



TC04429

Appeal number: TC/2014/01905

*EXCISE DUTY – seizure of incorrectly labelled cigarettes imported by post –
restoration refused – whether decision reasonable – yes – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAROL GRAVES-JOHNSTON

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

TRIBUNAL: JUDGE Barbara Mosedale

The appeal was determined on the papers with the consent of both parties.

DECISION

1. Ms Graves-Johnston appeals relates to seizures of cigarettes by HM Border Force. The Border Force has refused to restore to her cigarettes which she had purchased from an overseas supplier and which were posted to her and then seized on arrival in the UK.

Facts

2. The facts are not in dispute. The appellant ordered cigarettes from an overseas supplier to be posted to her in the UK. Two packages arrived, one on 14 and one on 15 January 2015.

3. Both packages were seized by UK Border Force at the Heathrow Distribution Centre on the grounds that the content of the parcels was incorrectly described. Although a Notice of Seizure was issued to the appellant, she did not challenge the legality of the seizure. She did make a written request for the goods to be restored to her.

4. Her case is that she ordered the cigarettes online because the particular type (Gitanes) were no longer available in the UK. She knew excise tax had to be paid and expected them to arrive through the post with a tax demand. Instead they were impounded.

5. She complained to the vendor of the cigarettes who sent out replacements to her. These were also seized.

6. The seized cigarettes and various letters from the Border Force can be summarised as follows:

Date of seizure	quantity	ref	Decision letter refusing restoration	Review letter	Further decision letter refusing restoration
14 January 2014	600	HWDC176	31-1-14	14-3-14	17-3-14
15 January 2014	400	HWDC180			
30 January 2014	400	ILC002/14	6-2-14		
27 January 2014	400	ILC003/14			
21 February 2014	600	ILC015	Letter dated 6-2-14		

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7. Five notices of seizure were sent to the appellant as set out above but the appellant did not challenge the legality of any of the seizures. All the goods were therefore forfeited under paragraph 5 of Schedule 3 of CEMA.

The subject matter of this appeal

5 *The legality of the seizures*

8. It is well established that the Tribunal does not have jurisdiction to consider whether it was lawful for the Border Force to seize the cigarettes. This jurisdiction is given to the Magistrates. Ms Graves-Johnston could have challenged the legality of the seizures by giving notice to the Border Force who would then have had to bring
10 condemnation proceedings in the magistrates court. As I have said, Ms Graves-Johnston did not do so.

9. I also mention that the Court of Appeal in *Jones & Jones* [2011] EWCA Civ 824 has put beyond doubt that Schedule 3 paragraph 5 of the Customs and Excise Management Act 1979 (“CEMA”) means that where a seizure is unchallenged, this
15 Tribunal must proceed on the basis that the things seized were liable to seizure.

10. Indeed, it appears Ms Graves-Johnston accepts that the goods were lawfully seized. Section 20 of the Postal Packets (Revenue and Customs) Regulations 2011 provides that packets which are not in accordance with the accompanying customs declaration are liable to forfeiture. And there appears to be no dispute between the
20 parties that the package was incorrectly declared by the vendor. In one email, the appellant says “I can’t control the commercial sites on the web, and had no idea that they would be cloak and dagger about sending them to me.”

11. So it was accepted that the sender of the package did not put a correct Customs declaration on the package and for this reason the goods were lawfully seized. And, as
25 I have said, this Tribunal has no jurisdiction to consider the matter anyway. So I proceed on the basis that the cigarettes were lawfully seized by the Border Force.

12. What is in issue is whether the Border Force should, despite the seizure, restore the goods to Ms Graves-Johnston. The Border Force have power to restore the goods, despite the lawful seizure, as this is what CEMA provides:

30 **“s 152 Powers of Commissioners to mitigate penalties, etc**

The Commissioners may, as they see fit –

....

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.”

35 13. As I have said, there were some 5 seizures, all of which the Border Force have refused to make restoration. To which of these does the appeal relate?

The restoration decisions in issue

14. The law is that this Tribunal only has jurisdiction to consider the question of restoration of seized goods where the appellant has requested a ‘review’ of a decision refusing restoration. The reason for this is a little convoluted. Section 16 of the Finance Act 1994 contains the right of the aggrieved persons to appeal. Section 16(1) and (1A) gives a right of appeal against *review* decisions of the Border Force, whether actual or deemed:

“16 Appeals to a tribunal

(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

(1A) An appeal against a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 75 days beginning with the date on which the review was required.”

15. The rest of section 16 is lengthy and I do not reproduce it in full here. It gives the right of appeal against a “relevant decision”. Section 13A gives the meaning of “relevant decision”. None of the subsections refer to restoration decisions, except S13A(2)(j) which specifically excludes “any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored.” In other words, a decision under S152(b), such as the five decisions at issue in this case, is not a “relevant decision” and no appeal against it lies under the remainder of section 16. The only route to an appeal is therefore via a review as s16(1) and (1A), as stated above, and that only allows a review decision (or deemed decision on review) to be appealed.

16. So the question of which of the five restoration decisions is under appeal depends upon whether a review was carried out, or whether Ms Graves-Johnston asked for a review, so that there was a deemed review.

17. There is no doubt that the refusal to restore the first two packages seized was the subject of a review decision. On 26 January 2014 the appellant asked the Border Force to restore the first two packages to her. The Border Force refused on 31 January 2014. On 3 February the appellant replied and her letter was treated as requesting a review of this decision. On 14 February the review officer wrote to the appellant asking for more information. The review decision was sent to her on 14 March 2014. The Border Force’s contention is that these are the only two seizures to which this appeal relates.

18. The position is more confused with the last three seizures. Ms Graves must have written to the Border Force requesting restoration of the third and fourth seizures but I have no copy of this. I do have a copy of the Border Force’s reply dated 6 February 2014 refusing restoration of the third and fourth packages. She was notified of her right to a review. On 10 February she replied. While she does not use the

expression 'review' she is clearly requesting the officer to reconsider his decision and I consider that this letter of 10 February was a request for a review.

19. There is no record that any such review was carried out and the Border Force are now out of time to do so. There is therefore a deemed review (coming to the same conclusion as the original decision) and so Ms Graves-Johnston was entitled to appeal the refusal to restore the 3rd and 4th seizures as well as the 1st and 2nd and I find that she did so. I reject the Border Force's position that only the refusal to restore the first two packages is the subject of this appeal.

20. With respect to the last of the five seizures, it is obvious that the letter refusing restoration was incorrectly dated 6 February as it refers to the seizure which took place (as the letter states) on 21 February 2014. I do not know the correct date of the letter. It appears it was after 14 March as that was the date Ms Graves-Johnston wrote to request restoration, having only received notification of the seizure on 8 March. There was also, for reasons unknown to me, a second letter refusing restoration dated 17 March, which, like the letter incorrectly dated 6 February, offered a review. What I have no record of is any acceptance by Ms Graves-Johnston of this offer of a review. Therefore, I find that there was neither a review nor a deemed review in relation to the fifth package. So this Tribunal has no jurisdiction to consider the question of restoration of the last of the five seized packages.

21. The correspondence may well have been confusing to Ms Graves-Johnston and this may explain why she does not appear to have accepted the offer of a review with respect to the fifth package. She can apply for a review out of time: however in view of what I say below in respect of the appeal of the first four packages, she may not consider this avenue worth pursuing.

22. Having dealt with the question of which of the Border Force's decisions are under appeal, I proceed to deal with the appeal.

The reasonableness of the Border Force's decision not to restore the goods

23. The Tribunal only has jurisdiction to consider whether the Border Force's decision to refuse restoration was a *reasonable* decision: I do not have jurisdiction to re-make the decision.

24. The Border Force considers that their decision not to restore the goods was reasonable. They say that it was the responsibility of the supplier of the cigarettes to label the package properly and they failed to do so. The law provides for the goods to be forfeit in these circumstances and their policy is not to restore; the Border Force's position is that a refusal to restore was reasonable and there were no exceptional circumstances justifying a departure from policy.

25. The appellant's case is that the Border Force acted unreasonably as it was not her fault that the package was incorrectly declared and she had always expected and intended to pay the tax.

26. While I accept the appellant's good intentions, that does not make the Border Force's decision unreasonable. By refusing to treat the recipient's good intentions as circumstances justifying restoration, they are necessarily encouraging purchasers making purchases from overseas suppliers to deal only with suppliers who correctly label their packages. While Mrs Graves-Johnston says she did not expect the supplier to mis-label the package, and that evidence is accepted, on the other hand she does not claim to have positively taken any steps to require the supplier to properly label the original two packages or the replacement two packages. Her notice of appeal does suggest that ultimately she did complain to her suppliers that it was their fault her packages were seized, but from this brief mention I am unable to find that she either requested future packages to be correctly labelled or that this interchange related to any of the packages at issue in this appeal, as she says this in context to what she describes as a gift of 200 cigarettes. So I am unable to find that Ms Graves-Johnston took positive steps to ensure that her package would be properly labelled so I do not consider the Border Force's decision on this basis to be unreasonable.

27. It is also not enough for Ms Graves-Johnston to be prepared to pay the tax now, as she has often stated, and I accept, that she is: I consider it is reasonable for the Border Force to expect purchasers to take steps to ensure that what they import is properly declared for tax on importation. It is not enough to offer the tax after the event.

28. In summary, I consider the Border Force's policy to be reasonable, and I find it has been reasonably applied to Ms Graves-Johnson in these circumstances. I cannot find the decision to refuse to restore the packages the subject of this appeal to be unreasonable and therefore the appeal must fail.

29. While I accept Ms Graves-Johnston did not expect her supplier to incorrectly label the parcels, I think she needed to go further and deal only with those suppliers who agreed to correctly label her packages. If she were to do so in future, it is to be hoped there would be no grounds on which her imported goods could be seized.

30. I dismiss her appeal.

31. I appreciate that she will find this a disappointing outcome particularly after the rather protracted appeal process (it has taken over a year for this simple matter to be dealt with in the Tribunal). Even after the papers reached me for determination, the matter was further delayed as the Border Force's bundle was incomplete. It is to be hoped in future that the Border Force will take care to photocopy both sides of double-sided letters when preparing bundles. They should also ensure that the bundle is a complete record of correspondence.

32. 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.

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BARBARA MOSEDALE

TRIBUNAL JUDGE

RELEASE DATE: 21 May 2015

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