



**TC03673**

**Appeal number: TC/2013/03750 & TC/2013/03750**

*EXCISE DUTY – restoration of seized trailers which had been adapted for the concealment of dutiable goods - whether HMRC acted reasonably in refusing to restore trailers - yes - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**UAB BARELA  
&  
UAB REISRIDA**

**Appellants**

**- and -**

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

**TRIBUNAL: JUDGE EDWARD SADLER  
MRS GILL HUNTER**

**Sitting in public at Bedford Square on 18 February 2014**

**Alexander Dos Santos, counsel, instructed by EBR Attridge LLP, solicitors, for the Appellants**

**Oliver Conolly, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

1. This case concerns two Lithuanian companies, UAB Barela and UAB Reisrida  
5 (together, "the Appellants") each of which owned a freight vehicle (a lorry comprising  
a tractor unit and a trailer) which transported goods into the United Kingdom in  
December 2012. In each case large numbers of cigarettes were concealed in the  
trailer in specially adapted compartments, and no excise duty was paid on those  
cigarettes. In each case The Commissioners for Her Majesty's Revenue and Customs  
10 ("HMRC") seized the trailer on the grounds that it was liable to forfeiture under the  
provisions of the Customs and Excise Management Act 1979 ("CEMA 1979").

2. The Appellants did not contest that the trailers were liable to forfeiture. Instead,  
they each requested HMRC to exercise their discretion (conferred by CEMA 1979) to  
restore the seized trailers to them. HMRC refused to restore the trailers, and the  
15 Appellants requested a review of that decision. HMRC upheld on review their  
decision not to restore the trailers.

3. The provisions of section 16 of the Finance Act 1994 ("FA 1994") give the  
Appellants the right to appeal to this tribunal against that decision, and each of the  
Appellants has exercised that right of appeal by a notice of appeal dated 28 May 2013.  
20 The tribunal has directed that their respective appeals should be joined.

4. As we explain below, the tribunal has a limited jurisdiction in respect of appeals  
against a decision of HMRC to refuse to restore vehicles or goods seized under the  
provisions of CEMA 1979. In summary, the tribunal may intervene only if it is  
satisfied that HMRC could not reasonably have arrived at its decision. The tribunal  
25 cannot substitute its own decision for that of HMRC. On the facts of this case, and  
having regard to the arguments put to us by the parties, we are unable to conclude that  
HMRC could not reasonably have arrived at their decision to refuse to restore the  
respective trailers to each of the Appellants. That decision was made in accordance  
with a policy which took account of the relevant legal requirements and with proper  
30 attention to all the relevant facts.

5. We therefore dismiss the appeal of each of the Appellants.

### *The relevant statutory provisions*

6. Since the Appellants did not challenge the forfeiture and seizure of the trailers it  
is not necessary to set out in detail the provisions of CEMA 1979 dealing with such  
35 matters, and a summary of those provisions will suffice.

7. Where goods (in this case, cigarettes) are liable to forfeiture because excise duty  
payable has not been paid, the vehicle used for the carriage or concealment of those  
goods is also liable to forfeiture under section 141 CEMA 1979. A vehicle which is  
so liable to forfeiture may be seized by HMRC under section 139 CEMA 1979. In

this case HMRC seized the respective trailers of the Appellants on the grounds that they were liable to forfeiture under these provisions.

8. A person who claims that a vehicle seized as liable to forfeiture is not liable to forfeiture may challenge the legality of the seizure (before the magistrates' court, not before the tribunal), and if no such challenge is made the vehicle is deemed to have been condemned as forfeited: Schedule 3 to CEMA 1979. In this case the Appellants did not take action within the prescribed time to claim that the seized trailers were not liable to forfeiture. The trailers have therefore been deemed to have been duly condemned as forfeited.

9. Section 152 CEMA 1979 confers on HMRC a discretion to restore vehicles or other items which have been forfeited or seized. So far as relevant to this case, the section provides:

*The Commissioners [that is, HMRC] may, as they see fit -*

(a) ...; ...

(b) *restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts ... .*

10. Provisions found in FA 1994 relate to the review by HMRC of decisions not to restore seized items and appeals to this tribunal against such decisions. Section 14 FA 1994 provides that where a person has requested HMRC to restore a seized item, and HMRC have refused restoration, that person may require HMRC to review that decision. On such review HMRC may either confirm the decision or withdraw or vary the decision (section 15 FA 1994). We should mention that there are time limits within which a person may require a review, and within which HMRC must complete their review (but a decision is assumed to have been confirmed if HMRC do not complete their review in time). In this case both the Appellants in requiring a review and HMRC in completing their review acted within those time limits.

11. If on review HMRC confirm the decision not to restore the seized item, section 16 FA 1994 gives the person who has requested the review a right of appeal to this tribunal. The Appellants have exercised that right and have applied to the tribunal under these provisions.

12. Section 16(4) FA 1994 sets out the extent of the powers and jurisdiction of the tribunal where such an appeal is made against the decision not to restore the seized item:

(4) *In relation to any decision as to an ancillary matter [a decision as to whether or not to restore anything seized or forfeited under CEMA 1979 is "a decision as to an ancillary matter" for these purposes] or any decision on the review of such a decision, the powers of [the tribunal] on an appeal under this section shall be confined to a power, where the tribunal are satisfied that [HMRC] ... 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;

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(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

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

15 13. By virtue of section 16(6) FA 1994 the burden lies on the Appellants to show that the grounds on which their appeal is brought have been established.

*The evidence and the findings of fact*

20 14. We had before us in evidence a bundle of documents comprising correspondence between the parties (including the decision and review decision of HMRC); photographs of the trailers and the modifications made to the trailers for the purposes of concealing the cigarettes on which no excise duty was paid; a transcript of the interview between Ramunas Jomantas (an employee of UAB Barela and the driver of the lorry whose trailer was seized) and an officer of HMRC conducted when the cigarettes were discovered; a letter from Mr Jomantas to UAB Barela as to his conduct in concealing the cigarettes; a transcript of the interview between Marius Sutkus (an employee of UAB Reisrida and the driver of the lorry whose trailer was seized) and an officer of HMRC conducted when the cigarettes were discovered; two witness statements of Louise Bines, the officer of HMRC who in each case carried out the review decision; a witness statement of Andrius Grudzinskas, the transport manager of UAB Barela; and a copy of the entries in the notebook of the HMRC officer who seized the concealed cigarettes and the trailers.

35 15. At the hearing Mrs Bines appeared as a witness, and was cross-examined by Mr Dos Santos on behalf of the Appellants. Her evidence dealt with the steps she took in reviewing the original decision; the facts she had taken into account in reaching her decision to uphold the original decision; her consideration of HMRC's policy in relation to the restoration of vehicles adapted for smuggling; and the reasons for her decision to uphold the original decision. We accept Mrs Bines's evidence without reservation.

40 16. Mr Grudzinskas did not appear at the hearing. In his witness statement (which is dated 5 February 2014 and therefore was not available to HMRC in the review process which was completed by 19 April 2013) Mr Grudzinskas states that he was unaware that Mr Jomantas was smuggling cigarettes; that the modifications made to the trailer for the purposes of concealing the cigarettes were not sophisticated and could have been done quickly and easily by the driver acting alone; that UAB Barela continued to employ Mr Jomantas after the smuggling in order to try to recoup from

him some of the loss suffered by the company as a result of the seizure of the trailer; and that, since the company has only a small business, the seizure of the trailer had resulted in severe hardship for the business. Certain of these statements (for example, the nature and level of sophistication of the modifications made to the trailer) are contentious between the parties, and Mr Grudzinskas could not be challenged in cross examination on his evidence. We set out below our conclusions in relation to Mr Grudzinskas's evidence.

17. We find the following facts.

18. Each of the Appellants is a Lithuanian company carrying on an international road haulage business. The relationship between the two Appellants was not explained to us, but they appear to have some kind of working relationship and, on occasion at least, share an email address and a fax number.

19. Each Appellant owned a Lithuanian registered freight vehicle (motor unit and trailer) which transported goods from an IKEA facility outside the United Kingdom to an IKEA distribution centre in Peterborough, arriving in Peterborough on 24 December 2012. The trailer unit owned by UAB Barela is identified as "DE 375" and the trailer unit owned by UAB Reisrida is identified as "DE 153". In each case the consignment of goods transported by the freight vehicles was normal, in good and valid order, and in accordance with the requirements of the shipper and the consignee: the vehicles were engaged in a legitimate and commercial shipping activity.

20. On 24 December 2012 police officers inspected the vehicles at Peterborough after the consignment of goods had been unloaded and after IKEA staff reported their suspicions of concealed cigarettes in the trailers. The police officers found 30,246 cigarettes concealed in trailer DE 375. The police called in HMRC officers. No excise duty had been paid on the cigarettes. The amount of excise duty evaded was £6,716.53. In trailer DE 153 the police officers found 32,760 cigarettes concealed. No excise duty had been paid on the cigarettes and the amount of excise duty evaded was £6,535.70. HMRC seized as liable to forfeiture the cigarettes and the trailers. (HMRC also seized the two tractor units of the lorries, but they were restored free of charge to the Appellants.)

21. The cigarettes, in the case of each trailer, were concealed in internal aluminium rigid beams or roof struts with a hollow square cross section. The fixing mechanism on the end of the beams had had the bolts removed; the bolts had been cut and filed to enable the end fixing mechanism to be removed, and sleeves of packets of cigarettes had been hidden within the beams. The fixing mechanism had then been replaced and the heads of the bolts had been glued back on. In each trailer 26 of these beams had been adapted in this way to conceal packets of cigarettes.

22. Both lorry drivers were arrested by the police on suspicion of evasion of UK excise duty and were interviewed first by police officers and then by HMRC officers on 24 December 2012 in each case with the assistance of an interpreter.

23. The driver of the vehicle of which trailer DE 375 formed part was Ramunas Jomantas, a Lithuanian national who at that time had been an employee of UAB Barela for four years. He stated (in interviews first with the police and then with HMRC officers) that he had purchased the cigarettes in Lithuania and had concealed  
5 them in the trailer with the intention of selling them in the United Kingdom for his own profit; that it was his idea to smuggle the cigarettes into the United Kingdom and for that purpose to conceal them in the beams; that he had travelled in convoy with the driver of the other vehicle (that is, the vehicle owned by UAB Reisrida), whom he knew as a workmate; that he had purchased the cigarettes from his own savings; that  
10 he knew excise duty was payable on the importation of the cigarettes into the United Kingdom; and that it was his own idea to smuggle the cigarettes and no-one else at his employer was aware that he had concealed the cigarettes in the trailer or that he intended to avoid paying excise duty on the cigarettes.

24. On a later occasion (possibly on 7 January 2013) Mr Jomantas wrote to his  
15 employer (we saw an undated English translation of the letter, which was sent by UAB Barela's solicitors to HMRC on 28 May 2013, that is, after the date of HMRC's review letter) in which Mr Jomantas confirmed that he adapted the beams in the trailer for the purpose of concealing the cigarettes. He said that he financed the purchase of the cigarettes from his own savings and from funds borrowed from his sister. He  
20 asked that his employment should be continued so that he could repay from his salary the losses suffered by his employer.

25. The employment contract between UAB Barela and Mr Jomantas has the following provision (in English translation): "Driver must obey the law of visiting  
25 country when driving abroad. Driver must very carefully follow rules of visiting country for bringing alcohol and tobacco goods for personal use."

26. Mr Jomantas has continued as an employee of UAB Barela as a lorry driver. According to the witness statement of Mr Grudzinskas the company has continued to employ him in order to try to recoup from him some of its loss and to have him available in the course of the procedures for seeking restoration of the trailer.

30 27. The driver of the vehicle of which trailer DE 153 formed part was Marius Sutkus, a Lithuanian national who at that time had been an employee of UAB Reisrida for about a year. Mr Sutkus had, at some time previously, been an employee of UAB Barela. He stated (in interviews first with the police and then with HMRC  
35 officers) that he was a friend of Mr Jomantas; that he was aware that duty is payable on imported cigarettes; that this was the first time he had smuggled cigarettes into the United Kingdom; that he borrowed funds from friends to finance the purchase of the cigarettes; that he intended to sell the cigarettes to members of the Lithuanian or Polish communities in the United Kingdom for his own profit; that it was his idea to conceal cigarettes in the trailer beams; and that no-one else at his employer was aware  
40 that he had concealed cigarettes in the trailer.

28. Mr Sutkus continued as an employee of UAB Reisrida for a period after the seizure of the trailer.

29. At the time its trailer was seized UAB Barela used four vehicles in its business, of which three (including trailer DE 375) were leased under finance arrangements. Rentals are payable for the trailer notwithstanding that it can no longer be used in UAB Barela's business.

5 30. At the time its trailer was seized UAB Reisrida used two tractor units and the seized trailer unit in its business. In order to continue its business it has leased another trailer unit.

31. Both the Appellants have continued in business since the trailers were seized.

10 32. By faxed letters dated 26 December 2012 and 8 January 2013 UAB Barela asked for the restoration of its trailer. On 10 January 2013 HMRC wrote to UAB Barela refusing to restore the trailer. That letter set out HMRC's policy that vehicles seized as liable to forfeiture should not be restored, particularly where the vehicles had been specifically constructed or adapted for concealing smuggled goods, unless there are any overriding humanitarian or hardship issues that warrant a departure from that policy. The letter set out the manner in which the trailer had been adapted for  
15 concealing the cigarettes, and the way in which they had been concealed. It stated that since HMRC were not aware of any humanitarian or hardship issues there was no ground on which to depart from the normal policy. The letter explained UAB Barela's right to ask for the decision to be reviewed.

20 33. By faxed letter dated 16 January 2013 UAB Reisrida asked for restoration of its trailer. In that letter it pointed out that as it had only one trailer it could not operate its business unless the trailer was restored. On 23 January 2013 HMRC wrote to UAB Reisrida refusing to restore the trailer. The terms of its letter were, in all material respects, identical to those of the corresponding letter to UAB Barela.

25 34. On 20 February 2013 solicitors acting for both Appellants wrote to HMRC seeking a review of the decision not to restore the trailers. The solicitors stated that neither owner was aware that the respective trailers had been adapted for smuggling purposes, and that the drivers had acted without the knowledge, connivance or  
30 negligence of the owners. They explained the business circumstances of each of the owners and the consequences for their businesses if the trailers were not restored to them. They stated that the owners were prepared to pay costs or a penalty in order to achieve restoration.

35 35. Mrs Bines was the HMRC officer who conducted a review of the original decision. She had not been involved in either the seizure of the trailers or the original decision not to restore the trailers. She wrote separately to the solicitors on 19 April 2013 in relation to each of the Appellants, but in all material respects the letters are identical. In each case her decision was that the trailers should not be restored.

40 36. In setting out the reasons for her decision Mrs Bines summarised the circumstances which had resulted in the seizure of the trailers. She stated that the work done to the trailers to adapt them to conceal the cigarettes "was considered to be very well done, and had taken considerable thought and planning", and that "a visual

inspection would not identify anything untoward". She set out in summary the representations made on behalf of the Appellant by their solicitors in their letter of 20 February 2013. She then summarised HMRC's policy for the restoration of vehicles, describing it as a policy which "is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods". She stated that although the policy is applied so as usually to permit the restoration of vehicles where the owner is both innocent of and blameless for the attempted smuggling (and to permit restoration without a fee if, additionally, the owner can demonstrate that he had taken reasonable steps to prevent the vehicle being used for smuggling), the policy does not normally permit vehicles specifically adapted to facilitate smuggling to be restored.

37. Mrs Bines continues in her letter by stating that in reaching her decision she is guided by HMRC's policy, but that she is required to consider every case on its individual facts and merits in order to decide if any mitigating or exceptional circumstances exist which should be taken into account, and that this is the approach she has taken. She concluded that she should apply HMRC's policy of not restoring vehicles that have been specifically adapted to smuggle goods into the United Kingdom, taking account of the following matters:

(1) The sophisticated nature of the adaptations to the trailers and the time it would have taken to carry them out indicate that they could not have been done without the owner's knowledge;

(2) It is irresponsible of the owner to continue to employ a driver who is an admitted smuggler and that also indicates that the owner was aware of his smuggling attempt; and

(3) Although disruption of the owner's business is an inevitable consequence of the seizure of the trailer, the owner can show no exceptional hardship which might be a reason for the general policy to be set aside.

38. Mrs Bines pointed out that the tractor units had been restored free of charge to the Appellants, which was in the circumstances "more than fair".

39. Mrs Bines invited the Appellants to submit any fresh evidence that might be relevant to her decision. On 28 May 2013 the Appellants' solicitors wrote to HMRC with photographs of an identical trailer showing the beams which had been adapted, and submitting that the adaption was not so sophisticated or time consuming as to lead to the conclusion that the owner must have had knowledge of the work. They also submitted that the owner had not acted irresponsibly in continuing to employ the driver, since that was for the purpose of recouping loss from the driver and keeping him available to provide information and evidence relating to the smuggling attempt. They stated that it was their understanding that the driver's employment was such that there was no risk that he would be involved in further evasion of duty.

40. Under cross-examination Mrs Bines explained that her view as to the complexity and sophistication of the adaptation of the trailers was based upon the enquiries she had made of the officer who had reached the original decision. She had concluded from those enquiries that it was likely, on the balance of probabilities, that each of the Appellants had been aware of the work carried out to adapt the trailers.

She also said that HMRC had discovered from their own enquiries that each of the Appellants had continued to employ the drivers - that information had not been volunteered by the Appellants.

5 41. HMRC do not publish their policy on restoration. Their statement of policy used internally within HMRC is in these terms: "The general policy is that a vehicle constructed, adapted, altered or fitted for the purpose of concealing goods will be seized and not restored. Such a vehicle is liable to forfeiture under section 88 of CEMA and may be seized under section 139 of the same Act, whether or not any  
10 goods are found in the vehicle. This applies to all types of vehicle, whether private or commercial, and irrespective of who owns them. If, exceptionally, the vehicle is to be restored, the restoration amount, calculated in accordance with the usual policy for the type of vehicle and circumstances, should be increased by the cost of removing the place where goods could be concealed and the work must be carried out prior to releasing the vehicle."

15 *The parties' submissions*

42. Mr Dos Santos appeared for the Appellants. He referred first to the policy of HMRC with regard to restoration of seized vehicles. That policy has to be legitimate in its aim, that is, in accordance with law (and in particular article 1 of the first protocol of Schedule 1 to the Human Rights Act 1998 and European Union law as to  
20 proportionality) and in its implementation in a particular case it must not result in the imposition of a penalty that is disproportionate having regard to the legitimate aim of the policy. He referred us to the cases of *Air Canada v United Kingdom* (1995) 20 EHRR 150 and *Lindsay v Customs and Excise Commissioners* [2002] STC 588.

43. In the Appellants' case no consideration had been given by HMRC to the  
25 question of whether the proportionate application of their policy in the circumstances was to restore the trailers upon payment of a fine or penalty. No consideration was given to the relativity of the value of the cigarettes and excise duty evaded to the value of the trailers. Instead, HMRC had reached a conclusion that the trailers had been adapted for concealment in a complex and sophisticated manner (and therefore  
30 with the knowledge or connivance of the owners) and therefore the trailers should be retained to ensure that they were not used as a tool for future smuggling operations.

44. However, the work carried out to the beams in the trailers which were used to conceal the cigarettes was not particularly sophisticated or complex, as the witness statement of Mr Grudzinskas demonstrated. It was perfectly feasible that the drivers  
35 had carried out that work themselves (which is what they had said when interviewed) without the owners' knowledge, and this would have been apparent to the review officer had she looked more carefully into this matter and had she asked the owners for their views. Further, the adaption work was not integral to the fabric of the trailers, and so the trailers could be restored (with the adapted beams removed)  
40 without the risk of their being used for future smuggling. Had the review officer taken these factors into account she would have concluded that a proportionate application of the policy in the circumstances of the Appellants was to restore the trailers upon payment of a penalty - an application of the policy on those terms would

5 have been consistent with the legitimate aim of the policy. Mr Dos Santos referred us to the cases of *Carlos Caeiro (Amexa De Carril) v HMRC* (2008) Excise Duties Cases E01087 and *Wieslaw Parysek t/a WP-Trans Wieslaw Parysek v HMRC* [2009] FTT 354 where the decision not to restore was upheld, but where it was clear that the adaption work to the vehicles was more structural and extensive than in the present case.

10 45. Mr Dos Santos submitted that the review officer had placed too much reliance on the factor that the Appellants had continued to employ the drivers without enquiring why this was the case - the review officer had taken this as further evidence that the Appellants were complicit in the attempted smuggling, whereas an enquiry of the Appellants would have shown that there were good commercial reasons for the Appellants to continue to employ the drivers.

15 46. Accordingly, in Mr Dos Santos's submission, the review officer's discretion was fettered in that it was not exercised with regard to the full and proper facts, and the conclusions and resulting decision were therefore flawed. The tribunal should therefore direct the officer to carry out a further review having regard to the full facts.

20 47. Finally, the review officer had not taken proper account of the hardship suffered by each of the Appellants by reason of the decision not to restore the trailers - she had not shown that she had considered the issue with reference to the modest scale of the business of each Appellant, where the failure to restore the trailers had a dramatic impact on the ability of the businesses to continue.

25 48. Mr Conolly appeared for HMRC. He said that it is clear from section 16(4) FA 1994 and from the case law (see, for example, *Leadsham Trading Company Limited v HMRC* [2012] UKFTT 426) that the tribunal, in considering the review decision of HMRC not to restore the trailers, must apply the principles set out in the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, asking whether the decision reached was reasonable having regard only to those facts relevant to the matter.

30 49. As to the legitimacy of HMRC's policy on restoration, Mr Conolly referred to the *Lindsay* case and subsequent tribunal decisions which established that in cases of "commercial" smuggling it is a legitimate and proportionate policy not to restore a vehicle used for smuggling where the owner is aware, or should have known, that the vehicle is to be used for smuggling, or where (regardless of the owner's knowledge) the vehicle is adapted to conceal smuggled goods.

35 50. That policy had been applied in the Appellants' cases. The review officer had noted that the trailers had been adapted to conceal smuggled goods (which the Appellants did not dispute), and from the nature and extent of the work done in so adapting the trailers, and from the continued employment of the drivers, had reached the reasonable conclusion that the Appellants were aware of the intent of the drivers to use the trailers for smuggling. The review officer was aware of the business  
40 consequences for the Appellants of any decision not to restore the trailers, but formed

the view, which again was a reasonable view, that no exceptional hardship would result from the failure to restore the trailers.

51. It was therefore clear that a legitimate policy had been applied with a discretion which took account of the circumstances of the case and with regard to a reasonable view of the facts as known to the review officer at the time of her decision. Her decision is therefore not open to challenge.

#### *Discussion and conclusion*

52. There is no dispute between the parties as to the approach we should take in dealing with this appeal. The first issue is whether HMRC's policy with regard to restoration in cases of "commercial" smuggling where goods are concealed in vehicles adapted for the purpose is lawful. The second issue is whether HMRC, acting by the review officer, properly exercised the discretion conferred on it by CEMA 1979 as to whether or not to restore the trailers in the particular circumstances of this case - that is, reached a reasonable decision by reference to the relevant facts (and only the relevant facts). Our jurisdiction is limited to this supervisory function by section 16(4) FA 1994. We cannot substitute our own decision for that of the review officer.

53. HMRC's policy is straightforward: vehicles specifically adapted to facilitate smuggling for a commercial purpose will be restored only in exceptional cases (we are concerned in this case with "commercial" smuggling, as is apparent from the number of cigarettes imported and from the admission of each driver that he intended to sell the cigarettes for his own benefit and profit). The review officer went to the trouble in her review decision to set out, additionally, HMRC's policy where the seized vehicle used for the improper importation of goods has not been adapted or altered for the purpose of smuggling the goods (and where the policy takes account of the knowledge and attitude of the owner of the vehicle who is not present at the smuggling operation), but that is not relevant to the Appellants' cases, and may have served only to confuse matters.

54. It is clear from the decision of the Court of Appeal in the *Lindsay* case (see the judgment of Lord Phillips MR at [63]) that a policy of refusing restoration of a vehicle used in "commercial" smuggling (provided that policy allows for due consideration to be given to cases of exceptional hardship) is compatible with the requirements of law. The *Lindsay* case does not deal with vehicles which are adapted for the purposes of concealing goods which are intended to be smuggled into the United Kingdom, but that is clearly a situation which, even more strongly, justifies a policy of refusing restoration: adapting a vehicle indicates a carefully planned smuggling operation with a likely intent to use the vehicle for that purpose on a recurrent basis, and the legitimate aim of protecting the revenue is fairly achieved by ensuring that the vehicle is never restored to its owner.

55. Mr Dos Santos argued that the policy (or, at least, its application to the circumstances of the Appellants) should permit the vehicles to be restored for a fee or penalty, and that the review officer's failure to consider restoring the vehicles on this

basis undermined the validity of either the policy or the exercise of her discretion. We do not agree. The policy of non-restoration in the case of adapted vehicles is, as we have said, legitimate, and as such meets any requirements as to proportionality. In applying the policy the review officer cannot be criticised for not considering whether to restore the vehicles for a fee - that would not be compatible with the aim of the policy of removing from circulation a vehicle which has the potential to be used to conceal smuggled goods in the future. It is true that the (unpublished) policy of HMRC contemplates that, exceptionally, an adapted vehicle will be restored - that would be the case, for example, where exceptional hardship is demonstrated; but that is not to indicate that, as a matter of policy, adapted vehicles may be restored for a fee.

56. We turn now to the question of whether the review officer properly exercised the discretion conferred on her.

57. First, it is clear that she was fully aware that she had such a discretion, notwithstanding the policy of HMRC. She said this in her review decision: "It is for me to determine whether or not the contested decision should be confirmed, varied or withdrawn. I am *guided* by the Commissioners' policy but I consider every case on its individual merits." She then goes on to say that in looking at the matter afresh she has considered the particular circumstances of the case and the representations and material provided to her on behalf of the Commissioners. That, it seems to us, is a careful and proper statement of the approach which she is required to adopt in a case such as this.

58. Did the review officer, having correctly stated the approach she should take, proceed to review the decision in accordance with that approach? In our judgment she did.

59. First, she took note of the nature and extent of the work carried out to the trailers to adapt them for smuggling purposes. She formed the view that the work in question, because of the likely time required to carry it out, must have been done with the owner's knowledge. Mr Grudzinkas in his witness statement was of the view that the work was not so extensive, and could have been carried out by the drivers easily and quickly acting alone. The review officer (or, at least, the seizure and decision officers she relied on) had the benefit of examining the actual work itself (Mr Grudzinkas did not), and the conclusion she reached on this issue cannot be said to be unreasonable when one notes that in each trailer 26 beams were adapted. There was no evidence available to the review officer (or to us) as to how long the drivers had custody of the empty trailers (the work could only have been carried out when they had no load), but at the very least the owners gave their respective drivers the opportunity to adapt the vehicles and carried out no examination to satisfy themselves that the trailers had not been tampered with.

60. Secondly, the review officer took note of the fact that in each case the Appellants had continued to employ their respective drivers after they had been caught smuggling. She regarded this as being further evidence that the Appellants were aware of the smuggling attempt, or at least had a disregard for the seriousness of

the offence. The Appellants pointed out, following the review decision, that (at least in the case of Mr Jomantas and UAB Barela) the driver was retained as an employee as a means of keeping him available for the review and appeal process and to enable the owner to recover from him some of its loss. It was not possible to put these  
5 assertions to the test before or at the hearing (for example, no evidence was offered as to the amount Mr Jomantas had paid to UAB Barela), and the credibility of the Appellants on this point is somewhat undermined by the fact that they did not disclose, when seeking a review of the original decision, that they had continued to employ the drivers - HMRC discovered that for themselves. Again, the conclusion  
10 the review officer reached on this issue cannot be said to be unreasonable.

61. Whilst these two issues, which look to the question of the likely knowledge of the Appellants of the smuggling attempt, show that the review officer was concerned to examine the particular merits of these individual cases, it is necessary to stress that they are issues which are extraneous to the application of HMRC's policy with regard  
15 to the restoration of vehicles adapted for smuggling purposes. That policy is to refuse, other than in exceptional cases, restoration of the adapted vehicle, whether or not the absent owner knew, or should have known, of the smuggling attempt. Therefore, even if it could be said that the review officer had reached an unreasonable conclusion as to the knowledge of the Appellants (and as we have said, we do not in  
20 any event consider that to be the case), that would not be a basis for impugning her decision to apply HMRC's policy and to refuse to restore the trailers.

62. As is made clear in the *Lindsay* case, cases of exceptional hardship must be given due consideration in the application of any legitimate policy by HMRC. In the present case the Appellants' solicitors advised the review officer of the business  
25 circumstances of each Appellant before she carried out her review. On this matter the review officer expressed her conclusion in these terms: "I appreciate that the loss of your client's vehicles is causing him difficulties but it is to be expected that this is a natural consequence of having one's vehicle seized and I would only consider  
30 *exceptional* hardship as a reason not to apply the policy as explained above. I do not regard the inconvenience in your client's case as *exceptional* hardship over and above what one should expect." That appears to us to be a correct statement of the approach a review officer should take, and in the circumstances of this case the conclusion reached - that there is no exceptional hardship demonstrated - is not unreasonable. It is true, as Mr Dos Santos argued, that the loss of a trailer bears harder upon a small  
35 business than upon a large business, but we consider that the review officer is correct to identify "exceptional hardship" as something beyond the normal consequence of losing the vehicle which has been seized.

63. For these reasons we conclude that the review officer's decision was not (in the terms of section 16 FA 1994) a decision that a review officer could not reasonably  
40 have arrived at. Accordingly we dismiss the appeals of the Appellants.

*Right to apply for permission to appeal*

64. 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

5 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.

10 **EDWARD SADLER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 4 June 2014**

15 *Cases referred to in skeleton arguments and not referred to in the Decision:*

*Customs & Excise Commissioners v J H Corbitt (Numismatists) Limited* [1980] STC 231

20 *John Clarke v Customs & Excise Commissioners* (2002) Excise Duties Cases E00242

*Mrs C D Switzer v Customs & Excise Commissioners* (2003) Excise Duties Cases E00561

25 *Eugene Crilly v Customs & Excise Commissioners* (2003) Excise Duties Cases E00452

30 *Sean Doran v Customs & Excise Commissioners* (2004) Excise Duties Cases E00754