[2016] UKFTT 0362 (TC)

TC05117

Appeal numbers: TC/2013/00738
TC/2013/02769
TC/2013/02771

EXCISE DUTY –seizure of imported tobacco - condemned as forfeit by the Magistrates - evidential dispute - res judicata and abuse of process considered –whether decision not to restore was reasonable and proportionate - yes - appeal dismissal

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILLIP BURTON **Appellants**
STACIE BURTON
TRUDI BROWN

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MS ELIZABETH BRIDGE

Sitting in public at Bristol on 21 March 2016

Ms Trudi Brown on behalf of the Appellants

Mr Robert Reid, Counsel, instructed by the Home Office, for the Respondents

Introduction and outline

1. This is an Excise duty case. On 11 November 2012 the respondents intercepted and seized approximately 20kg of hand rolling tobacco (the "Tobacco") from the appellants. They also seized the vehicle (a campervan) in which they were travelling.

2. The respondents decided that the Tobacco should not be restored, but restored the campervan on payment (which was made) of £3,347.50. These decisions (i.e. non restoration of the Tobacco and the decision to impose a fee of £3,347.50 for the restoration of the campervan) were reviewed by Officer Raymond Brenton ("Officer Brenton") who upheld both decisions.

3. In the condemnation proceeding heard before the Magistrates, the Tobacco was condemned, but the Magistrates observed that it was not proportionate to condemn the campervan. The restoration fee of £3,347.50 has, as a consequence, been reimbursed to the appellants.

4. This appeal is therefore solely against the decision by Officer Brenton that the Tobacco should not be restored.

5. The appellants appeals are joined and were heard together as they relate to the same facts and circumstances and all three appellants seek the same remedy in their appeals.

The Evidence

6. Trudi Brown ("Ms Brown") had prepared a statement of truth (basically a witness statement) in preparation for the condemnation proceedings before the Portsmouth Magistrates. She adopted that statement as her evidence in this appeal, and was cross-examined on it by Mr Reid. We found her to be a credible and reliable witness. It is therefore likely that she will seem baffled by the conclusion that we have reached at paragraph 49 below that we are obliged to accept the evidence of Officer Luke Starnes ("Officer Starnes") on the important evidential issue concerning the number of pouches of tobacco Mr Burton initially told Officer Starnes that the appellants were importing.

7. The witness statement/statement of truth compiled by Ms Brown had been drafted shortly after the events which happened on 11th and 12 November 2012, in anticipation of the condemnation proceedings.

8. Officer Starnes, the Officer who had initially stopped and searched the appellants' vehicle and who subsequently interviewed Mr Burton and Ms Brown, did not give evidence. He had however given evidence in the condemnation proceedings, and we were urged by Mr Reid to accept that evidence, and prefer it to the evidence given to us in person by Ms Brown.

9. We were not however provided with the witness statement of Officer Starnes which had formed the basis of his evidence in those condemnation proceedings. No explanation for this was given by Mr Reid.

10. Officer Brenton gave evidence on which he was cross examined. We found him to be honest and reliable witness and have accepted his evidence.

11. We were also provided with a bundle of documents, including notes of the appellants interviews with Officers of the Border Force at the time of the seizure; correspondence relating to the seizure, and the subsequent request for restoration. We were provided with an attendance note of the condemnation proceedings which took place before the Portsmouth Magistrates on 30 October 2013, compiled by Mr Duncan Milne ("Mr Milne") who attended and represented the Home Office in those proceedings.

12. Finally, we were provided with photographs of packets or pouches of hand rolling tobacco (not the goods in question in this appeal).

The disputed evidence

13. There is an important factual dispute between the parties which is highly relevant not only to Officer Brenton's decision, but also to our consideration of the facts as presented to us.

14. It concerns the entry in Officer Starnes notebook which records that in response to the question as to whether any of the appellants had purchased any goods whilst they had been away, Mr Burton replied "yes some baccy". Officer Starnes then asked "how much have you got", and Mr Burton replied "8 pouches each". Officer Starnes then asked "what 8 pouches or 8 X 500g sleeves of tobacco", to which Mr Burton apparently responded "8 X 500g pouches each".

15. It is the appellants' assertion that this is not what Mr Burton told Officer Starnes. Ms Brown says that both she and Mr Burton replied "12 – 13 packs each for three of us". Officer Starnes responded "what 12 pouches or 12 times 500g tobacco?", To which Ms Brown and Mr Burton replied "12 times 500g pack for all three of us to share".

16. We shall refer to this factual dispute as the "pouches evidential issue".

17. Mr Reid suggested strongly to us that we were obliged to accept Officer Starnes version of the pouches evidential issue because his evidence had been tested at the Magistrates court; and we could (and should) rely on the finding that Officer Starnes evidence was accepted by the Magistrates.

18. In effect he submits that we cannot, in the proceedings before us, come to a conclusion based on the appellants' version of the pouches evidential issue since this matter has already been decided by the Magistrates.

19. Mr Reid provided no statutory basis for this submission, nor any authorities but we believe he is basing his assertion on the legal principles of res judicata and abuse of process. For the reasons given in paragraphs 40-49 below, it is our view that we are bound by these principles and so must accept Officer Starnes version of the pouches evidential issue.

Findings of fact

20. From the evidence we make the following findings of fact:

(1) The appellants were intercepted at about 10 pm on the evening of 11 November 2012 at Portsmouth ferry port. They were entering the UK in a campervan ("campervan", "van" or "vehicle") which the appellants had driven to Spain some two months earlier where it had remained throughout that period.

(2) The appellants, however, had returned to the UK in the meantime. Ms Brown and Mr Burton had flown back twice in that period, and Miss Burton had flown back once.

(3) The reason given by the appellants for these interim return visits was that Mr Burton had to return to look after his business interests. Given his medical situation, Ms Brown had to accompany him. The family had also considered purchasing a caravan, in the United Kingdom, for Miss Burton, which they planned to take to Spain where it would be left. Ms Brown and Mr Burton would then return home in the campervan. As things turned out, no such caravan was ever purchased. But in anticipation of her "emigration" Miss Burton flew back to the UK whilst the van was in Spain, in order to collect some clothes and say goodbye to her friends.

(4) The appellants explained, and we accept, that they had not brought any hand rolling tobacco back into the UK on any of these interim trips. There was no need to carry it in hand luggage when it could be transported in the campervan on its ultimate return to the UK.

(5) Mr Burton had been intercepted at Portsmouth on a previous occasion in July 2009 when returning from a three day cruise to Bilbao. He was carrying 3.5 kg of hand rolling tobacco.

(6) On that occasion, Mr Burton had been travelling with Ms Brown who was also detained and interviewed. Our understanding is that it was on that occasion that she had been carrying cigarettes which were confiscated. She had misunderstood the phrase “duty-free” as it is used on ferries and assumed that she could bring in a duty-free amount as well as an amount on which duty had been paid in another EC country without any liability to further UK duty.

(7) It was Officer Starnes who stopped the campervan on its return to the UK on 11 November 2012. Mr Burton was driving the vehicle, Ms Brown was in the passenger seat and Miss Burton was sitting behind Mr Burton.

(8) There is no dispute that Officer Starnes asked Mr Burton whose vehicle it was, how long the appellants had been out of the country, where they had been, who had packed the vehicle, and whether they were aware that it was an offence to bring back items such as firearms and obscene

material to the UK. These have been described by Officer Brenton as "closing the door" questions.

(9) However what was said next is very much in dispute and is dealt with in more detail at paragraphs 38-49 below. But for the reasons given there we are obliged to find as a fact that in response to Officer Starnes question as to whether the appellants had got or purchased any tobacco or other goods, Mr Burton told him that the appellants had 8 pouches each. When further questioned by Officer Starnes as to whether he meant 8 X 500g pouches each rather than 8 X 500g sleeves, Mr Burton said that it was 8 X 500g pouches each.

(10) We were shown pictures of a "packet" or "pouch" (the two terms are used, apparently, synonymously) of hand rolling tobacco. Each packet is a box which weighs 500g. On removing the cellophane covering, the box contains 10 pouches each of 50g of tobacco.

(11) Mr Burton told Officer Starnes that these packets were in the wardrobe in the van. Officer Starnes then entered the vehicle and (helped by Mr Burton) unloaded 24 packets from the van onto a table which was in the foot hall. This table was out of sight of the appellants. It was behind and to the left of the vehicle.

(12) Officer Starnes then told Mr Burton that he wanted to x-ray the vehicle. Mr Burton drove it to the x-ray machine. Ms Brown and Miss Burton were still in the van at this stage. When it was parked in front of the x-ray machine, all three appellants got out of the vehicle. None of them could see the table on which the previously unloaded tobacco had been placed since it was in the foot hall whence they had come.

(13) The vehicle was x-rayed and then driven by Mr Burton back to the foot hall (and, we believe, to the table with the previously offloaded tobacco). We are not clear whether, at this stage, Ms Brown and Miss Burton were also in the van or whether they returned to the foot hall, on foot. But either way, they did not check the number of packets which had been previously offloaded onto the table.

(14) Officer Starnes then asked Mr Burton whether, if he (Officer Starnes) looked in the vehicle, he would find any more tobacco. Mr Burton replied "well how many have you got on the table". Officer Starnes said 24. Ms Brown and Mr Burton then told Officer Starnes that there was some more tobacco in the vehicle (as they had, in their version of events, already told him that each appellant was bringing 12 packets into the UK). They also told Officer Starnes where the additional packets could be found in the vehicle. These were then offloaded from the vehicle (and we think placed on the table with the others)

(15) The Tobacco had been purchased in Spain by Mr Burton. He had paid in cash, a large part of which originated from an insurance payout of approximately £15,000 arising from a burglary, theft from his van, and a whiplash injury. Ms Brown had been with Mr Burton on one of the trips on which he acquired this tobacco. It was Mr Burton who had packed the Tobacco into the van.

(16) Mr Burton has considerable mental health issues as a result of a fall from a ladder in 1993. His mental state is deteriorating. Although he did not give evidence in front of us, he was present throughout the hearing, and we could see how agitated he was with the proceedings.

(17) In light of Mr Burton's condition, Officer Starnes conducted only a short interview with him at the end of which Mr Burton was asked to sign Officer Starnes notes which he did. Officer Starnes records in his notebook that Mr Burton said that he had told Officer Starnes that the appellants had only 8 packets each of our hand rolling tobacco. Mr Burton wrote "I disagree with this as I said we had about 12 packets each I said cutters choice". He then signed the notebook. Ms Brown, who had been present when Mr Burton was interviewed, was also asked to sign the notebook. She wrote "I agree with the above". We find that by writing this, she was also agreeing with Mr Burton's caveat that he had told Officer Starnes that each appellant had about 12 packets each rather than 8.

(18) Ms Brown and Miss Burton were also interviewed. Following these interviews, another border agency Officer, Danny Marshall ("Officer Marshall") then explained to the appellants that the Tobacco was going to be confiscated as was the campervan. He said that, if the appellants paid £4,017, they could keep the van.

(19) The appellants phoned a friend who offered to pay this amount by way of a credit card payment over the telephone. The respondents were not prepared to accept payment in this way and so the appellants left the vehicle with the respondents.

(20) They returned to Portsmouth the following day with £4,017, in cash. Mr Burton paid this to Officer Starnes. It was then realised that this amount included VAT of approximately £700 which the appellants should not have paid. Officer Starnes took this amount out of the bag into which he had put the cash given to him by Mr Burton, and purportedly returned the £700 along with a pink chit, to Mr Burton. But in fact he did no such thing. He gave Mr Burton that chit but not the £700 cash. He had returned this to the bag. He then denied that he had done so. Mr Burton became increasingly agitated about this and it was only when the appellants threatened to call the police that Officer Marshall opened the bag and counted the cash. He found that the £700 was indeed in the bag and that Officer Starnes had not returned it to Mr Burton as he had claimed. The money was then returned to Mr Burton.

(21) The appellants told Officer Starnes (and indeed this tribunal) that they had bought the Tobacco for personal consumption and not for onward sale. They had also bought 2 packets for their weekday dog sitter, and 1 packet, the Golden Virginia, for their weekend dog sitter. In light of the decision in the Magistrate's court that the goods were condemned (and so treated as having been imported otherwise than for personal use (i.e. for a commercial purpose), we are obliged to find that the appellants had purchased and imported the Tobacco for commercial purposes.

(22) The appellants challenged the seizure of the Tobacco and the vehicle (basically seeking return of the Tobacco and the restoration fee paid for the vehicle). This challenge was made to the Portsmouth Magistrates.

(23) Prior to the hearing of the condemnation proceedings, the appellants had requested that the respondents restore both the Tobacco and the fee paid for restoring the van. By way of letters dated 20 December 2012, the respondents informed the appellants that they were prepared to do neither. The appellants then asked for a review of those decisions, and it was Officer Brenton who carried out these reviews. Although at that time the condemnation proceedings had not taken place, Officer Brenton undertook his reviews on the basis that the Tobacco was held in the UK for a commercial purpose.

(24) The outcome of his reviews were conveyed to Mr Burton in a letter dated 12 December 2012 (which dealt with his share of the Tobacco and the restoration fee for the vehicle) and by letters dated 21 December 2012 to Ms Brown and Miss Burton (which dealt with their shares of the Tobacco)

(25) In each case Officer Brenton concluded that the Tobacco should not be restored and, in the case of Mr Burton, the fee for the restoration of the vehicle should not be returned to him.

(26) The appellants appeal against these review decisions were stood over pending the outcome of the condemnation proceedings.

(27) Those proceedings were heard by the Portsmouth Magistrates on 30 October 2013. The Home Office was represented by Mr Milne, whose attendance note of the hearing we have already referred to at paragraph 11 above. From that note and the evidence given by Ms Brown before us, we find in relation to that hearing:

> (A) Officer Starnes tendered a witness statement which was based on his notebook entries. His evidence was given in accordance with that statement.
>
> (B) Officer Starnes was cross-examined at length about his notebook entries by Mrs Brown. She accused him of making a

number of mistakes and of omitting matters from his statement. She accused him of lying and that he had documented the evidence to suit his story.

(C) Officer Starnes's evidence to the Magistrates was that Mr Burton had initially told him that the appellants were each bringing into the UK, 8 X 500g pouches.

(D) Mr. Burton gave evidence and sought to explain that the Tobacco was for personal use and not concealed.

(E) Ms Brown gave evidence. Importantly, she expressed disagreement with Officer Starnes evidence and maintained that they had always disclosed the existence of 12 – 13 packs of tobacco each from the outset. She also said that the Tobacco was for personal use.

(F) A statement made by Miss Burton was also tendered as evidence.

(G) The Magistrates found on the balance of probabilities that there was "excessive tobacco for personal use" and noted there were a "number of trips". They also considered that a "full declaration" about the Tobacco was only made "when asked by the Officer". They were satisfied that this amounted to an "attempt to conceal" and therefore condemned the Tobacco.

(H) As regards the vehicle, the Magistrates decided that it was not proportionate to condemn it.

21. The respondents have repaid the restoration fee, originally paid by Mr Burton, of £3,347.50.

22. So although Officer Brenton's review letter to Mr Burton of 12 December 2012 deals with the restoration fee, that matter has now been resolved and is not an issue before us.

23. We had originally understood that there was a second round of review letters which dealt only with the Tobacco. But Mr Reid (from whom we had originally gleaned that impression at the strike out hearing), clarified that there were no further review letters. The ones that we should consider are those dated 21 December 2012 for Ms Brown and Miss Burton, and that dated 12 December 2012 for Mr Burton. We now turn to these.

The Review Letters

24. We have disregarded anything in the review letters which relates to the camper van.

25. The review letters to each of the appellants are in identical terms.

26. In each case Officer Brenton summarised the background. The summary was based very heavily on the interview records of the appellants following their questioning on the evening of 11 November 2012.

27. Officer Brenton indicated that his starting point was that the seizure of the tobacco was legal and that it was held in the UK for a commercial purpose (not for own use). At this stage, of course, the goods had not been condemned by the Magistrates.

28. He explained that seized goods should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered. He also indicated that he must consider whether the decision is fair reasonable and proportionate in all the circumstances.

29. He explained that he was guided by the restoration policy but not fettered by it. And he had considered the decision afresh to see whether there were any exceptional or mitigating circumstances that should be taken into account.

30. The general policy is that seized excise goods should not normally be restored. However each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

31. Officer Brenton then went on to consider the matters summarised below:

> (1) The appellants must have known that they were expected to answer questions truthfully and disclose the full quantities of any excise goods carried in the vehicle to Officers of the Border Force.
>
> (2) Mr Burton had initially told Officer Starnes that each appellant was carrying only 8 pouches. It was only when the vehicle was selected for examination by x-ray that, when asked whether, if the vehicle was searched, the Officer would find any more tobacco, Mr Burton replied "yeah to be honest there is some more under the seat"
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> (3) When signing the Officer's notebook Mr Burton indicated disagreement with Officer Starnes version, and countersigned the notebook by saying that he had said to Officer Starnes that they had about 12 packets each. Officer Brenton believed this assertion to be disingenuous and a further example of Mr Burton's dishonesty.
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> (4) The quantity of tobacco imported, namely 20kg, was almost 7 times the guide level specified in the relevant regulations of 1kg tobacco per person.
>
> (5) Mr Burton had failed to disclose all of the Tobacco thus misleading the Officer about the true quantity. If there was nothing to hide there was no need to mislead the Officer.

(6) Mr Burton had previously been intercepted in July 2009 following the return from a three-day cruise in Bilbao when he had failed to declare that he was carrying 3.5 kg of hand rolling tobacco. It was established then that Mr Burton had travelled five times in the previous four months, that he was out of work, and that he was reported to have stated that "he didn't care about the goods because he had a good run and he would not be returning through Portsmouth again".

(7) Mr Burton paid cash for the goods, something which is common amongst smugglers to ensure that there is no evidence of the transaction in their bank accounts or statements.

(8) No evidence had been produced to confirm how the purchase of the tobacco was funded by a family on a very limited income.

(9) Based on their actions, replies and previous experience, Mr Burton and Ms Brown clearly knew that what they were doing was wrong. They were importing a large quantity of excise goods worth over £6,000 in UK shops and which was likely to damage legitimate UK trade.

(10) Officer Brenton then summarised that:

(A) On the evidence before him the goods were held for profit. They should, therefore, not normally be restored and in any event they could only be restored by the Magistrates.

(B) Non-restoration is fair reasonable and proportionate in the circumstances

(C) He had read the appellants letters carefully to see whether a case had been presented for disapplying Border Force policy and whether there were any exceptional circumstances from doing so; he came to the conclusion that there was no reason to disapply the policy and that there were no exceptional circumstances.

(11) He concluded that "I am of the opinion that the application of the policy in this case treats you no more leniently or harshly than anyone else in similar circumstances and therefore conclude that the decision not restore tobacco was both reasonable and proportionate in all of the circumstances"

(12) He ended the letter by informing the appellants that if they had fresh information that they would like him to consider, it should be sent to him. He also explained the appellants appeal rights against his review decision.

32. We have never been wholly clear as to the amount of tobacco that was originally confiscated. In the review letters, Officer Brenton states that it was 20.4 kilograms. Yet Officer Starnes in his notebook records confiscating 20 kilograms of which 500 grams was Golden Virginia. The appellants claim to

have told Officer Starnes that they were each carrying 12 packets, but in various places, in the evidence, this is 12 to 13 packets each.

33. However, for the purposes of this decision, the precise amount is not important.

Officer Brenton's evidence

34. As we have said at paragraph 10 above, we found Officer Brenton to be an honest and credible witness.

35. He gave evidence broadly justifying the decision he had come to in the review letters, and in particular:

> (1) The Border Force Officers had decided that the Tobacco was not for own use and this had been confirmed by the Magistrates. This couldn't be challenged in these proceedings. So for Officer Brenton, the decision was whether there are any exceptional circumstances in this case that would move him to go against the policy (which is not to restore save in exceptional circumstances).
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> (2) His view was that there were no such exceptional circumstances.
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> (3) On the pouches evidential issue, the Officer had clearly asked what each appellant was carrying and had clearly been told that each was carrying 8 packs. This was confirmed when queried by Officer Starnes. If the Officer had been told that there were 12 packets each and had taken 8 each out of the vehicle, the Officer would have asked where the rest were. The 24 packets that he had taken out of the van tallied with the three lots of 8 packets that he had been told by the appellants that they were carrying.
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> (4) It was only when the x-ray had shown something else that it was put to Mr Burton that there might have been more packets and he then said that to be honest there was some under the seat. This is evidence of deceit and concealment.
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> (5) Miss Burton had said that she was prepared to buy illicit tobacco from her mates at about half the legal price. This suggested that she was somebody who was involved in illicit activity and made his decision more reasonable.
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> (6) The goods were not for personal use. This had been established by the Magistrates. There was no evidence that they were going to be passed on to anyone on a not for profit basis (the 3 packets which were being given to the dog sitter are treated as personal use). So the goods must have been intended to have been passed on to others for profit.
>
> (7) But in any case, the policy is now that it does not matter so much whether goods are to be passed on a "for profit" or "not for profit" basis.

What matters is whether there are exceptional circumstances to justify restoration in light of the policy.

The law relating to the pouches evidential issue

Res judicata and issue estoppel

36. We have considered a number of authorities which deal with these principles, namely *Littlewoods Retail Ltd v HMRC* [2014] EWHC 868 (Ch) ("*Littlewoods*"), *Foneshops Ltd v HMRC* [2015] UKFTT 0410 (TC) ("*Foneshops*"), *Carter Lauren Construction Ltd v HMRC* ("*Carter Lauren*"), *University College London v HMRC* ("*University College*"). We have also reviewed Phipson on Evidence, – 18th edition ("*Phipson*").

37. From these sources we derive the following principles which are relevant to the pouches evidential issue.

(1) The words res judicata explain themselves. If the res (the thing actually and directly in dispute) has already been adjudicated upon by a competent court, it cannot be litigated again.

(2) The underlying public interest for res judicata and abuse of process is the same. That there should be finality in litigation and that a party should not be twice vexed in the same matter. (*Littlewoods* at [243]).

(3) Res judicata whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. (*Littlewoods* at [166]).

(4) Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the issue is relevant, one of the parties seeks to re-open that issue (*Littlewoods* at [153]).

(5) In order for an issue estoppel to arise, three conditions must be satisfied:

(i) the same question must previously have been decided;

(ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and

(iii) the parties to the prior judicial decision must have been the same persons as the parties to subsequent proceedings in which the estoppel is raised. (*Littlewoods* at 152)

(6) "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of

action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement, to two or more different causes of action. If in litigation upon such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, nor deny that it was fulfilled if the court in the first litigation determined that it was". (*Littlewoods* at [209] recording Diplock LJ in *Thoday v Thoday*at [198]).

(7) When considering whether the same issue has been previously decided, the safest test is to enquire whether the same evidence would support both issues (*Phipson* at [43 – 33]).

(8) Generally the operation of res judicata does not apply to tax cases although there may be exceptional cases which do not fall within the general prohibition (*Phipson* at [43 – 34]). This stems from the case of *Caffoor v Colombo Income Tax Commissioner*[1961] AC 584.

(9) "Anomalous or not there is in my judgment no doubt that the Caffoor principle remains good law in England and Wales at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment". (*Littlewoods* at [175]).

(10) There is a distinction between appeals relating to assessments and other appeals; in assessment appeals it is inherent that the issue of finality of decision does not arise; there is no double vexation because each year is separate. In relation to CIS appeals, res judicata is required since there is a need for finality, and to avoid multiple vexation. The application of res judicata is necessary both for the protection of taxpayer and the Revenue. Neither party should be able to re-litigate an issue which has been determined in relation to one application in relation to subsequent application. (*Carter Lauren* at [52] and [54]).

(11) It cannot be in public interest or in the interests of finality of litigation that the exact same issue should be capable of being litigated a fresh – with potentially different answers – in more than one appeal. (*Carter Lauren* at [54]).

Abuse of process

(12) Abuse of process concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which

although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute, among right-thinking people (*Foneshops* at [30]).

(13) A previous judgement may preclude a subsequent claim in some situations even beyond the extended doctrine of res judicata. But a person may be barred from bringing a subsequent claim because he “could and should” have raised it during previous litigation. Further, a person may be barred from bringing a claim which amounts to a "collateral attack” on a previous judgement. (*Phipson* at [43 – 45]).

(14) It is an abuse of process to initiate proceedings in a court for the purpose of mounting a collateral attack on a final decision against an intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made (*Phipson* 43 – 58) recording the dicta of *Lord Diplock in Hunter v Chief Constable of West Midlands Police* [1982] AC 529..

(15) The doctrine of abuse of process is not part of the doctrine res judicata and so still applicable to tax cases (*Foneshops* at [29]).

(16) Abuse of process prevents previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances. (*Foneshops* at [31]).

(17) "Barring special circumstances, it would be an abuse of the litigation process if the appellant were able to raise in this appeal an issue that was effectively decided against it when it’s MTIC appeal was struck out". (*Foneshops* at [38]).

Discussion of the pouches evidential issue

38. As we said at paragraph 17 above, Mr Reid was of the view that we were bound to accept Officer Starnes' version of events on the pouches evidential issue. Officer Brenton certainly did and cited Mr Burton's subsequent admission that each appellant was carrying 12 packets as evidence of deceit and concealment. We consider that this could certainly be considered an aggravating factor and a reason not to restore.

39. Although we only had Officer Milnes' note of the Magistrates proceedings and decision, we also have Ms Brown's oral testimony to the effect that:

(1) Officer Starnes gave evidence along the lines of his notebook entries and in respect of the pouches evidential issue claimed that Mr Burton had initially said that each appellant was carrying only 8 pouches.

(2) She had cross-examined him on his evidence and suggested that he was lying.

(3) Notwithstanding this, the Magistrates had accepted Officer Starnes' evidence on the pouches evidential issue.

40. Accordingly, the pouches evidential issue has clearly been considered by the Magistrates who comprise a court of competent jurisdiction; and even if no specific mention was made to this effect by those Magistrates, Officer Starnes' version of the pouches evidential issue has been investigated and a ruling made (namely that the Tobacco should be condemned as forfeit) which has taken into account the pouches evidential issue, and in respect of which Officer Starnes' version of events was accepted by the Magistrates.

41. Officer Starnes' version of the pouches evidential issue is a necessary ingredient of the Magistrate's decision to condemn the Tobacco. The three conditions, mentioned in paragraph 37(5) above are satisfied. The pouches evidential issue has previously been decided in the Magistrates court. That decision is a final decision of a court of competent jurisdiction, and the parties to that decision are the same as the parties in this appeal. It is also a necessary ingredient of our decision.

42. The pouches evidential issue has been determined by the Magistrates and the general principle of res judicata, therefore, applies to his testimony unless the exemption for tax cases applies. In our view it does not.

43. For same reasons given in *Carter Lauren* in relation to the CIS (as set out in paragraph 37(10) above), we consider there is a similar distinction between appeals relating to an annual tax (to which the tax exemption applies) and one relating to a claim for restoration of seized excise goods.

44. Such a claim requires the same need for finality as a CIS claim. There is a possibility of double vexation since the claim relates to a single discreet event. There is a need for finality, and to avoid multiple vexation.

45. It is our view that it cannot be in the public interest, or in the interest of finality of litigation that the pouches evidential issue should be reheard before this Tribunal.

46. If we were to conclude that the appellants version was correct, what then? Two courts of competence jurisdiction would have come to different conclusions on the same issue. Would this enable the appellants to impugn the Magistrates' decision, on the basis that we have determined that the appellants initially said 12 pouches rather 8? It opens exactly the can of worms that res judicata is designed to prevent.

47. It is also an abuse of process since the pouches evidential issue is a previously litigated issue and therefore should not be retried unless there are special circumstances. We can see no special circumstances here.

48. Ms Brown would not, we suspect, see herself as mounting a "collateral attack" on the Magistrate's decision by raising the pouches evidential issue in these proceedings. But in legal jargon, that is exactly what she is doing. It would be an abuse of process if the appellants were able to raise, in the appeal before this Tribunal,

the pouches evidential issue which was effectively decided against them by the Portsmouth Magistrates.

49. And so, on the pouches evidential issue, we are obliged, as a matter of the twin principles of res judicata and abuse of process, to accept Officer Starnes' version of the pouches evidential issue in considering the restoration of the Tobacco, and the reasonableness of Officer Brenton's reviews.

The law relating to the seizure and restoration of the Tobacco

UK statute and case law

50. We set out in the Appendix to this decision the relevant statutory provisions relating to the seizure and the restoration of the Tobacco and the vehicle, the right to seek a review of decisions not to restore, the right to appeal to the Tribunal against review decisions and the powers of the Tribunal on determination of such an appeal.

51. It is important to bear in mind the limitations of the Tribunal's jurisdiction as set out in s 16(4) FA 1994. By virtue of s 16(8) and Schedule 5 of FA 1994, a decision under s 152(b) CEMA whether or not to restore any item is a "decision as to an ancillary matter" as referred to in s 16(4) FA 1994. Therefore in essence, our powers are limited to considering whether Officer Brenton's decision not to restore the Tobacco could not reasonably have been arrived at. If we find that it could not have been reasonably arrived at, our powers are limited to making directions of the type referred to at s 16(4)(a) to (c) FA 1994. We have no power to order the respondents to return the Tobacco to the appellants. Nor do we have any power to award compensation.

52. Since this is a case where proceedings for condemnation took place before the Portsmouth Magistrate and the Magistrates found that the Tobacco was at the time of seizure liable to forfeiture (and so condemned it as forfeited), we must consider what "real facts" were taken into account by the Magistrates in coming to that conclusion. In *Balbir Singh Gora v C & E Comms* [2003] EWCA Civ 525 ("*Gora*"), Pill LJ said at [56] "the Tribunal accepted that where liability to forfeiture has been determined by a court in condemnation proceedings, there is no further room for fact finding by the Tribunal and it has no jurisdiction". So we must accept that the Tobacco was lawfully condemned as forfeit in accordance with the finding of the Magistrates' court.

53. The court of Appeal in *Customs and Excise Commissioners v J H Corbett(Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by Officer Brenton and in so doing should answer the following questions:

> (1) Did he reach a decision which no reasonable Officer could have reached? Does the decision betray an error of law material to the decision? Did he take into account all relevant considerations? Did he leave out of account all irrelevant considerations? However, *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 is authority for the proposition that, if Officer Brenton's decision failed to take into account relevant considerations, we

> may nevertheless dismiss the appeal if we are satisfied that, even if he had taken into account those considerations, his decision would "inevitably" have been the same.

54. In *Gora*, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and any decision which in the light of the information available to the Officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal. As we said in the strike out application, "We can consider … facts as at the date of the hearing. We are not restricted to considering only those facts which were either available to or specifically put before the reviewing Officer when considering the reasonableness of the decision".

Proportionality

55. The application of the doctrine of proportionality to the reasonableness and lawfulness of the reviewing Officer's decision has been recently considered by this Tribunal in the case of *Vladimir Pilats v The Director of Border Revenue* [2016] UKFTT 0193(TC). In that case, Judge Herrington undertook a comprehensive review of the application of the doctrine of proportionality in this area. Whilst not binding upon us, we consider it to be an accurate and masterful summary of the relevant law. Having reviewed the various authorities, Judge Herrington opined:

> "59. *Smith* and *Waya* are therefore authority for the proposition that the imposition of a penalty, seizure of goods and the vehicle in which they were conveyed and the making of an assessment for the unpaid excise duty would not, depending on the circumstances, be a disproportionate response to a deliberate smuggling attempt.
>
> 60. Furthermore, this Tribunal has in the recent case of Staniszeski v HMRC [2016] UKFTT 128 held that the doctrine of proportionality is relevant to penalties but not to the duty itself. The Tribunal observed that excise duty is a tax derived from EU Directives and its aim is to raise revenue either directly or indirectly on the consumption of excise goods. Although the assessment power in s 12 FA 1994 was a revenue raising measure, it was not immune to challenge on grounds of proportionality. However, s 12 in the Tribunal's view clearly did not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be passed) and the time that they were seized this was sufficient for the defendant to have obtained a benefit by having evaded the payment of excise duty. Likewise, it appears to us that the moment the appellants brought the Cigarettes into the UK without having declared them the excise duty point arose and the liability to excise duty arose and could be assessed pursuant to s 12. In those circumstances, we cannot see that it can be said that it is in principle disproportionate to assess duty on goods which have been seized because they have been taken past the excise duty point without them having been declared. The assessment is simply the inevitable consequence of an excise duty point having arisen and the appellants, as the

person in possession of the goods at the time the excise duty point arose is the person liable to be assessed.

61. It is therefore our view that in considering the question of proportionality we should leave out of account the fact that that an assessment to excise duty has been made and the amount of that assessment. In other words, the assessment itself can never be regarded as disproportionate. We should therefore only consider whether the sanctions themselves for the failure to declare the goods are disproportionate in the circumstances - that is the seizure of the Cigarettes and the Vehicle and the charging of the penalty. That is not to say that in an appropriate case it would not be necessary to take into account the overall financial impact of those sanctions on the offender, and in that regard clearly the fact that he has liability to pay the excise duty may need to be taken into account.

62. What this means in the context of the present appeal is that we need to examine whether Officer Hodge exercised her discretion not to restore the Cigarettes and Vehicle proportionately as that term is understood both under EU law and under the Convention, and that a failure to do so will make the decision unreasonable."

Submissions on the seizure and restoration of the Tobacco

The respondents' position

56. Mr Reid for the respondents made the following submissions:

(1) We are bound to accept Officer Starnes' version of the pouches evidential issue.

(2) We are bound to accept the Magistrates finding that the Tobacco was condemned as forfeit and so was not for personal use.

(3) Since the Tobacco was not for personal use and there was no one to whom it was to be supplied on a not for profit basis, the logical conclusion was that it was to be used commercially for sale at a profit.

(4) The appellants have given no explanation as to their points of entry into the UK. Living in Bridgwater the obvious port to leave and enter the UK is Portsmouth. Dover is not the logical one if you are driving to Spain.

(5) The facts show that there are no exceptional circumstances, something that we have heard from Officer Brenton.

(6) We might be concerned with Mr Burton's almost tantalising taunting of the Officers that he had "had a good run".

(7) There were five broad strands on which Officer Brenton had made his decision:

(A) The untrue assertions to the Border Force Officers evidencing concealment.

(B) The 2009 interception of Mr Burton and Ms Brown which affects the reasonableness of the decision.

(C) The quantity of the Tobacco.

(D) The impression that they are regular contraband runners, given the number of trips they have made to and from the continent.

(E) The appearance of unexplained income financing those trips and purchases.

(8) So taking all the circumstances into account Officer Brenton's decision not to restore was reasonable

The appellants' position

57. Ms Brown on behalf of the appellants made few oral submissions at the hearing. However, she had made submissions in the strike out application and in her statement of truth, and from these we derive the following as being the appellants' position.

(1) The Tobacco was imported for personal use.

(2) Officer Starnes had not told the truth and that the appellants' version of the pouches evidential issue was the correct one.

(3) The trip to Spain and the purchase of the Tobacco had been funded (at least in part) by the insurance payment of approximately £15,000. The trips that the family had made without the vehicle were bona fide for the reasons given at paragraph 20(3) above, namely they returned to look after their business interests and Miss Burton to say goodbye to her friends (erroneously as it turned out on the assumption that she would be emigrating to Spain).

(4) There was a serious flaw in the Border Force's calculation that the number of cigarettes Ms Brown smoked.

(5) The Officers have not included their statements a number of matters which actually happened in practice (in respect of some whisky they had with them in the van, an ornamental knife and the "misunderstandings" regarding the VAT which had been paid by Mr Burton to the Border Force Officers at the time the vehicle was restored).

(6) The Officers had made a number of mistakes in their reports (for example getting names, dates of birth etc wrong). It was Ms Brown's submission that this lack of attention to detail was evidence of

incompetence on behalf of the Officers and thus rendered suspect their ability to judge whether goods were for commercial use.

(7) As regards the seizure in 2009, Ms Brown had explained that the reason she had brought in too many cigarettes was because of a misunderstanding about the meaning of "duty free" and its interaction between goods bought duty paid in other EC jurisdictions. She was not over the guide limit.

(8) The majority of the criticisms that have been made by Officer Brenton and the Border Force Officers have been aimed at Mr Burton which is unfair. The Officers knew of his medical condition on the night that the appellants were intercepted at Portsmouth.

(9) They are not commercial smugglers, and they simply used different ferry ports, even though there might have been nearer ports in the UK than Dover. The appellants have always been happy to drive, and would prefer shorter ferry crossings.

Discussion on the seizure and restoration of Tobacco

58. We remind ourselves that, as set out in paragraph 53 above, our jurisdiction is limited to considering whether Officer Brenton's decision not to restore the Tobacco could reasonably have been arrived at. So we must decide whether Officer Brenton's decision is (in shorthand) a reasonable and proportionate one.

59. The principles in determining reasonableness which we adopt are those set out in paragraph 53 above, and as regards proportionality, those set out at paragraph 55 above.

60. We also remind ourselves that, on the authority of *Gora*, we can consider not just the facts that were before Officer Brenton when undertaking his review, but facts which have been established since, and importantly, at the hearing before us.

61. We also remind ourselves of two other matters by which we are bound.

62. The first is that, we are obliged to accept that Officer Starnes' version of the pouches evidential issue is the correct one. Secondly, we must accept that the Tobacco was lawfully condemned as forfeit in accordance with the findings of the Magistrates court and thus was imported otherwise than for the appellants own use.

63. The respondents policy when considering whether the Tobacco should be restored was set out by Office Brenton in the review letters.

64. Importantly he stated that:

> "If the excise goods were held for profit, and should therefore not normally be restored, or if they were to be passed on to others on a "not for profit" reimbursement basis.

> If the excise goods were to be passed onto others on a “not for profit” reimbursement basis, whether there were aggravating circumstances because if there not, then the goods should normally be restored for a fee. If there were aggravating circumstances, then whether the degree of that aggravation should result in the refusal to restore the goods……”

65. The matters that he took into account are set out in paragraphs 27-31 and 35 above.

66. We cannot consider the appellants’ submission that the Tobacco was for personal use.

67. Having accepted Officer Starnes’ version of the pouches evidential issue, we agree with Officer Brenton that this evidences an intention to deceive.

68. And having considered the other matters that he took into account, and subject to what we say below regarding "not for profit", we think that he has taken into account all relevant matters and has not taken into account irrelevant ones, when reaching his review decision.

69. Whether or not goods are being passed on to others on a “not for profit” basis is clearly significant as the extracts from the review letters at paragraph 64 above illustrate. Whilst we have to accept that the Tobacco was imported otherwise than for own use, that does not mean that the appellants must be automatically regarded as intending to sell the Tobacco on at a profit.

70. Ms Brown’s evidence, as set out in her statement of truth, and as repeated before us in oral evidence, was that the source of funds for the purchase of the Tobacco was the insurance pay out mentioned at paragraph 20(15) above. We have found as a fact that this is the case. It was not seriously challenged by the respondents.

71. But Officer Brenton in the review letters states that "no evidence has ever been produced to confirm how the 20.4kg was funded by a family on a very limited income and the fact that Ms Brown did not own any of the Tobacco goods, I am satisfied on the evidence before me that these goods were held for profit and should therefore not normally be restored”.

72. Officer Brenton further stated in the review letters that "as you have not claimed that the excise goods were to be passed on to others on a "not for profit" reimbursement basis, I conclude that they were held for profit and should therefore not normally be restored. Non-restoration is fair, reasonable and proportionate in these circumstances".

73. Furthermore, in his evidence, Officer Brenton explained that he had also arrived at this conclusion by way of operation of the following logic. The Magistrates had found that the goods had been imported otherwise than for personal use (and personal use includes passing the goods on to the dog sitters by way of a gift). Since there was no evidence of the appellants having bought the goods for someone else who had paid

them, the only conclusion open to him was that they were being supplied to others for profit.

74. The basis for the statement in the review letter at paragraph 72 above seems to come from the exchange with Officer Starnes during Ms Brown's interview in which (according to the record in Officer Starnes' notebook) she was asked: "is it your intention to supply others with the HRT" to which Ms Brown responded "no just the day sitter and son".

75. And in her statement of truth, Ms Brown states that she was asked by Officer Starnes "are you receiving any money for the goods?", to which "we all replied no it is for own use plus some for our dog sitters and son".

76. So it seems it is not just Officer Brenton's logic that has formed the basis of his conclusion that, since there was no evidence of the appellants having bought the goods for someone else who had paid for them, the only conclusion open to him was that they were being supplied to others for profit. The statements by Ms Brown to Officer Starnes clearly indicate that the appellants were not proposing to pass the good on to somebody else who was to pay for them by way of reimbursement.

77. We agree with Officer Brenton. Since the goods were found to have been imported otherwise than for personal use, and the appellants have clearly indicated that they were not going to pass them on to others on a not for profit reimbursement basis, the conclusion that they were, therefore, passing the goods on a "for profit" basis, is a reasonable and wholly justifiable one.

78. But as we have mentioned above, Officer Brenton has failed to take into account the insurance payment as a source of funds for the Tobacco. Does this render the otherwise reasonable conclusion that Officer Brenton has come to, an unreasonable one? We think not. Although not expressly stated, it is no doubt the appellants position that they did not need to sell the Tobacco on for a profit because they had the financial wherewithal to pay for them in the first place. They did not need funding by someone else. But having the necessary funds is equally consistent with the inference that the appellants, in order to maximise their profit, were able to fund the purchase of a greater amount of Tobacco than would otherwise have been the case without the insurance payment. And thus were able to generate a greater profit when passing the goods on to others. In light of the fact that they were not passing these on on a not for profit basis the only reasonable conclusion is that they were passing them on a "for profit" basis.

Conclusion

79. For all of the foregoing reasons, it is our conclusion that Officer Brenton's decisions in the review letters were reasonable ones when tested against the criteria set out in paragraph 53 above. Furthermore, taking into account the principles of proportionality set out at paragraph 55 above we consider, like Officer Brenton, that non restoration in these circumstances is proportionate.

Decision

80. For the reasons given above, we dismiss the appeal.

Appeal rights

81. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 24 MAY 2016

Appendix

Relevant Legislation

Liability to excise duty

82. Section 2 of the Tobacco Products Duty Act 1979 provides that excise duty is payable on tobacco products when they are imported into the United Kingdom.

83. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

> "13(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held -
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ('P'), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of -
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;
>
> (c) P's conduct, including P's intended use of the goods or any refusal to disclose the intended use of those goods;
>
> …
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities

...

800 cigarettes

(i) whether P personally financed the purchase of those goods;

(j) any other circumstances that appears to be relevant.

(5) For the purposes of the exception in paragraph (3) (b) –

…

(b) "own use" includes use as a personal gift but does not include the transfer of goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

Seizure of Tobacco [and vehicle] and decision not to restore

84. Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

> "88. If in relation to any excise goods that are liable to duty that has not been paid there is –
>
> (a) a contravention of any provision of these Regulations, or
>
> (b) ...
>
> those goods shall be liable to forfeiture."

85. The Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

> "139(1) Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any Officer...
>
> ...
>
> 141(1) ...where anything has become liable to forfeiture under the customs and excise Acts -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the things so liable, shall also be liable to forfeiture."

86. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

> "Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ..."

87. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the Magistrates' court. In these circumstances, Paragraph 6 Schedule 3 provides:

> "Where notice of claim in respect of anything is duly given in accordance with paragraph 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

88. Section 152 of CEMA 1979 provides:

> "The Commissioners may as they see fit –
>
> (a) ...
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts] ... "

89. Sections 14 and 15 of the Finance Act 1994 makes provision for a person to require a review of a decision of HMRC under section 152(b) CEMA not to restore anything seized from that person. By virtue of Section 16(8) and Schedule 5 to FA 1994, a decision under Section 152 (b) of CEMA 1979 is a "decision as to an ancillary matter".

90. Section 16(1) of the Finance Act 1994 provides that a person can appeal against a decision on a review under section 15. Section 16(4) provides:

> "(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 that 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."