



TC04440

Appeal number: TC/2014/02279

VALUE ADDED TAX – refusal of restoration of goods seized at point of importation into the UK from Guernsey – whether reasonable – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAMUEL OTTEY

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE JOHN WALTERS QC
MICHAEL SHARP FCA**

Sitting in public at the Royal Courts of Justice, Strand, London on 22 January 2015

There was no appearance by or on behalf of the Appellant

Michael Newbold, Counsel, for the Respondent

DECISION

1. There was no appearance by or on behalf of the appellant, Mr Ottey, at the hearing
5 of this appeal. We considered whether or not to proceed with the hearing and, being
satisfied that Mr Ottey had been notified of the hearing or that reasonable steps had
been taken to notify him of the hearing – in particular that the Tribunal Service had
sent a notification of the hearing to Mr Ottey and the Respondent’s bundles had been
sent to Mr Ottey, both to the new address notified by Mr Ottey to the Tribunal – and
10 that it was in the interests of justice to proceed with the hearing, we decided to do so
(rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009
refers).

2. This appeal is against a refusal by the Respondent, the Director of Border
Revenue, to restore to Mr Ottey his share of a quantity of silver in excess of 17.5
15 kilograms (some 12 kilograms made up of silver bars and silver coins with a value of
£6,101.60, attracting a VAT liability at 20 per cent. of £1,220.32) seized on
importation by Mr Ottey and a Mr Ryan Samson into the United Kingdom from
Guernsey on 24 April 2013. The refusal is contained in a letter dated 27 March 2014
sent by Officer R Brenton of the Border Force. (We saw a copy of a letter of that date
20 sent to Mr Samson dealing with the entire importation. It is stated in the letter that the
review ‘is applicable to you Mr Samson and you Mr Ottey’.)

3. The gist of Officer Brenton’s letter was that the general policy of the Border Force
is that seized goods should not normally be restored, but that each case was examined
on its merits to determine whether or not restoration may be offered exceptionally.
25 Further, Officer Brenton decided that neither Mr Samson nor Mr Ottey had provided
details of exceptional circumstances which would result in a decision to restore the
goods and stated that there were positive additional reasons for concluding that the
goods should not be restored. Those reasons were that Mr Samson and Mr Ottey on
importing a substantial quantity of silver which was chargeable to VAT on
30 importation had, instead of declaring it, entered the Green “Nothing to Declare”
channel at Poole Harbour and, on being questioned by an officer (Officer Meade –
see: below) dishonestly did not declare the silver but gave answers indicating that
they had imported tobacco and alcohol of a quantity within the duty-free allowance.
This caused Officer Brenton to doubt their credibility and not to believe their
35 explanation that they had been informed by a third party that they could each import
£10,000 worth of silver without having to declare it.

4. Officer Brenton made a Witness Statement and we heard his oral evidence.

5. There has already been an appeal heard by this Tribunal in relation to a refusal to
restore the silver in issue in this appeal. That was an appeal brought by Mr Ottey and
40 Mr Samson, which was heard by this Tribunal (Judge McKenna and Ms Hunter) on 4
February 2014 under reference TC/2013/04748 and in relation to which a Decision
was released on 10 February 2014. That Decision was that the original decision not to
restore the silver imported by Mr Ottey and Mr Samson on 24 April 2013 (in a letter
dated 5 July 2013 sent by another review

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officer, Officer Collins) should be set aside and the Director of Border Revenue should be directed to make a fresh decision. The resulting decision was the decision made by Officer Brenton contained in his letter dated 27 March 2014 to which we have already referred, and against which this appeal is brought.

- 5 6. The Decision of Judge McKenna and Ms Hunter recounts the relevant facts surrounding the importation, which were also in evidence before us. We repeat what they said at paragraphs 5 to 8 of their Decision:

'The Facts

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

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

20 7. [Mr Samson and Mr Ottey] duly wrote to NPSU (letter received 26 April) but in reply received a letter dated 20 May 2013 which informed them that the silver would not be restored. By the time this reply was received, [Mr Samson and Mr Ottey] were close to the time limit for challenging the legality of the seizure in the Magistrates court. [Mr Samson and Mr Ottey] did not challenge the seizure but asked for a review of the decision not to restore the silver, which
25 resulted in Officer Collins's decision of 5 July 2013. A solicitor acting on their behalf made a number of complaints about the manner of the seizure.

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

7. Judge McKenna and Ms Hunter set aside Officer Collins's decision because they concluded that his decision letter had not referred to material matters which he told that Tribunal were in his mind when he made the decision. In particular, they noted that Officer Collins's decision had not referred to any consideration of the fact that there had been a procedural error by Officer Meade which led to Mr Samson and Mr Ottey being given misleading information and not being given an opportunity to explain themselves at interview. Judge McKenna and Ms Hunter stated that they could not be satisfied that Officer Collins's decision was reasonable because there was no indication on the face of his decision letter that he considered whether the accepted procedural errors by UKBA amounted to exceptional circumstances justifying restoration.

8. Officer Brenton, in the decision under appeal at this hearing stated, with reference to the decision of Judge McKenna and Ms Hunter as follows:

'It is clear that Officer Meade was an inexperienced Officer who procedurally erred when offering to return the silver bullion and coins on payment of the VAT. If either Mr Samson or Mr Ottey believed that the Officer's actions influenced the legality of the seizure then that was for them to appeal within the statutory time period, which they failed to do. As far as offering an interview, this was an absolute offence pursuant to section 78 of CEMA '78 [sic], the Officer had no requirement to interview to establish if an offence was in process. I reiterate my conclusion above that the replies given when questioned were a deliberate attempt at evasion.

I am satisfied that Mr Samson's and Mr Ottey's actions and replies clearly rendered the silver liable to forfeiture and should have been seized and am of the opinion that the procedural error by the Officer does not constitute exceptional circumstances for restoration.'

9. The reference to 'section 78 of CEMA '78' should be read as a reference to section 78 of the Customs and Excise Management Act 1979. That section (in subsection (1)) places an obligation on any person entering the United Kingdom from, among other places, Guernsey, to declare any thing contained in his baggage or carried with him which he has obtained outside the United Kingdom and in respect of which he is not entitled to exemption from VAT 'at such place and in such manner as the Commissioners may direct'.

10. Subsection (3) of section 78 provides that any person failing to declare any thing as required by the section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or level 3 on the standard scale, whichever is the greater.

11. Subsection (4) of section 78 provides that any thing chargeable with any VAT 'which is found concealed, or is not declared ... shall be liable to forfeiture'.

12. We have to consider whether Officer Brenton's decision to refuse restoration was unreasonable. We have no doubt that it was not. He (like Officer Collins) reasonably regarded the actions of Mr Ottey and Mr Samson and their replies to Officer Meade's questions at the time of the importation as evidence of a wilful and intentional failure on their part to declare the silver which was chargeable to VAT. It was, in our view, reasonable of Officer Brenton (like Officer Collins) to give no credence to the

explanation of Mr Ottey and Mr Samson that they had been told, and thought, that importations of silver by each of them up to a value of £10,000 need not be declared.

13. As to Officer Meade's indications to Mr Ottey and Mr Samson that they would obtain restoration of the silver from the NPSU on payment of the VAT – described by
5 Officer Brenton as 'procedural errors' – these were of course unfortunate and likely to mislead Mr Ottey and Mr Samson, but, in our view, they cannot make out any case that Officer Brenton's decision not to restore was unreasonable. These indications were made after Mr Ottey and Mr Samson had, by their actions and replies, failed to declare the importation. That failure cannot in any sense be attributed to any reliance
10 on their part on Officer Meade's erroneous indications. Accordingly, we consider that Officer Brenton's decision, not to regard the indications as exceptional circumstances justifying restoration of the silver, was entirely reasonable.

14. For these reasons we dismiss this appeal.

15. 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)"
20 ¹which accompanies and forms part of this decision notice.

JOHN WALTERS QC
TRIBUNAL JUDGE

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RELEASE DATE: 21 May 2015