Mr Lawrynowicz had described the individual as Henri/Henui, and stated that he did not know him.

35 47. Mr Sawtell referred to the description of the goods in that CMR, and argued that this was wholly unsatisfactory; it was an anonymous description of anonymous pallets. Despite this, Mr Lawrynowicz had made no checks of the pallets before loading them.

40 48. We have examined the copy of the CMR contained in the evidence. In the box containing headings 6 to 9 inclusive, respectively "Marks and Nos", "Number of packages", "Method of packaging", and "Nature of the goods", the only entry is "10 Euro Pallets"; the copy of the writing in this box is indistinct, despite the printed

wording being clearly shown. In the box containing heading 11, “Gross weight in kg”, the indistinct handwritten entry is “4.000 kg”. We do not consider that the CMR document as worded was sufficient to enable Mr Lawrynowicz as carrier to check the matters set out in Article 8(1) of the CMR Convention.

5 49. Article 8(2) of the CMR Convention sets out what the carrier is required to do if  
he is unable to comply with the requirements in Article 8(1). As none of the relevant  
information was shown in the CMR document, Mr Lawrynowicz should have entered  
his reservations in the consignment note, together with the grounds on which those  
reservations were based. The CMR document contains no notes in the box numbered  
10 18 (“Carrier’s reservations and observations”).

50. Mr Lawrynowicz stated at the interview that he did not know the man who had  
placed the order, nor did he know what the load contained; despite this, he did not  
take the appropriate step of making some note to show that the contents were  
unknown and that the matters required to be checked in accordance with Article 8 of  
15 the CMR Convention could not be checked. The cigarettes were found in the ten  
pallets in trailer FG92499 in unmarked white shrink-wrapped boxes. The description  
“10 Euro pallets” was not sufficient to indicate what the goods were, or whether they  
might be something hazardous. Article 6(f) requires particulars of “the description in  
common use of the nature of the goods and their method of packing”; the actual  
20 description did not comply with this. We find that no checks were made in accordance  
with Article 8(1), nor were any reservations entered in accordance with Article 8(2).

51. Mr Ratajczak referred to his client always requiring written transport orders. He  
explained that Mr Lawrynowicz had received a call from a company named Import-  
Export from Berlin. The man who called had referred to a company with which Mr  
25 Lawrynowicz had previously worked and asked him if he had a free vehicle to take  
some pallets. Because there was space in the trailer FG92499, Mr Lawrynowicz had  
decided to make a deal with Import-Export. He received a transportation order by  
email on 28 August 2012.

52. The version of that document included in the evidence is a certified translation  
30 from Polish of a document previously translated into Polish from German. The price  
is shown as “790”, without specifying the currency; it appears likely to us that the  
currency would have been Euros.

53. The explanation given by Mr Ratajczak on behalf of his client does not appear  
to be fully consistent with the account given in the Border Force’s interview of Mr  
35 Lawrynowicz on 30 August 2012. The reference in the interview was to 20 pallets, the  
shipment having been split between the two vehicles.

54. The circumstances of the placing of the order by an unknown individual on  
behalf of an unknown organisation were such as to justify some form of check by Mr  
Lawrynowicz of the details of that organisation. The name “Import-Export” appeared  
40 general, and there was no corporate designation or indication of the nature of the firm  
in question. Subsequent checks by Border Force established that although the street  
given as the location of “Import-Export” existed, there was no trace of any such

organisation at that address; we find that it would have been appropriate and justifiable for Mr Lawrynowicz to check the details of the organisation, by means of a simple check via the internet.

5 55. The addresses given at boxes 2 and 3 of the CMR document were not  
consistent; the Northwich address was some distance away from “Manchester  
Anglia”. We find that Mr Lawrynowicz did not check the details of the consignee or  
the inconsistency in the address details. Subsequent checks made for Border Force  
established that neither of the companies at the address mentioned was expecting the  
load. He could have made some form of check himself, given the circumstances of the  
10 placing of the order, although we accept that it may not always be practical for a  
carrier to contact the consignee.

56. The inconsistency between the accounts given by Mr Lawrynowicz and by his  
employee driver Mr Koroś also calls into question the rest of the circumstances  
relating to the order and the shipment.

15 *The Review Officer’s decision*

57. We have explained the nature of our jurisdiction. The initial question is  
therefore whether we are “. . . satisfied that the Commissioners or other person  
making that decision could not reasonably have arrived at it”. In considering this, we  
are required to examine whether the person in question took all relevant  
20 considerations into account and ignored irrelevant considerations. In his review  
decision letter dated 8 January 2013, Mr Brenton considered the factual background  
and the circumstances leading to the seizure of the vehicles. He considered the  
correspondence exchanged following the seizure, and the information provided by Mr  
Ratajczak. No further correspondence had been received after the request for the  
25 review.

58. Mr Brenton gave details of the Border Force restoration policy for commercial  
vehicles. He then set out details of his consideration of the contested decision, ie the  
decision notified in the letter dated 23 October 2012 refusing to restore both of the  
vehicles (units and trailers). He had not considered the legality or correctness of the  
30 seizure itself.

59. The restoration policy depended primarily on who was responsible for the  
smuggling attempt. As a result, the first matter which he had to consider was the  
evidence provided as to who had been responsible for it. The possibilities were the  
following:

- 35 (1) Neither the operator or the driver had been responsible;  
(2) The driver, but not the operator, had been responsible;  
(3) The operator had been responsible.

60. Mr Brenton referred to the requirements of Article 8(1) of the CMR  
Convention. The driver and the operator (ie Mr Lawrynowicz, in relation to both  
40 shipments) had not complied with any of the procedures for the movement of excise

goods from another EU country to the UK, nor had either of them made the checks required by Article 8(1).

61. He continued:

5                    “This was no casual concealment and required not just one but two  
vehicles to assist the perpetration of the smuggling attempt. I conclude  
from the evidence available that, on the balance of probabilities, the  
operator was involved or at least complicit in the smuggling attempt.”

62. He stated that the revenue involved in each of the cases had been more than  
£1,000,000. The amount was such that, in accordance with the policy, the vehicles  
10 should not be restored. He considered the question of proportionality in refusing to  
restore the vehicles. The total value in accordance with Glass’s Guide was £48,000.  
He concluded that in the circumstances of the case involving over £1,000,000 in  
revenue, it was reasonable not to restore the vehicles.

63. We have examined Mr Brenton’s decision in the light of the evidence before us.  
15 Taking into account all the points made in correspondence by Mr Lawrynowicz and  
Mr Ratajczak on his behalf, we are not satisfied that the condition in s 16(4) FA 1994  
is fulfilled. In other words, we do not consider that Mr Brenton’s decision, or that of  
the officer who refused to restore the vehicles, were decisions which they could not  
reasonably have arrived at; they were not “unreasonable” in those terms. Mr Brenton  
20 indicated in his oral evidence that, taking into account the way in which the goods  
were arranged within the vehicles, he believed that Mr Lawrynowicz was complicit in  
the smuggling attempt. On the basis of the evidence, we regard that conclusion as  
reasonable. In those circumstances, we have no power to intervene.

64. We need to consider certain other matters. The first is the effect of the  
25 subsequent request from the leasing company, Getin Leasing SA, for the restoration  
of the items which it leased to Mr Lawrynowicz. The second is the question of  
hardship, as raised by Mr Ratajczak.

65. By its letter dated 23 November 2012 to the Border Force National Post Seizure  
Unit, Getin Leasing explained that it was the owner of the trailer registered as  
30 ZS9831A, and indicated that it did not assume any responsibility for the transported  
cargo. It requested return of the vehicle.

66. No other correspondence from Getin Leasing was included in the evidence.  
However, Mr Brenton confirmed in his oral evidence that the Scania tractor unit  
registered ZS8497T and the Tilt trailer ZS9831A were restored to Getin Leasing on  
35 19 April 2013. The file and papers relating to Getin Leasing’s restoration request had  
been dealt with by another officer in Border Force.

67. The result is that we have found ourselves in the unsatisfactory position that we  
have not seen all the correspondence relating to the items owned by Mr Lawrynowicz.  
His tractor unit was the DAF one, registered FG7702A; this was the one which Mr  
40 Koroś was driving when he was intercepted on 30 August 2012. The trailer attached  
to this cab was the Tilt trailer ZS9831A; this was the trailer restored to Getin Leasing.

Mr Lawrynowicz's own trailer, the Curtainsider registered FG92499, was the one which was attached to the Scania tractor unit ZS8497T when he was intercepted on the earlier sailing on the same date.

5 68. We have not been provided with the documents relating to the seizure of the tractor and trailer driven by Mr Koroś. As a result, we are unable to following in detail the documentary "audit trail" relating to the DAF tractor unit. In particular, we have had to assume that the CMR relating to the second shipment was similar to that for the first shipment.

10 69. We raised this question at the hearing. As a result, Mr Brenton and Mr Sawtell produced a copy letter showing that the other items had been dealt with in the same way. We are satisfied that all four items were dealt with together until the point at which Getin Leasing sought restoration of its tractor unit and trailer. Although we have not seen the letter from Getin Leasing requesting restoration of the Scania tractor unit ZS8497T, we are satisfied on the basis of Mr Brenton's evidence that its request  
15 was in similar terms to that relating to the Tilt trailer.

70. Mr Brenton indicated that it was relatively common for operators to "mix and match" tractor units and trailers in this way, in particular putting a hired item with one owned by the operator. He emphasised that there was nothing suspicious about this; it happened all the time.

20 71. This practice does have consequences where there is a restoration appeal in a case where the operator has "mixed and matched" owned items and leased items, the latter having been restored pursuant to Border Force policy. The tribunal needs to see all the documentation relating to the items owned by the appellant in question. We strongly recommend that in future cases, Border Force should ensure that all relevant  
25 documentation is provided for every seized item owned by the relevant appellant.

72. In relation to documentation, we are also concerned that we have not been provided with a copy of the notes of the interview of Mr Lawrynowicz on 30 August 2012. The only notes included in the evidence were those of the intercepting officer, P Astro, and those of Michael Thompson. Officer Astro's notes give details of the  
30 interception and refer to Officer Thompson's information concerning the discovery of the cigarettes. Although Officer Astro's notes refer to Mr Lawrynowicz signing the relevant pages of the notebook to confirm that the account was true and accurate, the relevant pages recording the details of the interview were not in the evidence. We have been able to satisfy ourselves sufficiently as to the details of the interview from  
35 the information given in the review letter and from Mr Brenton's oral evidence, but we emphasise that we regard it as unsatisfactory not to have this information available for the purposes of an appeal. In the same way, we should have had access to the notes of the interview of Mr Koroś. We accept that originally the interviews took place in the context of a criminal investigation, but once the decision had been made  
40 not to proceed with any prosecution, we consider that there should have been some way in which direct evidence was provided to us of the information provided by Mr Lawrynowicz and Mr Koroś in their respective interviews.

73. Despite the absence of such direct evidence, we do not consider that our overall conclusion is affected; in the light of all the evidence available to us, we do not regard Mr Brenton's decision, or that of the officer who refused to restore the vehicles, as "unreasonable".

5 74. The other matter considered by Mr Brenton was that of hardship, both at the  
time of the review and following receipt of the letter dated 8 March 2013 from Mr  
Ratajczak. In that further letter Mr Lawrynowicz had requested that his financial  
situation should be taken into account. Mr Brenton explained in his review letter that  
10 hardship was a natural consequence of having a vehicle seized, and that it would have  
to be exceptional hardship for him to restore the vehicle under this part of the policy.  
He did not regard either the inconvenience or the expense caused by the loss of the  
vehicles in this case as exceptional hardships over and above what one should expect.  
He did not consider that Mr Lawrynowicz had suffered exceptional hardship, and he  
15 concluded that there was no reason to disapply the policy of refusing to restore the  
vehicles in all the circumstances. On further consideration following the 8 March  
2013 letter, he confirmed in his letter to Mr Ratajczak dated 20 March 2013 that the  
original decision still stood.

75. We have examined Mr Brenton's consideration of hardship, both in the review  
letter and in March 2013. We are not satisfied that Mr Brenton's decision relating to  
20 hardship is "unreasonable" as described above; again, the result is that we have no  
power to intervene.

### **Decision**

76. As we have no power to intervene in respect of the decisions made by Border  
Force, we dismiss Mr Lawrynowicz's appeal.

### **Right to apply for permission to appeal**

25 77. 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  
30 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.

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**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 March 2014**

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