



TC04015

Appeal numbers: TC/2011/05429 & TC/2013/02765

EXCISE DUTY – revocation of the appellant’s registration under Warehousekeepers and Owners of Warehoused Goods regulations 1999 – whether for “reasonable cause” – held, yes – refusal to restore seized excise goods of the appellant following the revocation of his registration – whether unreasonable – held, no – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ERIC SYDNEY FOSTER

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
MR JOHN ROBINSON**

Sitting in public at Bedford Square. London on 9 and 10 June 2014

The Appellant in person

**Ewan West, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. We heard two linked appeals by the appellant, Mr Foster. The first is Mr Foster's
5 appeal against the revocation by the Respondents ("HMRC") of his registration as a
registered owner of duty suspended goods under the Warehousekeepers and Owners
of Warehoused Goods Regulations 1999 ("WOWGR"). HMRC's decision to revoke
Mr Foster's registration was communicated by a letter dated 24 June 2011. The
10 second appeal is against HMRC's decision (communicated in a letter dated 21 March
2013) to refuse restoration of certain excise goods that had been seized by HMRC on
26 January 2012. The decision communicated in the letter dated 21 March 2013 was
a decision taken by Officer David Paton after a further internal review, confirming the
original decision of Officer Brendan Ricketts to refuse restoration. That original
15 decision was contained in a letter dated 25 September 2012 sent to Mr Foster by
Officer Ricketts.

2. Mr Foster was not professionally represented at the hearing but we had with our
papers a Skeleton Argument prepared on his behalf by Counsel (Mr Oliver Powell)
dated 12 January 2014 (shortly before a proposed date for the hearing of the appeal,
16 and 17 January 2014). This has assisted us in considering Mr Foster's case. Also,
20 Mr West, Counsel for HMRC, very properly took us through Mr Powell's arguments
when presenting his own submissions.

3. We received oral evidence (as well as Witness Statements) from Mr Foster,
Officer Bronagh Hyland, Officer David Paton and Officer Kenny Mitchell. We also
had before us a large number of documents. Mr Foster did not cross-examine the
25 Officers. From the evidence, we find the following facts.

4. Mr Foster is (or was, in October 2012, when he made his Witness Statement) a
sole trader, trading from an address in Northern Ireland, and, in the course of his
business, imported and exported alcoholic beverages. He did not own a warehouse
but had accounts at a number of UK tax warehouses. From 6 February 2009 he was
30 registered by HMRC as a registered owner of duty-suspended goods pursuant to
regulation 3 of WOWGR and section 100G(2) Customs and Excise Management Act
1979 ("CEMA").

5. HMRC became aware of the circular moving of excise goods to and from tax
warehouses in the UK and France in respect of goods held on Mr Foster's account in a
35 tax warehouse operated by Edwards Beers and Minerals Limited ("EBML") at
Leighton Buzzard. As a consequence, on 22 October 2010, by a letter addressed to
Mr Foster, HMRC placed a restriction on the removal of goods held in his account at
EBML at the Leighton Buzzard warehouse. The restriction, made pursuant to
regulation 17(3) of the Excise Warehousing (Etc.) Regulations 1988, was that "excise
40 goods currently stored in the account of Eric Sydney Foster may only be removed
under duty suspension with the written permission of HMRC". The restriction was to
remain in place pending the production of specified documents and information.

6. Eventually, on 2 December 2010, Dass Solicitors, on behalf of Mr Foster, wrote to HMRC in response to the placing of the restriction enclosing certain documents.

7. On 6 January 2011, a meeting took place between Officers Bronagh Hyland and Stephen Doyle of HMRC (working in the Excise Alcohol and Tobacco Team based in Belfast) with Mr Foster, who was accompanied by Dipak Jotangia of Dass Solicitors and Mr Foster's book-keeper, Philip Cheung.

8. At this meeting, Mr Foster was asked if he had any other trading activities or associated businesses, or any other trading style, apart from 'E.S. Foster, sole trader'. He replied that he had not. He also said that he held accounts in a number of UK tax warehouses, EBML, Seabrook Warehousing and BWA Logistics were mentioned. He said he did not have any accounts in non-UK warehouses, but said that he did send out goods to such warehouses as nominated by his customers. He said that he only bought from and sold goods to suppliers and customers within UK tax warehouses in duty suspension. When Officer Hyland put to him that the records of EBML showed purchases and sales from and to French warehouses, he stated that goods could be sourced from suppliers inside or outside the UK. He later admitted that he might have one or two suppliers or customers based in France.

9. When asked about cash payments, Mr Foster said that when goods were sourced from UK suppliers, he texted or telephoned stock offers to his customers and raised a purchase order. He asked for a £10,000 cash deposit. When asked how the cash got to him, he stated that if he was not there to receive it he would have someone else pick it up, and a person called Junior Cheema was mentioned, described as a friend from England. He said that he did not employ Junior Cheema, but he knew him through suppliers and customers. When asked, Mr Foster said that he was not prepared to give Junior Cheema's address because Mr Cheema did not want anyone to have his number. When asked if he paid Mr Cheema for collecting money, Mr Foster stated "no, sometimes £100 to £150". (In cross-examination, Mr Foster again asserted that he had not paid Mr Cheema.) He said that Mr Cheema collected money for Mr Foster once or twice a month and that he (Mr Foster) had not carried out any due diligence checks on him.

10. When asked how he paid his suppliers, Mr Foster said that he asked his customers to pay his suppliers direct, although the customer would not be aware whom they were paying. Mr Foster said he carried out due diligence checks on his customers, but, when asked by Officer Hyland for copies of due diligence paperwork on a French customer that she had selected from his VAT records (Boos), he was unable to supply any. Although Mr Foster said that he had paid the French duty on this consignment (Boos was a French customer), he did not produce, when asked, any documentary evidence to confirm this.

11. Officer Hyland asked Mr Foster to provide documentation for a recent transaction – she chose a purchase invoice (325) dated 1 October 2010, in the sum of £19,769. The goods were sold to a French company, Orient Ltd. on sales invoice 725 dated 7 October 2010 for £20,104. The goods were moved from EBML by Longfret at a cost of £463.13, which indicated that the transaction had incurred a loss of £128. When

Mr Foster was asked for evidence of payment he produced a receipt for £20,489, but no explanation of how this figure was arrived at was provided. The Longfret invoice was made out to EFS International (a company with the same address as Mr Foster and of which Mr Foster was a director). When asked why the invoice was made out in this way, Mr Cheung said that that was how he had set up the email address.

12. Mr Foster said that EFS International, although VAT registered, had not traded. However Officer Hyland identified some purchase invoices relating to purchases of goods from Ice Action which had been raised in the name of ESF International. Mr Foster was unable to explain this.

13. Mr Foster was asked about Panoramic Trading Ltd. (a company in whose name HMRC had information that Mr Foster had taken steps to open an account with another warehousekeeper). Mr Foster had not mentioned that company earlier in the meeting. He said it was set up because he wanted to deal in wines and did not need a WOWGR registration to do so. Mr Foster was the sole director of Panoramic Trading Ltd.

14. On 20 January 2011, Officer Doyle received information about three interceptions by Revenue Fraud Detection Team (“RFDT”) at Dover in the period 20 October to 23 December 2010 which discovered excise goods for the account of ESF International and “Panoramic International Wholesale” with an address in Armagh and “Panoramic International” with the same address.

15. On 25 January 2011, another meeting took place, this time between Mr Foster and Officers Arnold and Wilkinson. Mr Foster told them that ESF International and himself, as sole trader, traded side by side, with different suppliers and customers and bank statements for ESF International showing throughputs of large amounts of money were faxed by Mr Foster to Officer Wilkinson.

16. On 2 February 2011 a second meeting took place between Mr Foster and Officers Hyland and Doyle. At this meeting Mr Foster initially said that the bank statements of ESF International were not available as they had been burnt. When reminded that they had been forwarded to Officer Wilkinson the previous week, Mr Foster said that he had them but was not going to provide them that day. Mr Foster said that no bank records or cash receipts for ESF International and ES Foster were available. However, after a break, he and Mr Cheung presented trading records and banks statements of Panoramic International and ESF International.

17. The records indicated that ESF International had carried out a significant amount of trading between April and October 2010 and had issued 13 self-billed invoices with numbers between 01 and 017, but with 4 invoices in the sequence missing. Mr Foster was unable to say who was the supplier of the wine sold to Boos in January 2010. The records were uplifted by the Officers.

18. A third meeting took place on 11 March 2011, between Mr Foster and Officers Hyland and Doyle. The Officers told Mr Foster that after auditing the records a number of gaps had been identified in both purchase and sale listings.

19. One of these gaps concerned a sales invoice (no. 179). HMRC had information from another source that that invoice related to a sale by Mr Foster to a haulier of a lorry valued at £3,450. Neither Mr Foster nor Mr Cheung was able to explain why the invoice was not entered in Mr Foster's records.

5 20. Officer Doyle had been advised by another HMRC officer that a load of wine in the account of Panoramic Wine which had been intercepted by the RFDU at Dover on 22 (or 23) December 2010 (but allowed to proceed) had failed to arrive at the consignee, BWA Logistics Ltd. ("BWA").

10 21. Mr Foster agreed that Mr Cheung would look into the non-inclusion of sales invoice 179 in Mr Foster's records and also the non-arrival of the load of wine consigned in the account of Panoramic Wine to BWA. However he failed to revert to Officer Hyland on either of these matters.

15 22. On 6 April 2011, Officer Hyland and Officer Kieran Smith met with Mr Foster. The purpose of the meeting was to discuss the detention of a load of spirits on 30 March 2011 at Dover by the UK Border Agency. The spirits had been despatched by Spirit & Wine ("S&W") and were being transported by the haulier, Hughes Ireland. The detention was carried out because of what Officer Hyland termed 'the history of S&W and Hughes Ireland'. Contained in the spirits detained was a consignment for the account of Panoramic Trading. Mr Cheung had emailed RFDT on 31 March 2011
20 in response to a series of questions, informing them that he dealt with the administration of Panoramic Trading, that Mr Foster was a director of Panoramic Trading, that Panoramic Trading was the legal owner of the stock, it having been bought on 30-day credit from S&W, that there was as yet no customer for the goods, but that typically Panoramic Trading sold under bond and that their customer would
25 sell into free circulation and be responsible for the excise duty arising. Mr Cheung told RFDT that Panoramic Trading had nothing to do with the transportation of the load. Mr Foster told the officers at the meeting on 6 April 2011 that he had at that date purchased 6 loads from S&W, where his contact was 'Fabrizio' with an address in northern Italy (Omegna). Mr Foster produced 3 sales invoices from S&W to
30 Panoramic International and 3 Panoramic Trading sales invoices, which he stated related to the onward sale to Empire Trading (a UK company) of 3 loads purchased from S&W. However Officer Hyland's examination of the invoices on the purchase from S&W by Panoramic Trading do not match the sales invoice product details for the loads sold to Empire Trading.

35 23. Also at the meeting on 6 April 2011 there was a discussion about another load of excise goods, despatched by S&W, which had failed to arrive at Dynamic Storage bonded warehouse. When asked, Mr Foster said that he had no idea where that load was. He said that S&W had arranged the haulage which, he understood, was by Hughes Ireland. He produced a Depositio Fiscale, which appeared to Officer Hyland
40 to be a pro forma invoice for the detained load. Mr Foster also told Officer Hyland that he had been unable to establish anything about the whereabouts of the load of wine from S&W destined for BWA which had been intercepted at Dover by the RFDU on 22 (or 23) December 2010 but allowed to proceed. The load had not arrived at BWA.

24. The load of spirits detained by UKBA at Dover on 30 March 2011 (was seized by UKBA on 11 May 2011 and the seizure went unchallenged by Mr Foster.

25. Officer Hyland's decision to revoke Mr Foster's WOWGR registration on 24 June 2011 was arrived at (as her letter of that date states) after her consideration of the failure of the load of wine, intercepted on 23 (or 22) December 2010 to arrive at the consignee (BWA), and Mr Foster's failure to give a satisfactory explanation in relation to the consignment to Panoramic Wine included in that load, the seizure of spirits on 11 May 2011, which included a consignment to Panoramic Trading, and what she described as:

10 'the numerous unexplained irregularities in Mr Foster's trading records that indicated non-compliance with his revenue responsibilities, [his] unwillingness and/or incapacity to provide adequate business records to support the credible commerciality of his business dealings, his non-payment of liable VAT on various transactions and his inadequate revenue accounts for purchases and sales of excise goods in his associated companies'

15 26. Officer Hyland's view was that Mr Foster had demonstrated that he was not a fit and proper person to hold a WOWGR registration.

27. Following the revocation of Mr Foster's registration under WOWGR on 24 June 2011, excise goods (all, or chiefly, beer) in Mr Foster's account at Dynamic Storage were seized as liable to forfeiture by a notice of seizure dated 25 July 2011. Some of these goods had been formally detained on 7 July 2011. The seizure took place because, following the revocation of Mr Foster's registration under WOWGR, the excise goods held to his account were deemed by HMRC no longer to be held in a duty suspended regime. The notice of seizure, sent by Officer Ricketts, stated that it was that officer's decision that restoration of the goods would not be offered.

25 28. On 2 April 2012 the North Avon Magistrates Court dismissed Mr Foster's complaint against the condemnation of the seized excise goods.

29. A request for restoration of the goods was made, and further paperwork submitted in support (including receipted invoices intending to show Mr Foster's ownership of the goods), and Officer Ricketts wrote on 25 September 2012 to Altion Limited, then representing Mr Foster, stating that he had examined the paperwork along with all other paperwork held for the case and (although not state expressly) it is clear from the content of the letter that restoration was refused because HMRC were not satisfied that Mr Foster had title to the goods, but that even if he did have such title, there were no exceptional reasons for a departure from the general policy that seized excise goods would not be restored, having regard in particular to stated evidence of previous instances of smuggling or failure to comply with legal requirements relating to the importation of goods, the large quantities of seized goods where Mr Foster was involved would, if restored, be likely to damage legitimate trade and the seized goods were of a commercial quality and there was evidence that they were intended for commercial use.

30. Following a request for a review of Officer Ricketts's decision, Officer Paton (the reviewing officer) wrote to Mr Foster on 11 January 2013 informing him of his

5 decision to uphold the decision not to restore the goods, essentially for the same reasons as those stated by Officer Ricketts. Further information was supplied and a request for a further review made. A further review was eventually made by Officer Paton and, in his second review decision letter dated 21 March 2013 addressed to Mr Foster, he stated that Officer Ricketts's decision on 24 September 2012 to refuse restoration of the seized excise goods would be upheld, again, for essentially the same reasons.

31. Mr Foster appealed against the refusal of restoration – this is the second appeal before us.

10 32. Mr Foster said in evidence that he did not receive the letter (dated 24 June 2011) revoking his WOWGR registration until July 2011.

15 33. However Officer Mitchell's evidence was that on 29 June 2011 he received a telephone call from Mr Foster, requesting a review of Officer Hyland's decision to cancel his WOWGR registration. He said that he advised Mr Foster that he should write to request a review within 30 days of the date of the decision and that it would be looked at by an independent review officer. He said that he also advised the Mr Foster should include as much detail as possible, suggesting that Mr Foster could address the letter to him in Officer Hyland's absence and that he would forward it to the Glasgow review team. We accept this evidence. Mr Foster was asked by the Tribunal if he wished to ask Officer Mitchell in cross-examination whether he was 20 mistaken in any way, but he said he did not wish to ask that question. Officer Mitchell said that the telephone call was documented on a contemporaneous basis on a case progress sheet and, after the hearing, on 10 June 2014, a copy of that document was provided.

25 34. Another seizure of excise goods held to the account of Mr Foster was notified to him by the UK Border Agency by a letter dated 15 July 2011. These seized goods were located at EBML warehouse. In relation to these seized goods, Mr Foster did telephone HMRC to ask if he could pay the duty on the consignment of goods in question. He was told that he could not pay that duty as the goods were now in the 30 care of HMRC.

35. Mr West, for HMRC, accepted that in the light of this, Mr Foster may well have thought that there was no point in offering to pay the duty on the seized goods with which the second appeal is concerned.

35 36. In the Skeleton Argument settled by Mr Powell on behalf of Mr Foster, it is expressly accepted that HMRC does have power to revoke registrations under WOWGR pursuant to section 100G(5) CEMA at any time for 'reasonable cause'.

40 37. It is also accepted in that Skeleton Argument that the excise goods with which the second appeal is concerned were lawfully seized and that there was a deemed forfeiture pursuant to paragraph 5, Schedule 3, CEMA and that there is no jurisdiction in the Tribunal to consider the legality of the seizure (following *HMRC v Jones and Jones* [2011] EWCA Civ 824).

Submissions in relation to the first appeal (the revocation of the WOWGR registration)

38. Mr Powell submits that the Tribunal should not be satisfied that the revocation of Mr Foster's registration under WOWGR was for 'reasonable cause'.

5 39. Specifically, he submits that Officer Hyland's consideration of the 23 December
2010 movement as supporting the revocation was unreasonable, because Mr Foster
denies that he was a participant to the 23 December 2010 movement. Mr Foster's
evidence before us was that the diverted goods apparently ordered in the name of
Panoramic Trading was a fraudulent transaction made by persons unknown nominally
10 on Mr Foster's account, but without his knowledge or consent. It is also the case, as
submitted by Mr Powell, that Mr Foster was not investigated by HMRC in respect of
diversion fraud, nor was he requested to attend an interview under caution.

40. Mr Powell also submits that Officer Hyland's reliance on the seizure of the load of
spirits on 11 May 2011 (following their detention on 30 March 2011) was
15 unreasonable. This is because the seizure was the result of the failure by S&W to
record the correct dates for the movement and Mr Foster's efforts to obtain evidence
from S&W have been frustrated because S&W have since gone into administration.
Mr Powell's case is that a revocation of Mr Foster's registration under WOWGR on
the basis of errors made by third parties (S&W) is unreasonable.

20 41. Mr Powell also complains that the reference by Officer Hyland in her letter dated
24 June 2012 revoking the registration to 'numerous irregularities' and 'non-
compliance with revenue responsibilities' is too vague and unsupported to amount to
a valid reason for the revocation. He accepts that Officer Hyland provided further
detail in her Witness Statement – including many of the facts we have found above –
25 but argues that these may not have been in her mind when she issued the revocation
letter.

42. Mr West submits that Officer Hyland's decision to revoke Mr Foster's registration
under WOWGR cannot be faulted on the grounds of unreasonableness. In particular,
he makes the point that HMRC are entitled to take a precautionary view, and have a
30 considerable margin of discretion in determining what evidence may be relevant to
identifying the potential risks to the revenue of allowing persons to remain registered
under WOWGR.

43. He submits that the circumstances of the 23 December 2010 movement and the 11
may 2011 seizure are factors which were properly and reasonably taken into account
35 by Officer Hyland as being part of the general context within which Mr Foster has
been operating, even on the basis that the explanations for his non-involvement put
forward on his behalf were accepted. He also submits that there was no obligation on
Officer Hyland to set out extensively her reasons in the revocation letter and she was
entirely entitled to give evidence to the Tribunal, as she has done, to amplify her
40 reasons.

Submissions in relation to the second appeal (refusal of restoration)

44. Mr Powell argues that Mr Foster was not notified of the revocation of his registration under WOWGR until after the goods in issue had been detained (on 7 July 2011). He says that Mr Foster avers that the first time he became aware of the revocation was when he spoke to Dynamic Storage on the telephone on 4 July 2011 and that the revocation letter dated 24 June 2011 was not received by him until some time after he had received the letter from HMRC dated 7 July 2011 advising him that the goods had been detained. On that premise, he submits that Mr Foster was not given the opportunity to pay the duty on the goods held in bond and that it was disproportionate for HMRC to impose a penalty in respect of the failure to pay the duty.

45. Mr Powell also contends that Mr Foster has submitted a large amount of documentation (paid invoices) showing that he was the owner of the excise goods seized. However, this ownership point was not pressed on us by Mr West in argument.

46. He makes the point that since the decision not to restore the excise goods, the subject of the second appeal, was based ultimately on the decision to revoke Mr Foster's registration, the subject of the first appeal, then if the Tribunal decides that HMRC did not have reasonable cause to revoke the registration, the decision not to restore should obviously be regarded as flawed.

47. Mr West submits that Mr Foster was not denied an opportunity to pay the duty owing on the goods. He submits that the seizure on 25 July 2011 was fully justified given that at that point duty had not been paid. Mr Foster knew at the latest on 29 June 2011 (the date of his telephone conversation with Officer Mitchell) that his WOWGR registration had been revoked. He had, therefore, a period of nearly a month in which he might have sought to pay the duty owing on the goods.

48. While accepting that Mr Foster may well have thought that there was no point in offering to pay the duty on the seized goods with which the second appeal is concerned, Mr West submitted that this did not make the decision to refuse restoration of the goods disproportionate. A key element of any analysis of proportionality is a comparison of the end pursued with the means employed. Here, the refusal to restore the goods was entirely proportionate to the end in view, namely the maintenance by HMRC of a robust system of registration in this sphere of economic activity with significant revenue consequences.

Decision

49. We are not prepared to accept that Mr Foster was not a participant in the 23 (or 22) December 2010 movement or that he was not involved in the irregularities of the load of spirits despatched by S&W which was seized on 11 May 2011.

50. The 23 December 2010 movement included a load of wine in the account of Panoramic Wine. Mr Foster had been notably evasive at the 6 January 2011 meeting (shortly after the interception of that load) and had not mentioned his involvement with Panoramic Trading Ltd. (or other Panoramic entities, viz: Panoramic International Wholesale, Panoramic International, and Panoramic Wine which we

think likely to have been different names under which one entity traded) until he was asked about that company by the officers. We consider on the balance of probabilities that Mr Foster had purchased the wine in the account of Panoramic Wine and that it was not a transaction made by other persons without his knowledge or consent.

5 51. We also consider that his explanation of his non-involvement in the irregularities of the load of spirits despatched by S&W which was seized on 11 May 2011, cannot be taken at face value. We are not persuaded on the evidence that his explanation can be accepted.

10 52. The suspicious aspects of his trading which were brought out in the successive meetings with Officer Hyland, and which are set out as facts found earlier in this Decision, and the general unreliability of his evidence – for instance, in regard to the telephone conversation with Officer Mitchell on 29 June 2011 – lead us to the conclusion that he ought not to be given the benefit of the doubt on these factual assertions.

15 53. Since these matters of fact are the principal basis for Mr Powell’s submission that Officer Hyland’s revocation of Mr Foster’s registration under WOWGR was not for ‘reasonable cause’, it follows that we reject that submission.

20 54. So far as Officer Hyland’s reference to ‘numerous irregularities’ and ‘non-compliance with revenue responsibilities’ in her letter of 24 June 2012 are concerned, we consider that in the light of the four meetings which Mr Foster had with Officer Hyland and other officers, he had no reason not to be aware of the matters she was referring to. We also accept that she has, entirely properly, provided ample detail in her evidence to the Tribunal to back up these references. They afford no basis for the Tribunal to direct a further review of her decision, as suggested by Mr Powell.

25 55. Our function is to decide whether Officer Hyland’s decision to revoke Mr Foster’s registration under WOWGR was reasonable and in our judgment it definitely was. We accept the submissions of Mr West in this regard. In particular, Officer Hyland in our view reasonably reached the conclusion on the basis of the evidence before her that Mr Foster was not a fit and proper person to hold a WOWGR registration and that
30 therefore it was appropriate that HMRC’s powers of revocation should be exercised to revoke the registration.

35 56. Likewise, in our view, Officer Rickett’s decision to refuse restoration of Mr Foster’s goods lying at Dynamic Storage and seized on 25 July 2011 (and subsequently condemned) – and Officer Paton’s upholding of that decision – was not unreasonable. Setting aside the question of Mr Foster’s ownership of the goods – and assuming (without deciding), in his favour, that he did own them – we cannot regard the decision to refuse restoration as disproportionate.

40 57. In particular, it is clear from Officer Mitchell’s evidence that Mr Foster knew about the revocation of his registration under WOWGR at the latest on 29 June 2011 – and not in July as he had claimed, and as Mr Powell, on instruction, asserted. He therefore had time to pay the duty and avert the seizure before the actual date of the

seizure (25 July 2011). The fact that he may have thought that there was no point in offering to pay the duty cannot, in our judgment, affect the issue. It would have been reasonable for him (and he would have had the opportunity) to have taken advice on the point – if, which is not at all clear, he was or could have been in funds to pay the duty before the date of seizure.

58. We cannot fault on grounds of unreasonableness Officer Rickett’s decision that there were no exceptional reasons in Mr Foster’s case to depart from HMRC’s general (and lawful) policy of refusing to restore seized excise goods.

59. For these reasons both appeals are dismissed.

60. There was reference made at the hearing of the appeals to a number of decided cases, which we have not thought it necessary to mention, including *R (On the application of Eastenders Cash & Carry plc and another) v Revenue and Customs Commissioners*. At the time of the hearing of these appeals this case had been decided by the Court of Appeal ([2012] EWCA Civ 15; [2012] 1 WLR 2067) in the sense that the power of detention in section 139(1) CEMA could not be exercised on the basis only that there were reasonable grounds for suspecting that duty had not been paid on the goods in question. After the hearing, HMRC provided us with a copy of the judgment of the Supreme Court in that case ([2014] UKSC 34), handed down on 11 June 2014, the day after the hearing of Mr Foster’s appeals had concluded. In that decision, the Supreme Court allowed HMRC’s appeal holding that the creation of statutory powers of detention of goods liable to forfeiture did not abolish the power of detention which had previously been held to arise by necessary implication from statutory powers of examination (see: *ibid.* at [45] and [49]). In these circumstances we consider that we need not comment any more on this authority.

61. 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: 16 September 2014