



TC05435

Appeal number: TC/2015/02217

*EXCISE DUTY – refusal to restore – whether limited reasoning in decision
letter meant decision was unreasonable - no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GLOBAL LOGISTIK HEINSBERG GMBH

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR R FREESTON**

Sitting in public at The Royal Courts of Justice on 21 January 2016

Mr P Dayle, Counsel for the Appellant

Mr M Newbold, Counsel for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of the Respondent to refuse to restore a vehicle seized by Border Force on 25 September 2014.

5 Background

2. On 25 September 2014, a trailer registered in the name of the Appellant and pulled by a tractor unit owned by a third party was stopped at the port of Dover. The trailer contained 22,680 litres of mixed alcohol, the duty on such alcohol amounting to £31,151.26.

10 3. Border Force were not satisfied that duty had been properly accounted for in respect of the load and seized the consignment, the tractor unit and the trailer as liable to forfeiture under the provisions of the Customs & Excise Management Act (“CEMA”) 1979.

15 4. The legality of the seizure was not contested and, accordingly, the deeming provisions of CEMA 1979 apply and the consignment, tractor unit and trailer are deemed to have been legally seized.

5. The Appellant wrote to the Respondent (“BF”) on 23 October 2014 requesting release of the trailer unit, noting that the trailer had been hired out to a third party and disclaiming responsibility for any actions of that third party.

20 6. BF replied on 18 November 2014, requesting further information as to the hiring agreement with the third party. The Appellant did not respond to the request for further information and accordingly, on 8 July 2015, BF wrote to the Respondent with their decision to refuse to restore the trailer.

25 7. On 15 January 2015, the Appellant requested a review of the decision to restore, providing additional documentation:

(1) a rental agreement with option to purchase dated 19 September 2014 between the Appellant and Hoet Trucking en Renting nv (“Hoet”), in Belgium

(2) the trailer registration certificate issued by Belgium

30 (3) a rental agreement dated 20 September 2014 between the Appellant and KMB Logistic sro (“KMB”) in Slovakia for the period 20 September 2014 to 20 December 2014.

These documents did not fully provide the information sought by BF in their letter of 18 November 2014.

35 8. On 17 February 2015, the review was concluded and the decision not to restore the trailer was upheld. The review letter set out a summary of the Border Force restoration policy for seized vehicles and the matters considered, including a reference to a policy C, which provides that where an “operator fails to provide evidence ... that

the operator was neither responsible for or nor complicit in the smuggling attempt then ... if the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less)".

- 5 9. The letter noted that the appellant had not provided the information requested in the letter of 18 November 2014, nor had any explanation been given as to why the information had not been supplied. The review officer considered that a "somewhat confusing picture emerges" as the trailer was rented by the appellant from a third party, but no substantive details of the rental terms and conditions had been supplied.
- 10 The trailer was then rented by the appellant to another third party on the next day; again, no substantive details of the terms and conditions had been supplied. The review officer could not understand why the appellant would take out a rental agreement on one day and then the next day rent the same trailer to third party, and noted that there was no information as to whether the onward rental would breach the terms and conditions of the first rental agreement. The review officer could not find a reason to vary the Border Policy not to restore and upheld the original decision. The review noted that if the appellant had fresh information available, that this could still be considered, and also noted that the appellant had the right to appeal the review decision to this Tribunal.
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- 20 10. The Appellant appealed against the decision on 19 March 2015.

Relevant law

11. Section 139(1) CEMA 1979 provides that:

25 Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

12. Section 141(1) CEMA 1979 provides that:

Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—

30 (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

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

13. Section 152 CEMA 1979 provides that (as relevant):

The Commissioners may, as they see fit—

40 ...

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts

Appellant’s evidence

14. The Appellant provided a witness statement from Nihat Helvacioğlu, who was not present at the hearing. The relationship of Mr Helvacioğlu was not specified in the witness statement, which repeated the background to the seizure and referred to the copy documentation provided to BF. No further substantive information was provided in the witness statement.

Respondent’s evidence

15. Officer Harris, the officer who undertook the review, provided a witness statement and oral evidence at the hearing.

16. Officer Harris explained that he had based his decision on the information available to him at the time: the original restoration request, the correspondence, and the documents provided by the Appellant.

17. With regard to the documents provided by the Appellant, Officer Harris noted that the contract between the Appellant and Hoet (the rental agreement with an option to purchase) is not a full document as no terms and conditions are included, there are no details as to payments to be made, nor any details of the term period of the agreement.

18. Similarly, he noted that the rental agreement between the Appellant and KMB also does not have any substantive terms and conditions, and no evidence had been provided to indicate what provisions were in place to stop the vehicle being used for smuggling.

19. Officer Harris had contacted the Appellant’s solicitors whilst undertaking the review to ask whether they had any more information to add. He accepted that, in this conversation and in correspondence, he had not necessarily given specific detail on his concerns but explained that it would not be appropriate to do so and that his request for any further information should have made it clear that there were concerns. He noted that the burden of proof is on the Appellant to set out reasons by the discretionary power to restore should be applied.

20. When asked about the information included in the review letter about Border Force’s restoration policy, Officer Harris explained that he had included the information because the initial decision maker had only included a summary of the policy applying to leased vehicles. Officer Harris was not satisfied that the Appellant had provided sufficient evidence to show that the leased vehicle policy applied: for example, there was no information as to what had happened between the Appellant and KMB following the seizure, nor had any information been given to show whether the Appellant was still making payments under the rental agreement with Hoet. As it was not clear that the leased vehicle policy applied, Officer Harris had expanded the summary to include summaries of all the policies.

21. Officer Harris explained that he had upheld the refusal to restore decision for a number of reasons: he did not consider that the Appellant had demonstrated title to the trailer; he was unclear as to the relationship between the Appellant and the other parties involved, and he did not believe he had been presented with the full picture.
5 As such, he did not consider that restoration would be appropriate.

22. Officer Harris was asked to explain why he had not applied the Border Force policy permitting restoration to an operator who has not previously been involved in a smuggling attempt where the potential lost revenue is less than £50,000. Officer Harris explained that the Appellant had not demonstrated title to the trailer; before
10 such policy could be applied, the Appellant would have to have shown that they had such title.

23. Officer Harris further explained that he understood the “operator” referred to in Border Force policy to be the last link in the chain which, in this case, would be KMB as the haulier operating the vehicle.

15 **Appellant’s submissions**

Failure to follow policy

24. Counsel for the Appellant submitted firstly that BF’s refusal to restore the trailer was unreasonable because BF had failed to follow their own policy, set out in the review letter of 19 February 2015, that where an “operator fails to provide evidence
20 ... that the operator was neither responsible for or nor complicit in the smuggling attempt then ... if the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less)”.

25. The revenue involved in this case is £31,151.26; the Appellant has not been
25 involved in any prior smuggling attempt, neither has BF suggested that they may have been so involved. BF has provided no explanation to justify the departure from their policy.

26. The review decision appears to be based on only BF’s view that there is no explanation as to why the trailer was rented out to a third party the day after the
30 Appellant entered into a hire purchase agreement for the trailer. However, the review decision draws no conclusions from this, and so it is not clear what concern this gives rise to. There is no indication that BF has rejected the hire documents or rejected the Appellant’s claim to be the owner of the trailer for the purposes of restoration.

Failure to give reasons

35 27. Counsel for the Appellant further submitted that BF has a duty to give adequate reasons for the refusal to restore the trailer, making it clear how and why BF reached its decision. In particular, Lord Brown’s guidance in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953 at 1964 determines that whenever a public body has to give reasons

5 36. The reasons for a decision must be intelligible and they must
be adequate. They must enable the reader to understand why the matter
was decided as it was and what conclusions were reached on the
“principal important controversial issues”, disclosing how any issue of
law or fact was resolved ... The reasoning must not give rise to a
substantial doubt as to whether the decision-making erred in law, for
example by misunderstanding some relevant policy or some other
important matter or by failing to reach a rational decision on relevant
10 grounds. But such adverse inferences will not be readily drawn. The
reasons need refer only to the main issues in the dispute, not to every
material consideration ...”

28. The point was also made in *R (Ermakov) v. Westminster City Council* [1996] 28
HLR 819 at 826, where Hutchison LJ said:

15 It is well established that an obligation, whether statutory or otherwise,
to give reasons for a decision is imposed so that persons affected by the
decision may know why they have won or lost and, in particular, may
be able to judge whether the decision is valid and therefore
unchallengeable or invalid and therefore open to challenge.

29. Counsel submitted that the review decision lacks any clear reasoning for the
20 decision not to restore, as set out above. Counsel further submitted that BF cannot rely
on any more detailed reasoning in the original refusal decision, as that original
decision cites different policy. Equally, Counsel submitted that BF cannot rely on
reasoning set out in their Statement of Case where that reasoning is given for the first
time. In addition, the reasoning in the Statement of Case was said to have little
25 relationship to the reasoning in the review decision.

30. Counsel submitted that the evidence given by Officer Harris indicates that he
did not request specific information and that his concerns were not expressed in
writing with any particularity, let alone sufficient particularity. In effect, the evidence
bears out the fact that the concerns in relation to title were only disclosed when the
30 matter came to litigation and it became necessary to defend the decision. If these were
concerns at the time of the making of the review, they should have been made clear at
that time. It is not sufficient to refer to the state of affairs as having been confusing at
the time of the review; the concerns were clearly expressed in oral evidence but were
clearly absent in the decision itself. As noted in *Westminster City Council* it is
35 important that a person know whether a decision is open to challenge. In the absence
of proper reasoning, it was not clear to the Appellant that the concern as to the title
and any possible relationship between the parties involved constituted a bar to
restoration.

Appellant as innocent third party

40 31. In the alternative, Counsel for the Appellant submitted that the Appellant was an
innocent third party operator with no link to the importation and that there had been
no allegation that the trailer was adapted for the purposes of smuggling. The
Appellant had done everything that it reasonably could have done to ensure that the
trailer would not be used for an illegitimate purpose.

32. Accordingly, Counsel submitted that the decision not to restore was not made reasonably in the circumstances.

BF submissions

5 33. Counsel for BF submitted that the documentation and evidence provided by the Appellant was unsatisfactory. The documentation was very limited and did not particularly assist in determining whether to grant the request for restoration. The Appellant had not responded to any requests for further information, and did not dispute that such requests had taken place. As such the decision had to be made on the basis of the information available.

10 *Whether failed to follow policy*

34. Counsel for BF submitted that Border Force policy on restoration can only be applied where the person requesting restoration has proved ownership; as the Appellant has provided no proof of ownership of the trailer, there is no possibility of considering the question of whether any particular policy on restoration should apply.
15 For example, it remains possible that, in this case, KMB are the owners of the vehicle if the undisclosed terms and conditions of their rental agreement require them to purchase the vehicle. Alternatively, the terms and conditions may have required KMB to compensate the Appellant for the loss of the trailer, or the undisclosed terms and conditions of the initial rental agreement could entitle Hoet to claim that such
20 agreement had been nullified and that they owned the trailer.

35. Counsel submitted that, without such proof of ownership as a pre-condition, restoration could be made to a person who had no entitlement to the items restored. The policy that title needs to be demonstrated as a pre-condition of restoration is therefore reasonable, and that this has been confirmed in the case of *Worx Food and Beverage BV* [2014] UKFTT 774 (TC) at 58 where it was held that:
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Our starting point is that the UKBF’s general policy of restoring goods only when satisfied that a person has proved ownership is self-evidently reasonable ... it has to be a precondition of release that a person claiming a seized item must first show that it belongs to them”

30 36. Similarly, the case of *LVTC Limited* [2015] UKFTT 544 (TC) made the same point, holding that ownership was a relevant consideration for a reviewing officer to take into account when reaching his conclusions as to whether restoration should be granted.

35 37. Counsel submitted that the Appellant has still not provided any information to demonstrate ownership of the trailer; the terms and conditions of the rental agreements to and by the Appellant have not been provided and so it cannot be determined whether either agreement has been breached potentially removing any entitlement that the Appellant may have had. Without evidence that the Appellant was the appropriate person for restoration to be made, it would be wrong to make
40 restoration.

Whether failed to give reasons

38. Counsel for BF accepted that a review decision should include reasons for the decision, and agreed with Counsel for the Appellant that *South Bucks District Council* was relevant, although he noted that the relevant part of the decision continued on to confirm that

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The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable [the recipient] to assess their prospects ... Decision letters must be read in a straightforward manner, recognised that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision”

39. Counsel for BF submitted that the three issues concerning the review officer, as indicated in evidence, were the failure to demonstrate title, the lack of clarity as to relationships between the parties, and the failure by the Appellant to provide full information. Counsel further submitted that these concerns were all dealt with in the review letter, with the references to lack of information on terms and conditions and the references to the confusing picture as to relationships. Whilst the question of title might not be as clear as it could be, there is reference to breach of terms and conditions, and from the documents it is not possible to tell what the Appellant’s rights in respect of the trailer were.

40. With regard to the Appellant’s submissions that BF is not entitled to rely upon the reasoning Statement of Case, Counsel for BF submitted that the reasoning in the Statement of Case did not differ from the reasoning in the review decision but, even if it had, the decision of the High Court in *Alzitrans SL* [2003] EWHC 75 (Ch) at para 38 makes it clear that BF are

entitled to advance ... in their statement of case ... reasons for their decision ... which [are] different (if they were) from the reason which had led [the officer] to make the [original] decision ... the Tribunal were entitled to ignore ... reasons for [the] original decision and consider the matter on the basis of the reasons set out in the Commissioners’ statement of case.

41. Counsel for BF submitted that the Appellant’s contention that there has been a failure to give reasons fails because the review letter is adequately reasoned and, if there were to be any concern that the question of title is not adequately set out, the matters alluded to in the review letter are drawn together in the statement of case.

Innocent third party

42. Counsel for BF submitted that the Appellant’s submissions that the Appellant is an innocent third party and that the trailer had not been adapted for smuggling are not relevant to the decision as they were not features taken into consideration in the decision.

43. With regard to the Appellant's request that the trailer should have been restored on the basis that the Appellant had done everything it could reasonably have been expected to do to avoid the trailer being used for illegitimate purpose, Counsel submitted that this is not established from the evidence provided. No evidence of any
5 due diligence in respect of KMB has been provided, and the rental to KMB took place the day after the rental from Hoet. The rental agreement between the Appellant and KMB contains no details which could indicate that the Appellant had included terms intended to prevent attempts to evade duty. Accordingly, the review decision was correct not to treat the Appellant as having done all that could be reasonably expect to
10 prevent duty evasion by KMB and so the decision not to restore cannot be considered to be unreasonable on this basis.

Discussion

44. This Tribunal has a limited function in appeals such as these: the function is that of a review of the reasonableness of the decision taken. The test, as set out in section
15 16 of the Finance Act 1994 is whether "the tribunal are satisfied that [BF] could not reasonably have arrived at" the decision.

Application of policy

45. Whilst this Tribunal is not bound by the decisions in *Worx* and *LVTC Limited*, we agree with the decision in both cases that proof of title must be a precondition of
20 restoration for the reason given by BF: without such proof of title, items might be restored to the wrong party.

46. The Appellant has provided no evidence that it had title to the trailer applicable to the request for restoration and accordingly, we find that the BF policy on
25 restoration was not engaged and so the decision not to apply the relevant policy cannot be considered to be unreasonable.

Reasoning

47. We considered that, although the review decision did not state in particular detail the concerns it is nevertheless clear from the review letter that the review
30 officer considered that the Appellant had not provided sufficient evidence to demonstrate entitlement to restoration.

48. With regard to the Appellant's submission that BF are not entitled to raise alternate reasoning in their statement of case, this Tribunal notes that the High Court decision in *Alzitrans* means that, even if the reasoning in the statement of case is not
35 the same as the reasoning in the review decision, we are entitled to decide the matter on the basis of the reasons in the statement of case. Given the evidence put to us, we do not in fact consider that there is any material difference in the reasoning in the statement of case other than the detail with which it is expressed, and we find that there has been no failure to provide reasons and so the decision not to restore cannot be regarded as unreasonable on this basis.

49. *Innocent third party, making all reasonable attempts to prevent smuggling*

50. The Appellant had provided very little information to BF and still has not provided any further substantive information as to the issues identified in detail in the statement of case or otherwise. It would, of course, have been open to the Appellant to provide such evidence to this Tribunal.

51. The burden of proof is on the Applicant to show that the BF decision was unreasonable. In the absence of any evidence from the Applicant it cannot be determined that the Appellant made any attempt, let alone done everything that it could reasonably have, to ensure that the trailer was not used for smuggling. Accordingly, the review decision not to restore cannot be said to be unreasonable on this basis.

Decision

52. This Tribunal finds therefore that there are no grounds to consider that the review decision is unreasonable and the appeal is dismissed.

53. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 24 OCTOBER 2016