[2015] UKFTT 0544 (TC)

TC04705

Appeal number: TC/2014/06766

EXCISE DUTY – restoration – goods deemed condemned – requirement to show proof of ownership – invoices provided, but no evidence of payment – no further information supplied – decision not to restore, confirmed on review – whether review should have been confined to question of ownership – held, no – whether decision unreasonable – held, no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LVTC LIMITED **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JOHN CLARK
TOBY SIMON

Sitting in public at Fox Court, 30 Brooke Street London EC1N 7RS on 13 October 2015

Christopher Pulman of Counsel, instructed by Rainer Hughes, Solicitors, for the Appellant

Michael Newbold of Counsel, for the Respondent

DECISION

1. The Appellant "LVTC" appeals against the decision of the Respondent (referred to in this decision as "Border Force") to refuse restoration of excise goods.

The facts

2. The evidence consisted of a bundle of documents. This included a witness statement given by David Michael Harris, a Higher Officer of UK Border Agency. Mr Harris also gave oral evidence. A witness statement given by Alexander Lytras, the sole director of LVTC, was also included in the bundle. Although Mr Lytras had been expected to attend the hearing to give evidence and be available for cross-examination, Mr Pulman informed us that Mr Lytras would not be attending. We consider later in this decision the extent to which any account can be taken of his statement.

3. From the evidence we find the following background facts.

4. On 28 March 2014 at Dover, Border Force seized an HGV and trailer driven by Brendan Boyce, together with a load of mixed beer totalling 26,387.66 litres. The seizure information notice referred to the beer as "Untallied as per EMCS record".

5. Border Force wrote to LVTC on 8 April 2014 concerning the goods, explaining that if LVTC wished to claim that the goods were not liable to forfeiture, LVTC had one month from the date of seizure to give notice of such claim.

6. Border Force referred to the details set out in the electronic-Accompanying Document (e-AD) in respect of the Administrative Reference Code (ARC) presented to its officers. This was dated 25 March 2014, and referred to the goods as "24835.44 ltrs mixed beer". The consignor was ESS KEY SPRL, and the consignee was Seabrook Warehousing Ltd. The transport arranger was LVTC, and the transporter was Direct Transport and Logistics Ltd.

7. Border Force stated that it had identified that the vehicle and trailer seized had previously travelled to the UK at 21.45 hours on 26 March 2014, with its load manifested as alcoholic beverages. That earlier movement had been within the lifetime of the ARC/e-AD. Border Force therefore believed that the unique ARC number present to its officers had been used previously prior to interception of the load seized on 28 March 2014. An ARC/e-AD was unique and therefore valid for only one movement of excise goods. The seized load had therefore not moved under cover of an e-AD. In addition, the intercepted goods did not match those listed on the Delivery Note and e-AD.

8. Border Force enclosed a copy of Notice 12A explaining LVTC's legal rights in respect of the seizure and the appeals procedures.

9. On 10 June 2014 Rainer Hughes wrote to Border Force on behalf of LVTC. Rainer Hughes understood that the transport company had sought condemnation proceedings and requested restoration. They continued:

> "Our client seeks out of time condemnation proceedings of the goods which have been seized on the 28th March 2014."

10. After further correspondence, Border Force wrote to Rainer Hughes on 24 June 2014, explaining that for an appeal against the validity of a seizure to be valid, it must be received in writing by Border Force within one month of the date of seizure. The goods in the present case had been seized on 28 March 2014, and therefore any appeal request should have been submitted by 28 April 2014. This time limit was dictated by statute and could not be altered or extended. Thus the appeal against seizure could not be accepted. Border Force indicated that the request for restoration would be considered once information from the officers involved in the seizure had been collated.

11. On 5 July 2014, Border Force wrote again to Rainer Hughes stating that before consideration could be given to LVTC's restoration request, proof of ownership of the goods was required. This should include not only that LVTC had made payment for the goods, or a copy of the contract showing payment terms, but that the goods held by Border Force's Queen's Warehouse could be physically shown to be those that LVTC was claiming. Border Force requested information as to the system used to identify LVTC's goods, and any other paperwork relating to the goods which supported the claim for restoration.

12. On 23 July 2014 Rainer Hughes wrote to Border Force enclosing copy documents relating to the goods. They indicated that they did not understand why Border Force sought information that LVTC could physically show that the goods seized by LVTC could be identified by LVTC.

13. Border Force replied on 25 July, acknowledging the copy invoices supplied but indicating that, as previously requested, proof of payment was needed. They continued:

> "I note the invoices indicate that the goods remain with Dale Wholesale Limited until paid in full. At this juncture it is not clear that payment had been made."

14. On 21 September 2014, Border Force wrote to Rainer Hughes to notify them of the decision in respect of LVTC's restoration claim. Under the heading "My Decision", Border Force stated:

> "I have considered your client's request under section 152(b) of the Customs & Excise Management Act 1979 ("the Act"), and our policy.
>
> In considering restoration I have looked at all of the circumstances surrounding the seizure but **I do not consider the legality or the correctness of the seizure** itself.
>
> I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' [*sic*] policy as your client

> has failed to provide us with proof of payment for the goods. As such I can confirm on this occasion **the goods will not be restored**."

15. On behalf of LVTC, Rainer Hughes requested a review of that decision. On 13 October 2014, a member of the Border Force Review Team acknowledged this request, and indicated that this was the last opportunity for any further evidence or information to be provided to the Review Officers before the review proceeded. In their letter dated 20 October 2014, Rainer Hughes acknowledged receipt of the Border Force letter. No reference was made to the provision of any further evidence or information.

16. On 19 November 2014, Mr Harris, as the Review Officer, wrote to Rainer Hughes setting out the results of his review. His conclusion was that the goods should not be restored to LVTC. He set out his understanding of the background to the case, and referred to the correspondence. He summarised the Border Force restoration policy for seized excise goods. He explained the terms on which he had considered the decision afresh, and indicated that as no further information had been received following the earlier invitation, he had to make his decision based on the evidence that he already had.

17. In relation to the excise goods, he did not consider that he had been provided with details of exceptional circumstances that would result in the goods being restored. He referred to the judgment of Mummery LJ in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA Civ 824, [2012] Ch 414 at [71], and to other authorities.

18. He noted that the documentation provided by LVTC from Dale Wholesale stated clearly: "Title of the goods remain with DALE WHOLESALE LIMITED (VAT NO. 991 3357 94) until paid in full". He had not been presented with any evidence that LVTC had indeed paid for the goods, and therefore had to conclude that title to the goods had not passed to LVTC.

19. Under the heading "Conclusion" he stated his opinion that the Border Force policy in LVTC's case treated LVTC no more harshly or leniently than anyone else in similar circumstances, and he could find no reason in this case to vary the policy not to restore. He continued:

> "For the reasons set out above I uphold the original decision that: the seized excise goods should not be restored."

20. On 19 December 2014, Rainer Hughes gave Notice of Appeal to the Tribunal.

Arguments for LVTC

21. Mr Pulman accepted that, following *Jones* at [71], it was not open to LVTC to argue that the seizure of the goods was unlawful. The goods had been deemed to have been duly condemned as forfeited pursuant to statute (para 5 Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA 1979")).

22. In the same way, LVTC could not question the basis on which the goods had been condemned, namely that no duty had been paid on it, as this would be tantamount to contesting whether the goods really had been "duly" condemned (*Revenue and Customs Commissioners v European Brand Trading Limited* [2014] UKUT 0226 (TCC) at [57], [60].

23. However, it did not follow that every allegation made by Border Force concerning the importation of the goods was statutorily deemed to be true. Mr Pulman submitted that, importantly, it would not be reasonable for Border Force, in making the review decision, to assume that the goods were one of two consignments of alcohol imported under the same ARC. In the review decision, Border Force identified no evidence that could establish this alleged fact.

24. Mr Pulman submitted that there were various ways in which the appeal could be considered. He argued that the Border Force review should only reasonably have considered the question of ownership of the goods; as it had considered the substantive issue of restoration, this had been unreasonable. Thus on this basis the Tribunal should consider the issue of ownership; if LVTC won on this issue, the matter should be remitted to Border Force to consider the question of restoration.

25. In the alternative, if it had been correct for Border Force to consider both issues, the way in which Border Force had done so was inadequate. He submitted that the Tribunal should not consider the question of restoration.

26. If neither of these arguments succeeded, it would fall to the Tribunal to consider the substantive issue of restoration; it was accepted that in such circumstances LVTC would be in some difficulty, as the reasons given for restoration were fairly scant.

27. Mr Pulman referred to the correspondence and history up to the date of the review. Everything had been focused on ownership. The question whether there should be restoration if ownership were to be proved had "taken a back seat". Thus the substantive issue of restoration had not been in point. The case of *Worx Food and Beverage BV v The Director of Border Revenue* [2014] UKFTT 774 (TC), TC03892, had indicated that the Tribunal should deal with the question of ownership and go no further. On that basis, the question arose why Border Force would want further information.

28. Mr Pulman emphasised that his primary submission was that if the Tribunal found for LVTC on the question of ownership, the substantive issue of the restoration claim needed to go back to Border Force for consideration. He maintained that LVTC had submitted sufficient evidence of ownership, by means of the documents supplied to Border Force.

29. On the other argument, inadequate reasoning in a review letter might not matter, but if it was inadequate, the party requesting the review did not know what case it had to meet. Thus the restoration claim should go back for consideration. Further, if the decision was not adequate, the Tribunal could not consider it properly; there needed to be a decision on restoration before a Tribunal could send it back.

30. He submitted that, irrespective of the underlying issues raised, the review decision was inadequately reasoned, and that the same complaint could be made about all the Border Force decisions issued thus far in this case.

31. He made various submissions concerning the correspondence and the lack of rigour in Border Force's reasoning; we consider these below.

32. In the context of his primary submission, he referred to the Finance Act 1994 ("FA 1994"). The subject of reviews was considered in s 14 FA 1994; he drew attention to s 14(5). It was obviously open to Border Force to carry out reviews on multiple issues. Under s 14(5)(a), a person could only ask for a decision to be reviewed for a second or subsequent time if Border Force did not have the opportunity to consider certain facts or other matters. He argued that this might vary depending on what had been in dispute up to that point. The matter under consideration had been ownership; it was not open to Officer Harris to broaden the issue.

33. Mr Pulman put a second argument in support of his primary submission; this was that Border Force did not have to review the question of restoration unless ownership was proved. It appeared that the policy as reflected in *Worx* at [71]-[72] continued. The Tribunal in *Worx* had considered what the appellant in that case had said about ownership.

34. Mr Pulman suggested that we should put ourselves in the position of LVTC and assume that the Border Force's ownership policy was unreasonable. What LVTC had done was to provide documents, but only in connection with the question of ownership of the goods. If evidence were to be provided in connection with the question of restoration, Border Force was not required to examine it; on the basis of the policy approach reflected in *Worx*, there was no obligation on Border Force to consider it, and the same was the case for the Tribunal. Thus further evidence would not help.

35. Thus if it were a reasonable stance for LVTC to take that it would seek to use the appeal route to challenge the question of ownership, on which it could ultimately come to the Tribunal, it followed that it was reasonable for LVTC to take the view that there was no point in providing evidence relating to the question of restoration. This was why Mr Pulman argued that this was a decision that should not have looked at anything other than ownership.

36. In relation to ownership, he submitted that *Worx* was wrongly decided. He referred to the definition of "proprietor" in s 1 CEMA 1979; this was a broad concept. "Property" was not defined, nor "owner". In the same way, "restored" was not defined. Condemnation was dealt with in CEMA 1979 Sch 3 para 5, and in Sch 3 para 10(1) reference was made to an item being the "property" of the claimant at the time of the seizure. He submitted that there was an inference that this corresponded to the definition of "proprietor" in CEMA 1979 s 1. In Sch 3 para 10 there was a built-in vagueness in the use of the expression "to the best of his knowledge and belief".

37. In CEMA 1979 s 152, which gave Border Force power to restore anything forfeited or seized, the word "property" was not used, and the word "restore" was not defined. The power to restore applied where there was a seizure, and Mr Pulman argued that this did apply only to the owner. He submitted that the word "restore" connoted being put back into the position in which the relevant party had been before, and that such party did not necessarily have to be the owner. Restoration proceedings could involve a number of different individual parties.

38. Border Force needed proof of ownership before restoration, but in the light of the latter argument as to the meaning of "restore", a person such as an importer could be eligible to claim restoration. The question did not appear to have been considered in *Worx*, in which the Tribunal had set out its reasoning on the question of ownership at [54]-[68]. At [58] the Tribunal had described Border Force's policy of restoring goods only where ownership had been proved as "self-evidently reasonable"; however, CEMA 1979 did not refer to owners, but merely to "restore".

39. Mr Pulman questioned why it was reasonable to restore only to owners. The argument was presumably that multiple claims might be made, and that Border Force might be sued by the real owner of the goods. The argument had not been spelt out in *Worx*. Nothing had been seen to spell out what type of claim Border Force expected to see if there were competing claims. Mr Pulman raised the question as to the appropriate remedy where goods had been restored to another person.

40. Border Force had the power to restore to a wide range of individual parties, but did not have the power to restore to "just anyone"; if it were to do so, it would be acting unlawfully. If it restored to a party to whom it had power to restore, the only ground of complaint by others would be that such decision was claimed to be unreasonable.

41. Mr Pulman submitted that the starting point in *Worx* at [58] was not self-evidently reasonable. A policy which prevented Border Force from restoring was both inconsistent with CEMA 1979 and unreasonable. It was reasonable for Border Force to take steps to verify that a party had an appropriate right to seized goods before restoring them. It was also reasonable, if the necessary rights could not be proved, for Border Force to refuse restoration with no further consideration of a case. However, he submitted that all a claimant needed to demonstrate was a superior right to the seized goods (putting aside issues of condemnation) than that possessed by Border Force.

42. The Tribunal in *Worx* had been aware of the parallel with the proof of ownership in condemnation proceedings, referred to at [49]; however, the Tribunal had failed to give adequate consideration to this.

43. Further, the Tribunal in *Worx* had been concerned to protect Border Force, which might otherwise have been obliged to restore goods to someone other than their owner, as indicated at [56]. Mr Pulman argued that Border Force could take steps to protect itself by issuing notices of seizure to all prospective owners of goods and waiting for responses before considering restoration. No other party apart from LVTC

in the present case had laid claim to the goods, not even those other parties who had received a notice of seizure.

44. Mr Pulman submitted that LVTC's rights to and in the goods gave it a sufficient proprietary interest in them which had unreasonably been overlooked by Border Force.

Arguments for the Respondent

45. Mr Newbold submitted that the case being put for LVTC was not borne out by the correspondence. What was being sought was restoration, not an adjudication on ownership. (We deal with this issue in the following section of this decision.) He referred to the letter from Border Force dated 5 July 2014. This made reference to matters other than the proof of ownership of the goods. Rainer Hughes had purported to deal with the question of ownership. There had been no suggestion from them that they were limiting their consideration to that question.

46. Mr Newbold made reference to the subsequent correspondence, and commented that the basis on which the matter had been pursued, both in the correspondence and in LVTC's Grounds of Appeal, was inconsistent with the proposition that Border Force should have limited its consideration to the question of ownership.

47. The second submission for LVTC, that it had been right not to put in its evidence, was a surprising approach for an appellant to take. There had been no letter from Rainer Hughes showing that a conscious decision had been made not to present further evidence. In Mr Newbold's submission, it would be an astonishing conclusion to assume that two Border Force officers would take the same approach of dealing with the claim on the basis that further evidence would not be provided at that stage.

48. Mr Newbold made submissions concerning the question of adequacy of reasoning in the decision. We consider these below.

49. He argued that the issue of ownership had not been the primary reason for the decision; that had been based on the issue of exceptional circumstances.

50. On the question of ownership, he submitted that *Worx* had been correctly decided. In relation to Sch 3 CEMA 1979, care needed to be taken. It was accepted that the word "owner" was not used. However, this was not a point which could be said to have been decided in LVTC's favour; the matter was merely open to argument. The requirement in para 10(1) Sch 3 CEMA 1979 was for the claimant or his solicitor to swear that the thing seized was the "property" of the claimant at the time of the seizure. It was not possible to apply the definition of "proprietor" where the word "property" was not defined. The reference to knowledge and belief covered the position of a solicitor acting on a client's instructions.

51. There were good reasons to limit restoration to an owner rather than permitting restoration to a wider range of persons. There was the possibility of litigation; this could arise on a decision to restore. The question was what would happen in a case

involving multiple claimants; there would be competing restoration requests. As an example, if the goods were restored to Dale Wholesale and not to LVTC, there would be no locus for LVTC to intervene; what if the Tribunal decided that the goods should be restored to LVTC?

52. Further, there would be nothing to limit potential claims to two claimants; as an example, what if anyone with a beneficial interest in the goods could pursue a claim?

53. This left aside the possibility of "cherry picking" of claimants. A claimant could be chosen on grounds of being an innocent party, or subject to hardship, or some other ground. This could be the case even if other parties were more heavily involved, not in hardship, or perhaps more blameworthy.

54. In the context of the question of ownership in the present case, there had been "multiple journeys" in the lifetime of the ARC. It was necessary to have more than just invoices; there had been different consignments. It was appropriate for Border Force to ask a particular party whether these were their goods.

55. Mr Newbold made further submissions in support of the proposition that *Worx* had been carefully and correctly decided.

56. It had been argued for LVTC that, even prior to paying for the goods, it would have had an equitable interest in those goods, and that once in possession of the goods, it would be in a position to bring an action in conversion against any person who wrongfully deprived it of the goods; that action could be brought against Border Force if it acted outside its powers in seizing the goods. LVTC further argued that it was inconsistent to find that LVTC nevertheless had no standing to bring a less demanding restoration appeal. Mr Newbold commented that redress would not be limited to an action against Border Force. If LVTC was not responsible, but lost as a result of some other person's default, there was a remedy; it followed that it was not without redress.

57. Mr Newbold submitted that the documents provided by LVTC were not sufficient to demonstrate ownership. However, in any event it was not necessary to go on to the question of ownership; LVTC had not provided evidence to establish that there were exceptional circumstances justifying restoration.

58. On the evidence placed by LVTC before Mr Harris as the reviewing officer, Mr Newbold submitted that the decision not to restore the goods could not be considered unreasonable. The policy of Border Force was clear; where goods had been imported into the UK unlawfully, restoration would not normally be granted in the absence of exceptional circumstances.

59. The starting point for Mr Harris (and the Tribunal) had to be that the goods had been unlawfully imported; seizure had not been challenged within the permitted time, and the goods were therefore deemed to have been unlawfully imported for a commercial purpose. Mr Newbold referred to *Jones* as confirming the position.

60. LVTC had provided nothing of substance to demonstrate peculiar facts about the goods or its own circumstances which could result in a finding of exceptional circumstances being made. The only substantive documents provided by LVTC to Border Force were invoices. Leaving aside the question of ownership, Mr Newbold submitted that these could not begin to establish that there were any circumstances particular to LVTC's case for Border Force to disapply its policy. It was also the case that no further evidence establishing any exceptional circumstances had been served in the course of the appeal proceedings.

61. In summary, Mr Newbold submitted that LVTC had failed to establish that the decision of Officer Harris was unreasonable such as would justify the Tribunal intervening. Border Force's policy had been properly applied. The appeal should be dismissed.

Discussion and conclusions

62. The changes in administrative responsibility for matters such as those the subject of this appeal seem to have caused a degree of confusion. In the review letter (quoted in the extract above) Mr Harris referred to "the Commissioners' policy", ie to the policy of the Commissioners for Revenue and Customs ("HMRC"). In his arguments, Mr Pulman referred throughout to "HMRC"; we have amended these references to "Border Force". Under Part 1 of the Borders, Citizenship and Immigration Act 2009, the functions of HMRC that are exercisable in relation to general customs matters are exercisable by the Secretary of State concurrently with HMRC. It is this legislation that enables Border Force to carry out the relevant functions.

63. It seems to us that it would be clearer if references in correspondence and in arguments before the Tribunals in cases involving Border Force were to Border Force and its policy, or to the concurrent policy of Border Force and HMRC. Where appropriate, we refer to the relevant policies as Border Force policies.

64. Mr Pulman's primary submission was that in its review, Border Force should only have considered the question of ownership. We therefore deal first with that submission by reference to the applicable legislation.

65. Under s 152 CEMA 1979, HMRC, or in the present case Border Force—

> ". . . may, as they see fit—
>
> . . .
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts".

66. In accordance with s 14(2) FA 1994, LVTC is

> "(b) a person in relation to whom, or on whose application, [a decision under s 152(b) CEMA 1979 as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person]" (s 14(1)(a) FA 1994)

and may therefore require Border Force to review that decision. It follows that the question under review is whether the goods are to be restored. In our view, s 14 is not designed to provide a system of review of preliminary issues; what is required pursuant to a review is consideration of the overall question whether the relevant goods are or are not to be restored.

67. If Mr Pulman's argument were to be accepted, there would be a risk of multiple reviews. Had Officer Harris considered only the question of ownership, and decided that issue against LVTC, this would have led to LVTC taking that question to appeal before the Tribunal. If the Tribunal were to decide that the decision on review as to ownership was one which Officer Harris could not reasonably have arrived at, the Tribunal would in practice have to require Border Force to carry out a further review of the original decision not to restore the goods. Such an approach appears to us inconsistent with the language of the legislation, which refers only to a decision whether or not goods should be restored to any person. The further review might well give rise to a further appeal to the Tribunal, thus extending considerably the time taken to resolve the matter.

68. In relation to Mr Pulman's primary submission, our conclusion is that the decision to be taken by Border Force, initially or on review, is whether the goods are or are not to be restored to the relevant person; it is not appropriate for Border Force to limit its consideration to preliminary issues arising in connection with that decision.

69. In relation to Mr Pulman's submission that the Tribunal should not consider the issue of restoration, the Tribunal's jurisdiction under s 16(4) FA 1994 is limited. The decision taken by Border Force on review is that the goods are not to be restored. LVTC's appeal is against that decision, which under para 1(r) Sch 5 FA 1994 is an "ancillary matter", so that the appeal is governed by s 16(4). The Tribunal is therefore confined to dealing with that appeal under the restrictions imposed by the latter sub-section; it is not open to the Tribunal to depart from the terms of the legislation and to decide not to consider the very issue raised by that appeal.

70. It follows that we do not accept Mr Pulman's submission that Border Force does not have to review restoration unless ownership has been proved. The decision to be taken by Border Force is whether or not to restore the goods. In arriving at that decision, Border Force must take into account all relevant information and disregard irrelevant matters.

71. We turn to Mr Pulman's alternative submission, that the way in which Border Force had considered the questions of restoration and ownership had been inadequate.

72. We have referred above to the restrictive nature of the Tribunal's jurisdiction under s 16(4) FA 1994. For convenience, we set out the relevant parts of that subsection:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person

> making that decision 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;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) . . ."

73. Thus the question is whether we are satisfied that Mr Harris could not reasonably have arrived at the decision not to restore the goods to LVTC.

74. Mr Pulman referred to the Border Force letter dated 5 July 2014. This letter was important, as it was the first letter inviting Rainer Hughes to submit information in support of the application for restoration. In his submission, this carried the implication that the restoration request would not be considered until ownership of the goods had been proved. For Border Force the letter had been represented by Mr Newbold as a general request for other paperwork, but Mr Pulman argued that it read as relating to ownership. He submitted that this was a reasonable, and correct, interpretation of the letter; that was how things had proceeded, with subsequent correspondence, and a decision on ownership.

75. Mr Newbold referred to the third paragraph of the letter, following the first two concerning proof of ownership. This stated:

> "If your client has any other paperwork relating to the above goods which support the claim for restoration, please forward a copy of these to us at the above address as soon as possible?"

Mr Newbold argued that this was in general terms. The reply dated 23 July 2014 from Rainer Hughes, who are solicitors with a specialisation in this area of work, in which they had purported to deal with the question of ownership, contained nothing to suggest that they were limiting their response to that issue.

76. Similarly, in the Border Force letter dated 13 October 2014 giving information as to the conduct of the requested review, the following paragraph had been included:

> "If in the meantime you have any further *evidence* or *information* that you would like to provide in the [*sic*] support of this request then please send it to the Review Officers at the address shown at the top of this letter. This is your last opportunity to provide the Review Officers with such information: if you do not provide it now it cannot be taken into account in the review."

No further information had been provided on LVTC's behalf to Border Force. The actions of LVTC and its representatives could not be retrospectively rationalised as indicating that attention was being confined to the issue of ownership.

77. Mr Newbold referred also to the language of the review letter, which stated as part of the conclusion:

> "If your client has *fresh* information that you would like me to consider, then please write to me; however, I will not enter into further correspondence about evidence that has *already* been provided."

If LVTC or its advisers had thought at that stage that Border Force had dealt with the substantive issue of restoration rather than confining its attention to the question of ownership, they could have submitted further information in support of the restoration claim. Instead, the next step had been the appeal to the Tribunal. No reference to limiting the matter to the ownership issue had been made in the Grounds of Appeal submitted with LVTC's Notice of Appeal. In Mr Newbold's submission, it was not correct to say that Mr Harris should only have considered ownership.

78. In relation to the correspondence leading up to the review letter, we accept Mr Newbold's submissions, which we consider to be consistent with our interpretation of the legislation considered above. We agree that it would not be reasonable to expect the Border Force officer involved in the original decision, or Mr Harris as the Review Officer, to arrive at their decisions on the basis that evidence relating to matters other than ownership should not be submitted pending resolution of the ownership question.

79. The restoration refusal was contained in the Border Force letter dated 21 September 2014 (see above). The paragraph preceding that extract sets out the general policy, which is:

> ". . . that excise goods seized because of an attempt to evade excise duty should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

80. We find that the refusal decision was based on two grounds, namely the absence of any evidence of exceptional circumstances to justify departure from the general Border Force policy, and the absence of proof of payment for the goods.

81. In relation to the review letter, Mr Pulman challenged the adequacy of consideration of the question of restoration. He argued that all the reasoning was contained in the paragraph quoted below. He questioned whether the reasoning was adequate in the context of LVTC's case, bearing in mind that LVTC was not the transporter but was the purchaser of the goods. He criticised the basis on which the letter referred to authorities, including *Worx*, without drawing conclusions from those authorities. He referred to comments in the review letter concerning the nature of LVTC's business, and whether involvement with goods of the present type was consistent with the nature of that business, and a question as to whether Rainer Hughes had carried out due diligence as to its client. He submitted that the review decision was vitiated by irrationality.

82. Mr Newbold submitted that the review letter should not be treated as if it were a judgment of the Supreme Court; it was an administrative decision taken by an officer setting out what he had considered and what he had taken into account. The letter clearly set out the policy. The starting point was the absence of materials provided to demonstrate exceptional circumstances. If this had been a case involving extensive correspondence that had not been referred to, there might have been a question as to

the adequacy of reference, but this was not the case here. The Review Officer could not then be required to work out what possible cases might be argued by LVTC. On the basis that matters had not been put before Mr Harris, Mr Newbold submitted that Mr Harris's reasoning was more than adequate.

83. Mr Newbold argued that the quotations from cases included in the letter sufficiently demonstrated that tribunals had considered these matters. The passages from *Worx* were plainly relevant. Viewing the letter as a whole, it was completely apparent how Mr Harris had come to his conclusion. He had correctly concluded that there were no exceptional circumstances. Ownership had not been the primary reason for the decision; instead, the primary reason had been the absence of exceptional circumstances.

84. We note that in the review letter, Officer Harris indicated that he had considered the decision afresh. We set out the following paragraphs from the letter:

> "I have read your letters carefully to see whether a case for disapplying the Border Force policies of non-restoration have [*sic*] been presented. The onus for making your case rests firmly with you: it is not for Border Force to make the contrary case." [He referred to *McGeown International Limited* [2011] UKFTT 407 (TC), TC01262.]
>
> "The Excise Goods
>
> I have read your letters carefully to see whether a case for disapplying the Border Force policy of non-restoration has been presented. In my opinion, I have not been provided with details of exceptional circumstances that would result [*sic*] the good [*sic*] being restored. Furthermore, the following circumstances form positive *additional* reasons for concluding that the goods should not be restored:-" [He set out extracts from *Jones* and from Tribunal decisions.]

85. We are satisfied as to the adequacy of the reasoning in the review letter. The primary reason for the decision on review, taken afresh, is the absence of special circumstances justifying departure from the Border Force policy of non-restoration. The other matters referred to under the "Excise Goods" heading are clearly designated as additional reasons; among these, there are references to *Worx* concerning ownership.

86. The references to the nature of LVTC's business and the different nature of the goods covered by the review, and the comments as to whether Rainer Hughes had carried out due diligence in relation to LVTC appear to be peripheral to the decision, being more in the nature of comment than part of the reasoning. In his oral evidence, Mr Harris explained during cross-examination that Border Force had in the past seen companies' names "hijacked", and therefore carried out a simple internet check of companies' registration details. On the question of due diligence, he had raised this because of past experience of a wasted costs case.

87. In re-examination, Mr Newbold asked Mr Harris whether, if he had omitted the reference to due diligence, he would have decided that the goods should be restored; he confirmed that he would not have done so.

88. We are satisfied that if these matters were to be regarded as irrelevant to the decision rather than peripheral to it, they made no difference to the decision, which was arrived at on the basis of the factors considered above. Taking into account the deemed condemnation of the goods and the absence of evidence to support LVTC's contentions as to the inadequacy of reasoning in the review letter, we are not satisfied that the decision taken by Mr Harris on review falls within the description in s 16(4) FA 1994; it is not a decision at which he could not reasonably have arrived.

89. Mr Pulman conceded that the reasons provided by LVTC for restoration were scant. As indicated by Mr Harris in the review letter, the burden of making the case for restoration rests on the claimant, and it is not for Border Force to make the contrary case. We consider that, in the absence of any information or reasons provided by LVTC to justify a claim that Border Force should depart from its non-restoration policy, the conclusions in the review letter cannot be described as unreasonable.

90. Although we have addressed all the main issues raised by LVTC in the course of its appeal, we think it appropriate to deal with Mr Pulman's submission that *Worx* was wrongly decided, and his further submissions relating to that decision. Mr Newbold's response to those submissions was that to some extent the point might be academic on the present facts: the decision was not that LVTC was merely a bailee; Officer Harris simply decided that proof of ownership had not been provided. Nevertheless, it was Border Force's case that it was appropriate for it to seek proof of ownership when considering restoration; Border Force had to ensure that goods were restored to their legitimate owner. If Border Force did not insist on establishing ownership as part of the process of deciding whether to restore goods, there would be a risk of reviewing officers having to adjudicate between competing claims to restoration. This was not the purpose of the procedure for consideration of restoration.

91. Mr Newbold referred to the lack of opportunity to cross-examine LVTC's director. There were various points which would have been raised, including apparent inconsistencies. The director might have had an explanation for these matters. Mr Newbold submitted that Mr Pulman's attempt to distinguish *Worx* on the basis that the director in that case had been entirely unrealistic in his approach, whereas in LVTC's case the goods were identifiable, was not correct; the Tribunal in *Worx* had been dealing with policy. The documents in LVTC's case were not sufficient to demonstrate ownership, although Mr Newbold emphasised that it was not necessary to go on to the question of ownership in any event.

92. In relation to Mr Lytras's witness statement, we do not consider it appropriate to attach any weight to it, given the absence of any opportunity for him to be cross-examined at the hearing. In any event, we find nothing in the statement which affects our conclusions as set out above.

93. We do not consider that *Worx* was wrongly decided. In its decision at [34]-[35] the Tribunal set out extracts from the review letter. It is clear from [35] that the first part of the review process had been to examine whether a case for disapplying the Border Force policy on restoration had been presented; the review officer had found

no exceptional circumstances which would justify restoration. He referred to the first step in the restoration process being to establish who had title to the goods at the time of seizure. However, our reading of these comments is that he followed a similar process to that taken by Officer Harris in LVTC's case, namely that he considered the primary question as to presence or otherwise of reasons for departure from Border Force's non-restoration policy, and then addressed questions as to evidence of ownership as the first of any secondary matters to be taken into account as supplementary reasons for refusing restoration. Thus the approach taken in both cases appears consistent: the restoration claim is first considered by reference to the policy, and then other additional factors are taken into account. The question of ownership or "property" is a major one among these additional factors, given the difficulties referred to in argument by Mr Newbold. We accept his submissions in this context, although we leave open the question whether there could be any exceptional cases in which rights in property not amounting to full ownership might be sufficient.

94. Mr Pulman referred to *Worx* at [56] and described the Tribunal as being concerned to protect Border Force. We think that this is a misinterpretation of the decision; at [56] the Tribunal was summarising the submissions made on behalf of Border Force, and dealt with the respective arguments in the subsequent paragraphs.

95. On the question whether Border Force's policy of restoring goods only where satisfied that a person has proved ownership is "self-evidently reasonable", as referred to in *Worx* at [58], we think it material that in the submissions for Border Force at [48]-[53], Counsel drew an analogy at [49] with the position in condemnation proceedings, where those who sought to contest such proceedings had first to swear ownership. (In the present appeal, Mr Pulman made reference to this in the course of his argument.) In our view, but subject to the caveat that there might conceivably be very limited exceptions to the general principle, it would be strangely inconsistent if condemnation proceedings required proof of ownership but restoration proceedings did not.

Outcome of the appeal

96. LVTC's appeal against the decision of Border Force dated 21 September, upheld in the review decision dated 19 November 2014, is dismissed.

Right to apply for permission to appeal

97. 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 CLARK
TRIBUNAL JUDGE

RELEASE DATE: 12 NOVEMBER 2015