[2017] UKFTT 082 (TC)

TC05600

Appeal number: TC/2016/01911

EXCISE DUTY - CUSTOMS AND EXCISE MANAGEMENT ACT 1979 SECTIONS 139 AND 141 – SEIZURE OF VEHICLE - RESTORATION FOR A FEE- WHETHER DECISION UNREASONABLE - APPEAL DISMISSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

DWP & SONS LIMITED **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE IAN HYDE
PHILIP JOLLY

Sitting in public at Stoke-on-Trent on 9 November 2016

Colin Drew, solicitor, for the Appellant

Rupert Davies, counsel, instructed by Cash Forfeiture & Condemnation Legal Team, for the Respondents

DECISION

1. The appellant appeals against a decision of the Border Force of 3 March 2016 to restore a tractor unit and trailer ("the Vehicle") for a fee of £4,736.37 being a sum equivalent to the duty payable in respect of 25.5kg of tobacco found in the spare tyre of the lorry on arrival in Dover.

Chronology

2. The appellant is a small transport company that runs between 6 and 8 lorries. Some of them are regularly engaged in taking deliveries of refrigerated food from Ecofrost a customer with a warehouse in Belgium, entering the UK via Dover and delivering it to customers around the Warrington area. The route is fixed, including the stops.

3. On 28 May 2015, one of the appellant's vehicles driven by a Darrell Harrison, a driver employed by the appellant at the time, was seized by the Border Force at Dover coming into the UK on the regular Ecofrost delivery run. 35.5kg of tobacco was found in the spare tyre in the pallet locker under the trailer and the vehicle was restored for a fee equal to the duty payable of £6,593, although this was later refunded.

4. On 3 December 2015 the Vehicle, again being driven by Mr Harrison was stopped by seized by the Border Force at Dover coming into the UK. 3.5kg of tobacco was found in the cab of the trailer but after correspondence between the Border Force and the appellant the vehicle was released upon payment of a £500 release fee.

5. On 12 January 2016 the Vehicle being driven by Mr Greatbach, on the regular Ecofrost delivery run was stopped by Border Force officers at Dover and was found to contain 25.5kg of tobacco in one of the spare tyres in the pallet locker under the trailer.

6. The tobacco was seized under section 139(1) Customs and Excise Management Act 1979 ("CEMA") as being liable for forfeiture under Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations") and section 49(1)(a)(i) CEMA as being held for commercial purposes and the Vehicle seized under section 139(1) as being liable for forfeiture under section 141(1)(a) CEMA having been used for the carriage of goods liable to forfeiture.

7. The Border Force offered to restore the Vehicle for a fee of £4,736.37 being an amount equal to the duty otherwise payable on the tobacco ("the Original Decision"). The appellant paid the fee and the vehicle was restored.

8. On 19 January 2016 the appellant requested a review of the Original Decision to restore for a fee on the grounds that the Border Force Officers appeared to know that the tyre contained goods, the fact that the tyre was worn and not the appellant's, Mr

Greatbach's physical infirmities that meant he could not have been involved and the company's policies including driver handbook and contract of employment.

9. On 25 January 2016 the Border Force wrote to the appellant explaining the process and inviting the appellant to provide any further information relevant to the request for a review. In addition the appellant was asked to provide;

(1) Copies of employment references from the driver's previous employers

(2) Details of the appellant's interview with the driver before employing him

(3) Copies of any instructions or written procedures that the appellant issue to drivers or other staff to prevent them smuggling

(4) details of how the appellant obtained the contract to carry the goods

(5) the checks the appellant made of the consignor

(6) the arrangements to collect the goods from the consignor and load them into the vehicle

(7) details of any physical checks made of the load and the application of any seals

(8) the checks made of the consignee

(9) the arrangements made to deliver the goods to the consignee

(10) details of other measures the appellant takes to prevent its vehicles being used for smuggling.

10. The appellant did not provide any such further information.

11. On 3 March Mr Harris concluded the review and by letter of that date confirmed the Original Decision ("the Review Decision"). In doing so Mr Harris expressly did not consider the legality of the seizure itself as that was a matter for appeal to the Magistrates Court. The issue considered by Mr Harris was whether, the Vehicle having been seized, there was any justification for departure from the Border Force's restoration policy for seized commercial vehicles ("the Restoration Policy"), noting that the burden of proof was on the appellant.

12. In the Review Decision Mr Harris took into account the three previous seizures in 8 months including the fact that the same method was used on 28 May 2015. Mr Harris noted that Mr Greatbach at the time of seizure said he did checks on the vehicle but accepted that he did not check the locker in which the spare tyres were stored and that there was no explanation provided as to how the tobacco could have got into the tyre without the driver knowing. Mr Harris did not find it credible that the driver was not aware of the tobacco being there. Mr Harris concluded that had he had to make the decision afresh he would not restore the vehicle at all but he was happy to confirm the original officer's decision to restore the vehicle for a fee equal to the taxes evaded on the smuggled goods.

13. In applying the Restoration Policy Mr Harris took into account the failure in the operator's duty to take reasonable steps to prevent smuggling. Mr Harris considered

the degree of hardship cause by the payment of the fee, noted that hardship was a natural consequence of having to pay a restoration fee and did not consider that there would be exceptional hardship justifying release of the vehicle free of charge.

14. On 8 March the appellant made further representations which were rejected by the Border Force by letter of 9 March.

15. On 22 April the appellant appealed the Review Decision.

Evidence

16. A short witness statement and oral evidence was given by David Harris the review officer at the Border Force and oral evidence by Daniel Poole the director and owner of the appellant.

17. There was produced to the Tribunal a witness statement from Thomas Greatbach, a former employee of the appellant and the driver of the Vehicle. Mr Greatbach was not at the hearing. The appellant had tried to contact Mr Greatbach but he, having left the appellant's employment, could not be traced.

18. There was also produced in evidence the notebooks of a number of Border Force officers including those of Mr Hooker and Mr Hurlstone, who were involved in stopping, searching and seizing the Vehicle on 12 January 2016. None of the officers were at the hearing.

19. A number of documents were produced to the Tribunal including;

(1) a single page document headed "Driver responsibilities" requiring the driver to check the vehicle was safe to drive, requiring the driver to walk around the vehicle and check lights, tyres, wheel fixings, body work, trailer coupling and load an other equipment ("the DWP Checksheet")

(2) front covers of the Border Agency Code of Practice on prevention of clandestine entrants, the Border Agency guide to how to avoid a penalty, the Border Force guide as to what can be brought in, what can't be brought in and what must be declared.

(3) Mr Greatbach's contract of employment

(4) Memorandum of 21 July 2015 from Mr Poole to all drivers.

(5) E mail from Best Tyres, the appellant's tyre supplier, of 18 January 2016.

(6) Border Force vehicle security checklist ("the Border Force Checklist")

(7) Incident/defect/safety/equipment check report ("the Incident Check Report")

20. The evidence from Mr Harris was limited to the Review Decision and the process and factors he took into account as set out in the Review Decision. In oral evidence Mr Harris noted the fact that the appellant was still employing Mr Harrison, the driver involved in the first seizure some months later. The Border Force would

expect some sanction as most hauliers treat smuggling as gross misconduct. On the third seizure the Border Force was not presented with any plausible explanation as to how the tobacco got there. It was a different driver and the only common denominator was the appellant. Accordingly if it was open to Mr Harris he would not have restored but in the circumstances he had to uphold the decision to restore for a fee.

21. In cross examination Mr Harris conceded he did not know Mr Harrison had been dismissed after the first seizure or the circumstances of his re employment and dismissal after the second seizure. Mr Harris was invited to comment on how a flat tyre might look in the locker and how third parties might have swapped the tyre and smuggled the tobacco but Mr Harris still believed this theory to be implausible. Mr Harris confirmed that he was not aware of the driver's handbook or any of the other checklists.

22. The Border Force notebooks described the basic facts of the seizure on 12 January 2016, the questions put to Mr Greatbach and his answers. According to the notebooks on 12 January 2016 the Vehicle being driven by Mr Greatbach was stopped by Border Force officers at Dover and, using x ray scanners, an anomaly was found in one of the spare tyres kept in the pallet locker under the trailer. When the tyre was inspected it was, according to Border Force officers, found to be flat and, on cutting it open, was found to contain 25.5kg of tobacco. Mr Greatbach was interviewed and, according to the records of the interview, claimed he did not know anything about the tobacco or how it came to be in the tyre. He confirmed to the officers that he checked the vehicle but not the lockers.

23. Mr Greatbach in his statement described the delivery route on 11/12 January which led to the seizure and his account differed in some limited respects from the Border Force records. In particular Mr Greatbach described how the Border Force officers appeared to know that there was something in the spare tyre and recalled the air being let out of the tyre, so that it was not flat as claimed by the Border Force.

24. Mr Poole gave extensive evidence as to the design of the Vehicle's pallet locker, the background to the seizures, the delivery route, the appellant's policies on driver training and the steps he took to prevent smuggling.

25. Mr Poole provided information on the pallet locker. It was a long shallow box under the trailer unit. Mr Poole confirmed that the lockers hold two spare tyres and wheels– one for the tractor unit and one for the trailer - and could not be locked. He had tried to fit a lock but it was not possible on new trailers. In any event locks can be cut and superglued back together. Each spare tyre and steel wheel weighed 250kg and would need more than one person to move.

26. Mr Poole said that Mr Harrison had been dismissed immediately after the first seizure in May 2015. However, Mr Poole re engaged him in November 2015 because Mr Harrison had had marital difficulties, needed a job and Mr Poole felt sorry for him. Mr Harrison told Mr Poole at the time that he would not import tobacco again. Following the second seizure Mr Poole dismissed Mr Harrison immediately.

27. Mr Greatbach was employed by the appellant on 3 December 2015 and at that point only had UK driving experience. He was put on a two week probation during which time he went out with experienced drivers. After the probationary period and from 28 December 2015 Mr Greatbach was allowed to drive to the continent. Mr Greatbach left the appellant's employment in March.

28. Mr Poole explained the driver's pack that was provided to all new drivers including Mr Greatbach, albeit the pack was not produced in evidence to the Tribunal. Mr Poole had 20 years experience of driving on the continent and that experience was reflected in the pack. Mr Poole would spend 4 hours with each new driver, sitting down with them and explaining everything. Mr Poole said that each driver would be told by him that if they did not follow the rules they would be dismissed. It was Mr Poole's operating licence that was at risk.

29. The drivers were required to countersign copies of Border Agency Code of Practice on prevention of clandestine entrants, the Border Agency guide to how to avoid a penalty, and the Border Force guide as to what can be brought in, what can't be brought in and what must be declared. The copies produced to the Tribunal purported to show Greatbach's signature on each of these guides confirming he understood and accepted the contents. Notwithstanding inconsistencies with the signatures the Tribunal accepts Mr Greatbach signed these documents.

30. There was produced to the Tribunal a memorandum of 21 July 2015 which was sent to all staff and, according to Mr Poole, sent because of the seizure in May 2015. The memorandum stressed the need to comply with limits on duty free goods and highlighting the recent incident with Mr Harrison (albeit he was not named) and that the driver had had his contract of employment terminated. The memorandum stressed the need for drivers to be more vigilant when checking their vehicles for clandestine entrants and unlawful smuggling.

31. As to taking other steps to prevent smuggling, Mr Poole said it was difficult. He paid above average wages and was choosy as to whom he took on. It was difficult to get a truthful reference these days from previous employers. There was a shortage of drivers and most were recommended by other drivers.

32. Mr Poole explained, supported by written evidence from Best Tyres, his tyre supplier, that the tyre found to contain the tobacco was not of the same type as that used by the appellant's vehicles and, further, was worn. Further Best Tyres confirmed that the steel wheel was of a different type to that kept by the appellant. Mr Poole in evidence explained that his vehicles always carried new tyres as it was more cost efficient to replace with new tyres so that they did not need changing again, the cost of replacement tyres in Belgium being particularly expensive.

33. Mr Poole could not explain why a different tyre and wheel was found. He speculated that the reason for tobacco being found in his vehicles was that he was being targeted because the Ecofrost route was very rigid and predictable. Half the vehicles were on the same route from Ecofrost in Belgium to customers in the Harrogate area with predetermined stops at a rest area in Stoke. Someone could have

swapped the tyre and wheel when the driver was parked at Ecofrost's warehouse and being loaded up. Loading finished at 4pm and it could have happened after that as the driver would be on a 9 hour rest sleeping in the cab before starting his drive back to the UK at about midnight. The refrigeration unit was very noisy and could cover the sound of someone swapping the tyre. Some of the vehicles were in distinctive customer livery with the appellant's details on the back door and followed the same route so there was no need to follow the vehicle, just have someone else swap the wheel and tyre later on the route, for example at the rest area at Stoke. Mr Poole conceded that there would have to be someone working for the appellant or formerly working there who knew the route and could provide the relevant information. An employee of Ecofrost could also have been involved.

34. Mr Poole thought that there were suspicious things happening. On one occasion one of the vehicles was parked outside Mr Poole's house and at about 2.30 in the morning the police knocked on his door and reported two men acting suspiciously looking round his vehicle.

35. Mr Poole did not think Mr Greatbach was complicit, even if he was he would have needed help to move the tyre. He was about 5 foot tall and had misshapen legs.

36. Mr Poole said he raised this theory as to external third parties with HMRC in a letter of 19 January 2016 although, by inferring the Border force officer knew where to find the tobacco, he conceded he might not have expressed it correctly. However, for Mr Poole the point remained that third parties were the likely cause of the smuggling.

37. Under cross examination as to what he did to make sure the smuggling did not happen again, Mr Poole said that he reinforced with drivers what they should do and not do, including issuing the 21 July memorandum. However, he agreed that neither the memorandum nor the DWP Checksheet required the driver to check the spare tyre. Mr Poole accepted that the edge of the tyre would be some 30 cm from the edge of the locker and so, depending on the driver, potentially visible even at night with a torch.

38. Mr Poole did not call the police or the consignor or consignee. Mr Poole conceded that the employment contract did not expressly state that smuggling was forbidden or that it would lead to automatic dismissal but pointed to the memorandum of 21 July saying it would not be tolerated. Mr Poole also accepted that reemploying Mr Harrison was a mistake.

39. Mr Poole was asked to comment on two forms handed up during the hearing, a Border Force Checklist and the Incident Check Report. The Border Force Checklist required checks to be made at the start of a journey and each stop. External compartments are to be checked but nothing more specific. The Incident Check report was apparently a document produced by the appellant ans was concerned with the roadworthiness of the vehicle, for example steering, brakes, oil level and so on. There was no specific mention of spare tyres or the pallet locker.

40. Mr Poole now puts wooden blocks in the tyres so that when they are rolled there is a noise. If there were tobacco in the tyres this would stop the blocks moving and making a noise. There has not been an incident since.

The Restoration Policy

41. The Border Force's policy on restoration of commercial vehicles was set out in the Review Decision as follows, with Border Force italics and underlining:

> "The policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross border smuggling and to disrupt the supply of excise goods to the illicit market. "Commercial vehicles" include not only 'Heavy Goods Vehicles' but any vehicle considered to be moving primarily for a commercial and business purpose. Each case is considered carefully on its individual merits so as to decide whether exceptions should be made and any evidence of hardship is always considered.
>
> A vehicle <u>adapted for the purposes of smuggling</u> will not normally be restored.
>
> Otherwise the policy depends on who is responsible for the smuggling attempt:
>
> 1. Neither the operator nor the driver are responsible; or
> 2. The driver but not the operator is responsible; or
> 3. The operator is responsible.
>
> A. If the operator provides *evidence* satisfying Border Force that <u>neither the operator nor the driver were responsible</u> for or complicit in the smuggling attempt then:
>
> (1) If the operator also provides *evidence* satisfying Border Force that both the operator and the driver carried out <u>basic reasonable checks</u> (including conforming to the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.
>
> (2) Otherwise,
>
> (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).
>
> (b) On a second or subsequent occasion (within 12 months) the vehicle will not normally be restored.
>
> B. If the operator provides *evidence* satisfying Border Force the <u>driver</u>, but <u>not the operator</u>, is responsible for or complicit in the smuggling attempt then:

(1) If the operator also provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:

(a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or the trade value of the vehicle if lower) except that

(b) If the second or subsequent occasion occurs within 12 months of the first, the vehicle will not normally be restored.

(2) Otherwise,

(a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).

(b) On a second or subsequent occasion the vehicle will not normally be restored.

C. If the operator fails to provide *evidence* satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt then:

(1) 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).

(2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 12 months, the vehicle will not normally be restored."

The law

42. The relevant legislation is as follows.

43. Regulation 88 of Excise Goods (Holding, Movement and Duty Point) Regulations provides;

"If in relation to any exercise goods that are liable to duty that has not been paid there is -

(a) a contravention of any provision of these Regulations; or
(b) a contravention of any condition or restriction imposed by or under these Regulations,

(2) Those goods shall be liable to forfeiture"

44. Section 49(1)(a) of CEMA:

"(1) Where –

(a) Except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty -

(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom,

(iii) unloaded from any vehicle on, or otherwise brought across the boundary into, Northern Ireland, or

(iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or

(b) Any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

..., those goods shall, subject to subsection (2) below, be liable to forfeiture."

45. Section 139(1) of CEMA:

"(1) 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."

46. Section 141 of CEMA:

"(1) …where any thing 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.

(2) Where any ship, aircraft, vehicle or animal has become liable to forfeiture under the Customs and Excise Acts, whether by virtue of subsection (1) above or otherwise, all tackle, apparel or furniture thereof shall also be liable to forfeiture"

47. Section 152 of CEMA:

"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.

48. Section 14(2) of the Finance Act 1994 ("FA 94"):

"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 who, 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."

49. Section 15(1) FA 94:

"Where the Commissioners are required in accordance with this Chapter 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."

50. Section 16 provides :

"(1) An appeal against a decision on a review or under section 15…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.

….

(1F) an appeal may be made after the end of the period specified in subsection (1)…if the appeal tribunal gives permission to do so

…

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the power 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, 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 further review of the original decision; and

(c) in that case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid)

shall lie upon the Commissioners, but shall otherwise be for the appellant to show that the grounds on which such application is brought have been established.

…

(8) …references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 of this Act which is not comprised in a decision falling within section 13A (2)(a) to (h) above"

The parties' submissions

51. It was accepted by both parties that once the Commissioners have exercised their power under section 152(b) of the CEMA, whether in the form of a refusal to restore or a decision to restore on terms, the powers of the Tribunal on appeal are limited and set out in section 16(4) FA 94.

52. Specifically as set out in section 16(4), the exercise of those powers are limited to "where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at" the decision. This test is within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at page 239:

> ".....if it were shown the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal might also have to consider whether the Commissioners had erred on a point of law."

53. It was agreed by the parties that the burden of proof was on the appellant to demonstrate that the decision of the Border Force was unreasonable (section 16(6) FA 94).

54. The appellant did not appeal the forfeiture of the Vehicle in the Magistrates Court, nor, quite properly did it seek to do so in this Tribunal. Instead, the appellant appealed against the Review Decision, seeking repayment of the fee. In doing so the appellant did not challenge the Restoration Policy itself but its application in the Review Decision to the facts and circumstances of this seizure.

55. As developed in the hearing the appellant argued firstly that neither the appellant or its driver Mr Greatbach were complicit in the smuggling justifying no restoration (category C(2) in the Restoration Policy). The appellant knew nothing of the smuggling, it being most likely a scheme by third parties with inside information on the regular Ecofrost route to use the appellant's vehicles to smuggle tobacco. Further, the driver Mr Greatbach suffered from a medical condition which meant he could not carry out any strenuous activity, including inspecting the spare wheel.

56. Secondly, the appellant argued it had carried out reasonable steps to prevent smuggling so that the Vehicle should be restored without a fee (category A(1) in the Restoration Policy) rather than for a fee equal to the duty(category A(2)(b)) . These steps included

(1) issuing the DWP Checklist;

(2) dismissing Mr Harrison and issuing the internal memorandum of 21 July 2015 after the first seizure warning staff of the risk of smuggling;

(3) circulating Border Force advice to all drivers;

(4) including in the contract of employment procedures for travelling abroad; and

(5) putting wooden blocks in the tyres so that it would be obvious if there were tobacco in the tyres.

57. Finally, on hardship, the appellant did not produce any evidence but argued that it was a small family company, being effectively just Mr Poole employing the drivers. He could not afford to pay the fee.

58. Mr Davies for the Border Force argued that the Review Decision was one that could reasonably have been arrived at because;

(1) The review was carried out afresh and carried out impartially and fairly;

(2) The reviewing officer did not consider the lawfulness of the seizure;

(3) The reviewing officer applied the correct policy;

(4) It was reasonable to conclude that the appellant had failed to carry out basic reasonable checks; and

(5) It was reasonable to conclude that there was insufficient evidence that restoration with payment of a fee would result in exceptional hardship

59. Mr Davies argued that on the facts the Border Force was not satisfied that the operator was not responsible or complicit in the smuggling and so the vehicle would not normally be restored. The appellant did not on the second seizure seek to blame the driver and so the connection between the near identical seizures in May 2015 and January 2016 is the appellant. The two seizures happened over a short period of time with a similar and peculiar *modus operandi* and, allegedly, by persons unknown. Even if the operator did not know it turned a blind eye, which is sufficient to bring the appellant within Category C.

60. Further, even if (which was not accepted) neither the operator nor the driver was responsible then the seizure fell within category A(2)(b) requiring restoration for a fee as there were insufficient basic reasonable steps taken to prevent smuggling. The driver conceded he did not check the spare tyres and there was nothing in the appellant's checks to say he should do so even though it was only 7 months since the attempt to smuggle using this method. As this was the second event in 12 months, (b) applied and so again the vehicle would not normally be restored.

61. On hardship the Border Force repeated the point from the Decisions that there was no evidence of exceptional hardship.

Decision

62. As described above the Tribunal's role is supervisory. The issue to determine is not whether the Border Force made the correct decision but whether in the light of all the facts as found the Review Decision is one that no reasonable officer could have made. The Review Decision confirmed the Original Decision that the appellant did not take all reasonable steps to prevent smuggling (category A(2)(b)) although Mr Harris the review officer commented that had he to make the decision afresh he would have decided that the appellant and/or its employees were complicit in the smuggling (category C(2)) so that there would have been no restoration.

63. The burden of proof is on the appellant. The appellant has to satisfy the Tribunal that the Border Force could not reasonably have made the Review Decision, that is restore the Vehicle for a fee.

64. We accept Mr Poole's evidence as to the nature and details of the route from Belgium to Warrington, the remedial steps he took, the training given to drivers, the details of the vehicle, the pallet locker, the tyres and so on. We find that the tyre and wheel found by the Border Force on 12 January 2016 was not the appellant's.

65. However, we find that it was not unreasonable for the Border Force to conclude in the Review Decision that the appellant did not take all reasonable steps.

66. There is sufficient basis for the Review Decision. Following the first seizure in May 2015, Mr Poole issued the 21 July 2015 memorandum reinforcing the need to be alert to smuggling and highlighting that a driver's employment had been terminated. However, Mr Poole did not alert the police or investigate by contacting the consignor or consignee. Further, Mr Poole accepted in evidence that the tyre would be potentially visible even at night with a torch. Drivers were under instructions to check for immigrants and to check the condition of a number of aspects of the vehicle but following the May 2015 seizure the appellant did not give specific instructions (for example in the 21 July memorandum or by amending the DWP Checklist) that an inspection was to be made as to whether the tyres were worn. A company policy of new tyres meant worn tyres would be a warning sign drivers could potentially pick up on but this was not acted on.

67. We did not find the Border Force Checklist and the Incident Check Report of any assistance. As to the anti-smuggling blocks in the tyres, aside from whether it would be possible to test the 250kg tyre and wheel at points in the journey, this strategy was adopted after the 12 January 2016 seizure and so is not relevant to the reasonableness of the Review Decision.

68. We neither accept nor reject Mr Poole's theory as to the existence of any third party smuggling scheme as it is not necessary for us to do so to reach a decision in this appeal. The Review Decision in endorsing the Original Decision was concerned with what steps the appellant took to prevent smuggling. The existence of a third party scheme is only indirectly relevant insofar as it might indicate what steps should reasonably be taken.

69. As we have determined that the Review Decision was not unreasonable on the ground that the appellant failed to take all necessary steps, it is unnecessary for the Tribunal to determine whether the appellant and/or its employees were complicit in the smuggling.

70. Under the Restoration Policy the fee should be rebated if there is hardship. In the Review Decision Mr Harris had no evidence provided to him as to hardship and so determined there was none. The appellant in this appeal did not produce any specific evidence as to hardship beyond describing his business as a small one, which could

not afford the fee. Accordingly we find that the appellant has not produced any evidence to justify overturning the refusal to apply a rebate for hardship.

71. Accordingly, the appellant's appeal is dismissed.

72. 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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 16 JANUARY 2017