[2016] UKFTT 0124 (TC)

TC04912

Appeal number: TC/2015/03439

CUSTOMS DUTY – restoration of goods seized for incorrect description on Customs Entry - whether review carried out and whether deemed conclusion - whether decision one that could reasonably have been made – review required and directions made.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ZAIGUL AFRO CARE LTD **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
ELIZABETH BRIDGE

Sitting in public at Fox Court, Brooke St, London EC1 on 29 January 2016

The Appellant did not appear and was not represented

Tom Rainsbury, instructed by Director of Border Revenue, for the Respondents

DECISION

1. This was, in form at least, an appeal by the appellant against a review decision made by the Border Force ("BF") of the Home Office.

2. It had appeared to both members of the Tribunal when reading the papers before the hearing that something seemed to have gone badly wrong following the issue of a decision letter by Mr John Sanders, an officer of BF. We were not then surprised when our clerk informed us shortly before the start of the hearing that BF were offering to review the case again.

3. However by the time of the start of the hearing at 10 o'clock no one had appeared for the appellant. Our clerk telephoned the appellant and was told that the principal, Mr Dungersi, was not attending due to illness but that someone was intending to represent the appellant, and that someone had apparently set off at 6 am to do so. Mr Dungersi was not however in phone contact with the representative.

4. We waited until 10.30 for any representative to arrive but no one came then (or indeed at any later time). We were not satisfied that arrangements had been made to provide a representative. No attempt had been made to seek an adjournment of the proceedings. Having regard to the fact that BF had intimated that they were seeking the only outcome that could be regarded as a success for the appellant, we decided that it was in the interests of justice to continue with the hearing.

5. Mr Rainsbury for BF submitted that it might be appropriate for the Tribunal to adjourn the hearing of the appeal while BF carried out a review. Since the Tribunal's only power in a case such as this is, in accordance with s 16(4)(b) Finance Act ("FA") 1994, to require BF to carry out a review and, importantly, to do so in accordance with any directions the Tribunal gives, it seemed to us more appropriate for BF to put its case to us as it would have done in any event and to provide us with evidence of what had happened particularly in relation to the seizure of goods that had occasioned the appeal and for us to consider the ground of appeal that had been put forward by the appellant, all with a view to us making appropriate directions for the review.

6. There also appeared to us to be a few difficult points of law arising from the provisions relating to appeals and reviews in FA 1994. Mr Rainsbury agreed and added that BF had clearly been unsure of the correctness of their conduct of the appeal in this case and would welcome guidance.

Evidence

7. BF had prepared a bundle of evidence and a witness statement from Mr Sanders. Although it had been sent to the Tribunal and the appellant, unfortunately it had not been forwarded to either member of the Tribunal. Although we had seen most of the correspondence starting with the decision of Mr Sanders, we had not seen any details of the seizure and its aftermath, so we asked Mr Sanders to give oral evidence to us on some points in his statement. We unreservedly accept Mr Sanders's evidence of what he actually did and said, and we have no reason for doubting that the

seizing officer's comprehensive notebook account of the seizure, and of actions after the seizure, was accurate.

Facts

8. From the documents supplied to us, and from Mr Sanders's evidence, we find the following facts, none of which had been disputed by the appellant.

9. A bill of lading dated 21 September 2014 showed that 11 packages of "Hair Accessories" with HS Code 9615 11 00 were to be shipped from Jebel Ali (Dubai, UAE) to Felixstowe, and that the consignee was the appellant.

10. An invoice dated 17 September 2014 from AAGT International LLC (the consignor on the bill of lading) showed the same description and HS number and a price of 1200.00 (though whether £ sterling, UAE Dirhams or other currency was not shown).

11. We interpose here to say that the "HS number" is the numerical classification of the goods in the Harmonised System of nomenclature and classification of goods of the World Customs Organisation. The classification in the HS is also that used in the Combined Nomenclature of the European Union's harmonised customs system. There 9615 11 00 denotes:

> "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof
>
> – Combs, hair-slides and the like
>
> – – Of hard rubber or plastics"

The rate of duty for this category is 2.7%

12. Following the ship's arrival in Felixstowe on 18 October and the submission of a Customs Entry on 22 October, cartons from 3 pallets of goods from a container were, on 27 October 2014, examined by an officer of BF, Mr Cruse.

13. On 31 October BF sent a Notice of Seizure to the appellant, the accompanying letter stating that the goods examined which were destined for and ordered by the appellant were not as shown on the Customs Entry, that is they were a variety of goods which did not fall to classified in item 9615 11 00, and were therefore seized. Mr Sanders told us that for many of them the appropriate classification showed a higher rate of duty than that for 9615 11 00. Notice 12A detailing the appellant's rights was also issued.

14. On 6 November 2014 the appellant gave notice "to claim my seized goods". We were informed that although the appellant started the process of having condemnation proceedings instituted, they did not go through with it.

15. On 27 December 2014 the appellant sought restoration of the items, having paid the duty and VAT due.

16. On 15 January 2015 BF asked for proof of ownership. This was provided to BF's satisfaction on 27 January.

17. By a letter dated 5 *January* 2015 Mr Sanders wrote in response to the request for restoration. He summarised the BF's policy of restoring seized goods, which was that "the general policy is that goods seized because of an attempt to evade duty should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

18. The letter went on to say that in considering restoration Mr Sanders had not considered the legality or correctness of the seizure and that he made his decision on the assumption that the seizure was lawful.

19. His conclusion was that there were no exceptional circumstances that would justify a departure from the Commissioners' policy "as you have provided no compelling reasons for me to consider. I can confirm on this occasion the **goods will not be restored**." (Mr Sanders's emphasis).

20. The appellant's rights to a review were then set out. The letter stated that the appellant had 45 days to request a review, so that the last date for such a request was 27 March 2015. The Tribunal notes that this March date clearly indicates that the date on the letter should have been 5 *February* 2015. Mr Sanders accepted that this was so, the error was his, and it was the incorrect January date which was entered on the BF's computer system.

21. On 27 February 2015 the appellant requested a review.

22. On 1 March 2015 the importer of the goods informed BF that the error on the Customs Entry was its fault.

23. On 15 April 2015 BF (not Mr Sanders) informed the appellant that its request for a review was out of time.

24. On 24 April 2015 the appellant informed BF that the request was not out of time as the decision letter had been wrongly dated.

25. On 30 April 2015 BF wrote to the appellant. The heading was "Review of the decision not to restore the seized goods". The letter said:

> "It has been brought to my attention that your request, contained in your letter dated [*left blank*], to have the above mentioned matter reviewed by an independent Review Officer, has not been completed within the statutory 45 day time limit. Therefore the original non-restoration decision is now considered to have been deemed to be upheld. What that means is that the original decision not to restore the goods continued to have effect, as per the letter issued to you on 5th February 2015 (dated 5th January 2015)"

It then informed the appellant that it had 30 days to appeal to the Tribunal. It was signed by a Mr D Harris.

26. On 26 May 2015 the appellant notified the Tribunal of their appeal.

Law

27. The provisions dealing with restoration of seized goods are in s 152 Customs and Excise Management Act 1979 ("CEMA") which provides relevantly:

> "The Commissioners 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;"

28. The seizure in this case was made under s 49(1) CEMA which provides relevantly:

> "Where—
>
> …
>
> (e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or
>
> …
>
> those goods shall, subject to subsection (2) below, be liable to forfeiture."

29. The law on appealing and reviewing decisions made under s 152(b) CEMA is in Part 1 FA 1994. The provisions of that part relating to appeals were quite heavily amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) to reflect the fact that before the Tribunals were established, Part 1 FA 1994 provided the only "review" provisions in the whole of indirect and direct tax legislation, but that SI 2009/56 enacted review provisions for all taxes, and so some alignment was needed. The relevant provisions after those amendments are as follows:

> "***Customs and excise reviews and appeals***
>
> **13A Meaning of "relevant decision"**
>
> (1) This section applies for the purposes of the following provisions of this Chapter.
>
> (2) A reference to a relevant decision is a reference to any of the following decisions—
>
> …
>
> (j) any decision by HMRC which is of a description specified in Schedule 5 to this Act, except for 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.
>
> **14 Requirement for review of decision under section 152(b) of the Management Act etc**

(1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say—

(a) 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;

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

(2) Any person who is—

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

(2A) But in the case of a relevant decision that falls within subsection (1)(b), a person may require HMRC to review the decision under this section only if HMRC are also required to review the decision within subsection (1)(a) to which it is linked.

(3) The Commissioners shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review.

(4) For the purposes of subsection (3) above it shall be the duty of the Commissioners to give written notification of any decision to which this section applies to any person who—

(a) requests such a notification;

(b) has not previously been given written notification of that decision; and

(c) if given such a notification, will be entitled to require a review of the decision under this section.

(5) A person shall be entitled to give a notice under this section requiring a decision to be reviewed for a second or subsequent time only if—

(a) the grounds on which he requires the further review are that the Commissioners did not, on any previous review, have the opportunity to consider certain facts or other matters; and

(b) he does not, on the further review, require the Commissioners to consider any facts or matters which were considered on a previous review except in so far as they are relevant to any issue to which the facts or matters not previously considered relate.

14A Review out of time

(1) This section applies if—

(a) a person may, under section 14(2), require HMRC to review a decision, and

(b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).

(2) HMRC are required to carry out a review of the decision in either of the following cases.

(3) The first case is where HMRC are satisfied that—

(a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and

(b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.

(4) The second case is where—

(a) HMRC are not satisfied as mentioned in subsection (3), and

(b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.

(5) A person may require HMRC to review a decision falling within section 14(1)(b) only if HMRC are also required to review the decision within section 14(1)(a) to which it is linked.

(6) Section 14(5) applies to notices given under this section as it applies to notices given under section 14.

15 Review procedure

(1) Where the Commissioners are required in accordance with section 14 or 14A to review any decision, it shall be their duty to do so and they may, on that review, either—

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

(2) Where—

(a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 or 14A above to review any decision; and

(b) they do not, within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,

they shall be assumed for the purposes of section 14 or 14A to have confirmed the decision.

…

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.

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, …

…

…

(1F) An appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so.

(2) An appeal under this section with respect to a decision falling within subsection (1) or (1A) shall not be entertained unless the appellant is the person who required the review in question.

…

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

…

> (6) On an appeal under this section the burden of proof …—
>
> …
>
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.
>
> (8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.
>
> (9) References in this section to a decision as to an ancillary matter do not include a reference to a decision of a description specified in the following paragraphs of Schedule 5—
>
> (a) paragraph 3(4);
>
> (b) paragraph 4(3);
>
> (c) paragraph 9(e);
>
> (d) paragraph 9A."

From now on references to a section without more are to that numbered section of FA 1994.

Discussion

30. In the light of BF's position at the hearing, there is little point setting out the respective contentions of the parties as set out in the appeal or BF's Statement of Case. We have decided that the appropriate course is for us to order BF to carry out a review in accordance with s 16(4)(b). In this part of our decision we therefore explain how we think BF's actions in this case are not what the law requires of them, the doubts we had about what right of appeal is available to the appellant in the light of those actions and whether in the circumstances of this case we can in fact order a review.

Border Force's errors

31. The first error made by BF in this case was the misdating of the letter of 5 February to show 5 January. This is not an error of law of course, but has led to BF making such errors.

32. When the appellant sent its request to have the decision reviewed on 27 February it had not failed to meet the deadline set out in the decision letter. It should be noted that 27 March, the deadline given, is in fact 50 days after the correct date of the decision letter, not the 45 days mentioned in s 14(3). This is presumably because the 45 days runs from the date when the notice of decision is given, and Tribunals and Courts have construed the word "given" in this context to mean the date the letter was received by the addressee. Thus five days were added to the date of the letter to cater for this (a practice that is followed in other tax contexts).

33. BF was in error in telling the appellant that its request was out of time. No doubt the officer concerned was going by the date on the computer system and did not read the text of the misdated letter of 5 February. They should have done.

34. It seems clear to us that the more serious error, and Mr Rainsbury did not demur, is that the officer, having concluded that the request for a review was late, should have gone on to consider s 14A. He did not. As a result the officer did not inform the appellant that BF had considered whether the appellant had a reasonable excuse or ask the appellant if it had one, and did not inform the appellant of its right to have the Tribunal consider a late appeal. That failure was a further error.

35. BF were in yet further error when they ignored the appellant's letter pointing out the mistake in the dates. Even if BF were not that seriously at fault when first assuming the date of the letter was correctly 5 January, when they responded to the review request they were in our view seriously in error in not reading the text of the 5 February letter and seeing from the deadline of 27 March that it had obviously been misdated. And even assuming Mr Sanders had in fact miscalculated the 50 days or put in March when he meant February, the appellant should have been given the benefit of the incorrect deadline, as it would have relied on it.

36. The next and the most unfortunate error is in the letter of 30 April, part of which we have quoted at §25 above. This has to be seen in the light of the admission in BF's Statement of Case that "[f]ollowing an error on the part of the Respondent a review of the decision was not conducted within the statutory 45 day period". That is not exactly what the letter itself says:

> "It has been brought to my attention that your request, contained in your letter dated [*blank*], to have the above mentioned matter reviewed by an independent Review Officer, has not been completed within the statutory 45 day time limit."

37. There is no evidence at all that BF even started to conduct, let alone complete, a review. The letter of 15 April telling the appellant it was out of time would hardly have been sent if the BF was then and there going to conduct a review. And the Statement of Case admits one was not "conducted".

38. It is not as if Mr Harris, the officer who wrote this letter, was using the language of the statute but in a not entirely apt way. Section 15(2) says nothing about a review being "completed": the 45 day rule applies to notification of the conclusions. A review may have been completed well before the 45 days but BF may have failed to notify the taxpayer. And we do think it is unfortunate to say the least that the letter implies that a review was started but not finished.

39. It is also highly regrettable that Mr Harris does not appear to have given any consideration *at any time* to the appellant's letter of 24 April. A reasonable officer would have taken the view that the letter amounted to a request to have a review which, even if regarded as out of time, showed that the appellant had on the face of it a reasonable excuse for the lateness. A review should then have been conducted, the 45 day limit running from 24 April. If Mr Harris had in fact considered the letter

from the appellant before issuing his of 30 April he should not have sent that letter. If he had considered the letter after issuing his own of 30 April, he should have withdrawn that letter.

40. Mr Harris's second error is in the part of his letter where he informs the appellant of his rights to lodge an appeal to the Tribunal "within 30 days of the date of his letter" [his emphasis]. Section 16(2A) applies in the case where the appeal to the Tribunal is against a deemed conclusion under s 15(2). This is clearly what Mr Harris says happened here. In such a case the time limit for notifying the appeal to the Tribunal is 75 days from the date on which the review was required. This date is 13 May, whereas 30 days from 30 April is 30 May. The appeal was made on 26 May and so was actually out of date if the letter of 27 February is treated, as BF do, as the only request for a review. The Tribunal's administration did not take the point that s 16(1F) (appeals made to the Tribunal out of time) applied since the questions on its Appeal Form do not cater for this particular circumstance, and BF themselves were not aware of it so did not ask the Tribunal to take it.

41. A further point needs to be made about the BF letters in this case, and, we imagine, other cases. Mr Sanders's decision letter and Mr Harris's letter of 30 April refer to the appellant being able to "request" a review. "Request" implies that permission is being sought which is in the person addressed's discretion to grant. What the legislation in Part 1 FA 1994 (and for that matter all the other places in tax law where reviews are available) says is that the appellant may "require" a review, so that it is not in BF or HMRC's gift to refuse. What is more, uniquely in Part 1 FA 1994, BF are put under a statutory *duty* to carry out a review if they are required to, a duty they signally failed to fulfil in this case and one which is not apparently visited with any consequences if they fail to carry it out, except it seems for the person who required it.

The respondent's submission on the 30 April letter and our view

42. Finally in relation to this letter Mr Rainsbury argued that BF was correct to say that s 15(2) applied in this case to deem the initial decision of Mr Sanders to stand. The argument depends on a failure to give "notice to that person of their determination on the review" meaning not only a failure to give a notification of their determination on an actual review, one that BF has actually started to carry out but has not notified the appellant of its conclusions within the 45 day limit, but also a failure to give such a notification where a review has not been carried out at all, because BF considered the appellant was out of time to require one and told the appellant so. We consider that a failure to give a notification of the conclusions on a review which BF has refused to carry out so the notification would actually be impossible to give is not a failure that is contemplated by s 15(2)(b).

43. The words "their determination on the review" can only refer in our view to a review that was properly begun with the intention that there would be a notification of its conclusions, but where BF does not do so within the 45 days. Failure to notify the conclusions within 45 days, which is what triggers the deemed upholding of the original decision, is a meaningless concept if no review has begun, especially where the person whose duty it is to conduct the review denies that a review is required.

44. And the argument of BF is wrong for another reason. The first condition for the operation of s 15(2) is that the subsection operates "where … it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 or 14A to review [a] decision". It is the duty of the Commissioners to review a decision only if they have been required to do so by a notice given within the time limit, or if outside the time limit, the Commissioners have accepted that there was a reasonable excuse. In this case BF wrongly decided that they had no duty to review. Having done so they cannot then say to the person who required the review that they *did* have a duty to review within the meaning of s 15(2)(a) but unfortunately they didn't notify the conclusions of the review they didn't do within 45 days of receiving the notice of requirement.

The Tribunal's handbrake turn

45. It will be apparent from the previous section of this decision that in our opinion there was no valid review, no deemed conclusion on a review and no failure to give notice of a determination of a review. But in the most peculiar circumstances of this case we are going to accept Mr Rainsbury's submission that there *was* a deemed determination under s 15(2) that the decision letter should be upheld. We think that to take this course is something that is within the scope of the overriding objective of the Rules of this Tribunal to deal with a case fairly and justly. We are under no compulsion to do so: no binding authority to suggest our view as expressed above is wrong has been brought to our attention or has been discovered by us. But we need to explain ourselves.

The right of appeal in this case

46. What then are the rights of appeal to this Tribunal in a customs duty case? Between them subsections (1) to (1B) of s 16 seem to cover the field of appeals against decisions in relation to such duties. Section 16(1) is not applicable here because it only applies to an appeal against a review decision. Section 16(1A) does not apply (we would say based on our views set out in §§42 to 44) because it only applies to appeals against deemed conclusions under s 15(2) and we consider there has not been one. Section 16(1B) does not apply because the decision here, whether the original decision or any subsequent one, is not a relevant decision as that term is defined in s 13A, having regard to subsection (1)(j) of that section. (We do observe that it is decidedly odd that a person who does not require a review but wishes simply to appeal against a restoration decision cannot apparently do so. A review is, after all, not mandatory.)

47. If we were to stick to our view that there was no valid review in this case there appears to be no right of appeal. We considered whether we could strain the wording of s 16(1F) which provides that "[a]n appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so." We have no doubt this was intended to apply only to appeals to which those subsections apply. Read with an extreme literalness that is out of fashion at present, the subsection could be said to simply allow the Tribunal to permit an appeal to be made to it even though the application is made more than 30 or

75 days after the decision date and even though the decision is not one mentioned in subsections (1) to (1B).

48. While we are confident, in view of what Mr Rainsbury said to us, that BF would not take the position that such an interpretation is wrong and seek to appeal it, it is not an interpretation that we would feel at all comfortable in putting forward. Nor do we think that it would necessarily help, for this reason.

49. We could, if we thought s 16(1F) did apply, permit an extension of time to appeal to this Tribunal, and in the strange circumstances of this case we think from the attitude of BF to this appeal that they would not object to the Tribunal acting in this way.

50. That would then require us to consider the terms of s 16(4) FA 1994, as our powers in an appeal on an ancillary matter (which this is by virtue of paragraph 2(1)(r) Schedule 5 FA 1994) are limited. We can in relation to an ancillary matter require the Commissioners to conduct a review if we are satisfied that the person making the decision as to that matter could not have reasonably have arrived at that decision.

51. This gives us some difficulty because the obvious decisions to which the paragraph refers are the original decision (that of Mr Sanders) and a decision on a review, which does not, on the basis of our views in §§42 to 44, exist. On the basis of the evidence of Mr Sanders and the lack of evidence from the appellant we cannot say that Mr Sanders's decision was one which he could not reasonably have arrived at based on the evidence he had and which he explained to us.

52. But a "decision as to an ancillary matter" is, it seems to us, wider than just those two decisions (only one of which was actually made in this case – in our opinion). It could be argued that the decision of BF to treat the in time request for a review of an ancillary matter as out of time, the decision of BF to ignore s 14A and the decision of BF that there has been a deemed conclusion on a review when there was no review are all decisions "as to" an ancillary matter. They are decisions which in our view no person could have reasonably arrived at.

Drawing together the threads

53. But all of the arguments we have set out under the heading require a great deal of strained and/or creative interpretation. We are not at all confident that such a way of arriving at a requirement on BF to carry out a review (or further review) would survive much critical attack. It is for that reason that we have decided that the best way of allowing BF to carry out the review which they now accept they ought to carry out is for the Tribunal to swallow its pride and accept that it is sometimes better for the sake of an appellant who has been denied justice to admit that black is sometimes at least pale grey. We are therefore going to accept that there was a deemed determination of a review under s 15(2) and that therefore s 16(1A) applies to give the appellant a right to appeal to this Tribunal.

54. But there is still a logical difficulty which we are troubled by. We are accepting that an appeal is possible by virtue of s 16(1A) FA 1994 (deemed determination). Section 16(4) only applies if a person making a decision as to an ancillary matter could not reasonably have come to the impugned decision. In a s 16(1A) case no review decision has been made. So it still seems that the only decision we can declare unreasonable is the original one and we have no grounds to do so (see §51).

55. In the end we have to revert to the arguments set out at §52. We are going to say that the decision of BF not to carry out a review and to let the 45 days expire without notifying the appellant of its conclusion of a review is one that relates to an ancillary matter and is one that no reasonable person could have arrived at. We are confident from what we told by Mr Rainsbury that the Border Force will not seek to appeal this decision in this case.

56. We set out our decision with the directions we attach to it in the next part of this decision (see §60 below).

Guidance to BF

57. Mr Rainsbury said that BF would welcome guidance in cases like this. We have set out extensively where we think BF fell into error. Clearly the existence of s 14A and the need to deal properly with late requests for a review needs to be brought to the attention of officers dealing with appeals in restoration cases. Those seeking a review have rights in such cases including a right to apply to this Tribunal for a decision. BF must not deny people the ability to exercise that right.

58. The response to the appellant's letter of 24 April 2015 is a classic example of "Computer says no" - if the computer says the letter was issued on 5 January, no one dares to think that it could be wrong. As the *Little Britain* sketches in which that catchphrase appears show, BF is certainly not unique in this. But it was in error in neither taking the appellant's letter seriously nor checking the text of the letter dated 5 January to see if the appellant was making a valid point.

59. As to deemed conclusions we can only suggest that officers dealing with review requests make themselves familiar with HMRC's Appeals, Reviews and Tribunals Guide (ARTG). Any suggestion that they are not applicable to Border Force cases is wrong, as ARTG 6000ff is only about the special provisions that apply to restoration decisions. ARTG 6350 is particularly relevant here.

Decision

60. Our decision is that Border Force must carry out a review of Mr Sanders's decision of 5 February 2015. We direct that BF, in carrying out that review, must:

(1) take into account the letter from Instant International Freight ("IIF") of 1 March 2015, and in particular consider whether it gives rise to the existence of special circumstances in terms of the BF policy on restoration;

(2) take into account any representations and evidence from the appellant about the circumstances of the seizure and whether the appellant was attempting to evade duty rather than make an innocent or careless error;

(3) consider in the light of the IIF letter and any representations and evidence from the appellant whether BF's policy on evasion of duty was the correct one to apply, and if not must consider which is the correct policy to apply.

61. We say this to the appellant. It must not be assumed that because we have ordered the Border Force to conduct a review that their appeal will be upheld. We are ordering a review because we consider that the appellant was unfairly denied the opportunity to have a review, not because we think that the original decision was wrong or unreasonable. If the appellant believes the original decision was wrong or unreasonable it should make any representations it wishes to make (whether new ones or restatements of previous ones) to the Border Force which will no doubt be in contact with it soon.

62. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2016