[2017] UKFTT 0159 (TC)

TC05652

Appeal number: TC/2014/03997

EXCISE - Seizure of two vehicles with UK rebated fuel in running tanks - Whether decision not to restore the vehicles unreasonable? No - Vehicles correctly treated as related vehicles under laundering plant part of HMRC policy - Whilst decision took account of an immateriality, namely Appellant's lie to the officers, a re-review would inevitably lead to the same outcome - John Dee v CCE [1995] - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR PHILLIP DORAN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MS CELINE CORRIGAN

Sitting in public at the Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 5 December 2016

Mr Danny McNamee of McNamee McDonnell Duffy Solicitors LLP, for the Appellant

Mr Paul Joseph, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 10 April 2014 three officers of HMRC's Road Fuel Testing Unit attended a site at 37 Burrenbridge Road, Castelwellan, County Down BT13 9HP.

2. 37 Burrenbridge Road comprises a dwellinghouse which faces the road. It is occupied by (at least) the Appellant's parents. The Appellant gives 37 Burrenbridge Road as his address on his Notice of Appeal but in fact he lives elsewhere, about a mile away. He is a groundworks contractor, trading as 'Doran Contracts', and he says that this is a 'one man' operation, and that he does this work with a lorry and digger which he keeps at 37 Burrenbridge Road.

3. Alongside the house is a driveway, which leads to a yard behind the house. The yard is part of the curtilage of the property. The yard is rectangular and there are three externally connected sheds ('the Sheds') running alongside it, perpendicular to the back of the house and accessible from the yard. Shed 1 is nearest to the house, Shed 2 is in the middle, and Shed 3 is furthest away.

4. We do not know whether the Sheds were connected internally. The officer's notebook records that, helpfully, photographs were taken by the officers and stored on a memory card. However, less helpfully, those were not put before us in evidence.

5. The officers were told that neither the Appellant nor his father, Christopher Doran, were at home.

6. There were three vehicles present:

   (1) A Daf recovery lorry YJ53 WHR ('WHR');

   (2) An Izusu jeep KJZ5820 ('the Jeep'); and

   (3) A Volvo tipper truck, SJZ6517 ('the Tipper').

7. The Appellant does not dispute, and in any event we are satisfied to the requisite standard, that, on the site, officers found:

   (1) An Intermediate Bulk Container (an 'IBC' or 'pallet tank', namely, a re-usable container designed for the transport and storage of bulk liquid, designed to be moved using a forklift or pallet jack);

   (2) 200 litres of waste products;

   (3) A compressor;

   (4) 3 fuel tanks ('Tank 1', 'Tank 2', and 'Tank 3') inside Shed 3;

   (5) 3 filters;

   (6) 2 pumps;

   (7) 2 metered pumps;

   (8) Hoses and nozzles;

   (9) A brown wheelie bin with a tap on the front of it;

(10) 15 litres of cat litter and 3 bags of bleaching earth: together, 'the Items'.

8. We also find as follows:

(1) The Intermediate Bulk Container was in Shed 2.

(2) There was another Intermediate Bulk Container, which was empty, in Shed 1. It was not tested;

(3) There were two bowsers on the premises which were also empty. They were not tested.

9. The pump for the diesel tank was locked inside a wooden box outside one of the sheds (whilst the officer's note records this, the officer's notebook does not say which shed, and the sketch plan in the officer's notebook does not show the wooden box).

10. A hose and pump were attached to Tank 3, and led from Tank 3, which was nearest the door, to 'outside Shed 3'.

11. Samples were taken from Tank 1 and Tank 2. All were field-tested positive to SET and Quinizarin. A sample taken from the nozzle of Tank 3 field-tested positive to Quinizarin. A sample from the diesel tank pump field-tested positive to SET and Quinizarin.

12. The officers formed the view that they had discovered the components of a laundering plant.

13. A sample was taken from the running tank of WHR. It did not test positive for any markers.

14. A sample was taken from the running tank of the Jeep. Field-tested, it was positive to Quinizarin.

15. The Tipper was locked, and its body covered the filling point so that the officers could not, without unlocking the Tipper, take a sample of fuel from its running tank. Officer Malone was told by someone (she does not record whom, but both the Appellant's mother and one of his brothers, Barry, were also present) that the keys were with the Appellant in England.

16. The Appellant's mother contacted the Appellant by phone.

17. The Appellant spoke to the officer. He told the officer:

(1) That he did not know anything about fuel being laundered at the site and was only concerned about the red diesel;

(2) He got his fuel using DCI and Fuel Wise cards and paid for it by direct debit.

18. The Appellant was asked if there were keys to the Tipper in the house. The Appellant told Officer Malone that he had the keys with him, and that there was no spare set.

19. Undeterred, Officer Malone located keys to the Tipper on the vehicle's fuel tank. That enabled the body to be lifted, and a sample of fuel was taken. Field-tested, the sample was positive to Euromarker and the SET test.

20. The cab of the Tipper contained two printed fuel receipts which did not show any supplier details. One was dated 1 April 2014: that is, a few days before the inspection. They both recorded payment with the same card. We do not know any further details about that card.

21. All the Items were seized as liable to forfeiture pursuant to section 139 of the *Customs and Excise Management Act 1979.*

22. The Tipper and the Jeep ('**the Vehicles**') were both seized as having themselves become liable to forfeiture under section 141(1)(a) of the *Hydrocarbon Oils Duties Act 1979* (HODA 1979) by virtue of being used to carry fuels (in their running tanks) which had itself become liable to forfeiture under sections 13(6) and 24A of *HODA 1979*: namely, 470 litres of diesel in the running tank of the Tipper and 40 litres of diesel in the running tank of the Jeep.

23. Two Seizure Information Notices were given and each was signed for by Barry Doran, the Appellant's brother. A Public Notice 12A was also issued.

24. At the end of the inspection, Barry Doran, closed Sheds 2 and 3.

25. On 15 April 2014, a very short request for restoration of the Vehicles was made. It gave no reasons why the Vehicles should be restored.

26. On that same date, an in-time Notice of Claim was given, thereby triggering the obligation upon HMRC to commence condemnation proceedings in the Magistrates' Court under Schedule 3 of the *Customs and Excise Management Act 1979.* We know nothing further about those proceedings.

27. In the meanwhile, samples of fuel taken from the running tanks of the Vehicles, and samples taken from the Items, were sent to the laboratory of the Government Chemist for testing.

28. Those tests confirmed the presence of rebated fuel (UK rebated gas oil and UK rebated kerosene) in the running tank of the Jeep and rebated fuel (UK rebated gas oil) in the running tank of the Tipper.

29. Laboratory testing further confirmed that Tank 1, Tank 2, the diesel tank pump and the nozzle of Tank 3 all contained laundered fuel.

The Decision Letter

30. On 5 June 2014, the request for restoration was refused. The decision letter set out the circumstances of the seizures and the following policy:

> "**Customs' Policy for the Restoration of Seized Road Fuel**

The Commissioners' general policy is that seized fuel should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

Customs' Policy - Mis-use of rebated fuel

Where the offence committed relates to the deliberate misuse of rebated fuels e.g. fuel laundering, the Department's general policy is that the seized apparatus (including vehicles) should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

Contamination of fuels

The presence of any rebated fuel markers in road fuel is conclusive proof under [HODA] that there is rebated fuel present and immediately there is a statutory contravention. This makes the fuel liable to forfeiture and as a result any vehicle or tank that contains the fuel is also liable to forfeiture.

The Department's stance is that any contamination of road fuel with any detectable levels of rebated markers is unacceptable and, without prejudice to any other action, the fuel cannot remain in the market place as road fuel and must be uplifted.

[..]

My Decision

I have considered your request under section 152(b) of the Customs and Excise Management Act 1979 and our policy.

[...]

I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy.

Regrettably, on this occasion the vehicles will not be restored"

31. On 19 June 2014 the appellant, through his representatives, requested a review of the decision not to restore.

32. The Appellant made the following points:

(1) He was in England at the date of the seizure;

(2) He had no knowledge of the Items or of fuel laundering;

(3) Since vehicle WHR was not seized '*which would of course indicate that the mere presence of the vehicles in the vicinity of what are alleged to be components for use in laundering operation was not deemed to be sufficient to justify the seizure of [that vehicle]*'

(4) The Tipper and the Jeep should be treated in the same way as vehicle WHR *'the only issue being the presence of rebated fuel or fuel contaminated with rebated fuel in the running tanks'*

(5) The appropriate way to treat the Vehicles was as vehicles containing rebated fuel, and not as vehicles involved in fuel laundering;

(6) Hence the vehicles should be restored.

The Review Letter

33. On 18 July 2014, Officer Louise Bines, a Higher Officer of the Appeals and Reviews Team of Specialist Investigations completed her review and concluded that the original decision not to restore the two vehicles should be upheld.

34. That conclusion was set out in a review letter. After setting out the background, and the results of the fuel tests, the Review Letter went on to say that Officer Bines had been 'guided' by the Commissioners' policy, but had considered the case on its merits.

35. The Review letter said:

"**<u>Conclusion</u>**

You have requested that the vehicles be restored to your client as this is a first offence and another vehicle of his, that tested negative to testing (sic) was not seized.

I understand that your client was in England at the time of the seizure; however I am of the opinion that your client was aware of the presence of the components used to launder fuel at the premises, and the presence of rebated fuel in the running tanks of the vehicles.

Your client advised officers he had the keys for [the Tipper] and there was no spare set, yet officers found the keys on the vehicle, which then tested positive for rebated fuel.

The Commissioners' general Policy for offences relating to the deliberate misuse of rebated fuels e.g. fuel laundering is that the apparatus, including vehicles is seized and not restored

I am of the opinion that there are no exceptional circumstances in this case that would justify a departure from the Commissioners' policy"

36. The Grounds of Appeal, in full, are:

> *"Our client disputes having any knowledge of any diesel laundering plant or process for involving the deliberate misuse of rebated fuel. The vehicles should be returned to our client pursuant to the normal policy of HMRC given that this was the first incident where our client's vehicle has been found to have contaminated/rebated fuel in the running tanks."*

37. On 7 August 2014, HMRC applied for a direction that the present appeal be stood over pending determination of the condemnation proceedings.

38. On 20 August 2014, the Appellant's representatives responded, resisting that application, and stating, inter alia, as follows:

> *"The Appellant is of course content to challenge the decision not to restore on the presumed basis that the goods are liable to forfeiture".*

39. The reference to 'goods' must be taken to have included the Vehicles.

40. On 17 October 2014, HMRC withdrew their application.

The Policy

41. The Policy referred to and applied by Officer Bines was placed before us. It is entitled 'Civil sanctions: Vehicle and Equipment Seizures for Oils Offences'. The document was physically created from HMRC Intranet Guidance in October 2015, but was the version from July 2014. Officer Bines' evidence, which we accept, was that a materially identical version had been in force at the time of the seizure.

42. Insofar as material, the Policy reads:

> Every detection of the misuse of rebated fuel or the smuggling of fuel should result in the seizure of the vehicle concerned. We should then consider terms of restoration and our policy on restoration is set out below.
>
> Note - all vehicles adapted for the misuse of controlled oils (e.g. false tanks) or for smuggling of fuel (e.g. concealments) are to be seized and not restored.
>
> **Misuse of Rebated Fuels** - Restoration fees for vehicles fuelled with rebated fuels
>
> Where the offence committed relates to the misuse of rebated fuels by an end user, HMRC's restoration policy is to provide increasingly hard restoration terms for the first two detections, with a strict non-restoration policy on third detection of misuse....the approach to vehicle seizure and restoration is:
>
> **First offence** -
>
> - An amount equal to the value of the civil penalties

- 100% of the revenue calculated on the fuel capacity of the vehicle's running tank[s]
- Any removal or storage costs incurred (or the value of the vehicle, whichever is the lower'

43. Hence, mis-use of rebated fuels is within an 'escalating' scheme in the sense that there are increasingly severe terms for second and subsequent detections, but that the first detection does not automatically lead to non-restoration.

44. The scheme is qualified in this way:

> It is important to note that obstruction or violence to officers is not a consideration as to conditions of restoration or failure to restore a vehicle. These are separate offences unrelated to the seizure of the vehicle.

45. After considering smuggling and decanting, the policy goes on to consider 'Laundering Plants':

> **Laundering plants**
>
> Laundering plants are an attack on the system used to control rebated fuels. They are deliberate and calculated and involve considerable investment by the perpetrators of the fraud. Prosecution should always be considered in cases of laundering plants.
>
> However, as a matter of course when a laundering plant is detected, in addition to seizure of the oil, all related plant, equipment and vehicles are to be seized and not restored. Vehicles will be subject to the usual rules on proportionality as explained below.

46. The final relevant section of the Policy deals with proportionality:

> **Proportionality**
>
> Issues of proportionality and human rights should always be considered on every occasion where a detection is made. It is of paramount importance where restoration would follow but is not being offered in a particular case that the Officer must be aware that their decision not to offer restoration must take into account the issues of proportionality and human rights (ECHR)

The evidence

47. We have already set out certain facts, with which the appellant takes no issue. Accordingly, we formally find those facts.

48. The Appellant gave oral evidence. There had not been any direction for any witness statement from him. He told us that when it came to the keys, he had said that there was only one set of keys. He accepted that he had lied and deliberately obstructed the officer, but said that he had done so because he did not want anyone else *'touching my lorry'* because he had *'personal stuff'* in it. He did not expand on what *'personal stuff'* he had in the Tipper, or why, if it was valuable or sensitive, he

was not keeping it at home, but instead was keeping it in the cab which, given some searching, could be opened and which was therefore not very secure.

49. We reject his explanation as to why he had lied. In our view the Appellant had lied since he did not want to reveal the existence and location of a set of keys because he did not want anyone to test the running tank.

50. The Appellant advanced no evidence from any other witnesses.

51. Officer Bines gave oral evidence. She was cross-examined on her witness statement, and the other documents in the bundle. She quickly accepted that references in her witness statement to laundered fuel in the running tanks were wrong, but pointed to the contemporaneous documents. She was asked some searching questions as to her understanding of the Policy and its application in certain hypothetical scenarios. In our view, she answered those questions intelligibly and consistently with the Policy, bearing in mind (i) that the questions and answers were on a hypothetical footing, and dealt with circumstances other than those of this appeal, (ii) Officer Bines' acknowledgment of the status of the Policy as guidance, and (iii) her acknowledgment that cases should be considered on their individual merits.

The Law

52. Section 152 of the *Customs and Excise Management Act 1979* entitles the Commissioners, 'as they see fit', to 'restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the Customs and Excise Acts'. Hence, when it comes to restoration, section 152 confers a broad discretion on HMRC.

53. The review decision is an 'ancillary matter' for the purposes of section 16 of the *Finance Act 1994*. Our powers are therefore those which are set out in section 16(4) of the Finance Act 1994:

> "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 have reasonably have arrived at it, to do one of 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;
>
> (c) in the 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"

54. In broad terms, this means that the review decision can only be challenged on 'Wednesbury' principles, or principles analogous to Wednesbury: see the judgment of Dyson J. (as he then was) in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 101.

55. 'Wednesbury' is simply a useful shorthand referring to the principles articulated by the Court of Appeal (Lord Greene M.R., with whom Somervell LJ and Singleton J agreed) in the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the [decision-maker] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..." (at pp 233-234)

56. Thus, we are not concerned with reviewing the merits of the review decision, but rather the lawfulness of the decision-making process itself.

57. Section 16(6) of the 1994 Act puts the burden on the Appellant. He must show (albeit, only on the balance of probabilities) that the decision was unreasonable in any of those senses.

Discussion

58. In essence, this appeal turns on whether the Policy was correctly applied by HMRC.

59. HMRC's position in its Statement of Case is that the decision not to restore 'the Vehicle' (which is an obvious misprint for 'Vehicles') was in line with 'publicly stated policy' and was 'a reasonable exercise by the Respondents of their discretion under section 152(b) CEMA 1979'.

Standing

60. It is not clear whether the present Appellant had any standing even to advance this appeal. No evidence of any kind was placed before the Tribunal that the Appellant has a proprietary interest in either of the Vehicles. Nor was any documentary evidence placed before us, by anyone, as to the corporate status of 'Dolan Contracts' or whether it owned these Vehicles, although the Appellant's evidence was that it had a turnover of about £250,000 per year, used an accountant, and produced annual accounts.

61. In *Global Logistik Heinsberg GmbH v HMRC* [2016] UKFTT 706 (TC) the Tribunal (Judge Fairpo and Mr Freesman) remarked that proof of title must be a precondition of restoration, since without proof of title, items might be restored to the

wrong party. In *Global Logistik* the Tribunal held (at Para. [46]) that, since the Appellant had not provided any evidence that it had title to the seized vehicle, then the Border Force policy on restoration was not engaged at all.

62. Since HMRC did not apparently raise the point, and in order to do justice and fairness, we have proceeded on the footing that the present Appellant does have standing to advance this appeal.

New or developing reasons

63. Officer Bines' witness statement makes three main points:

(1) She considered that, although the Appellant was in England, he would have been aware of the fuel laundering components at the premises, and their use;

(2) She considered that the Appellant would have been aware of the contaminated fuel that was found in the running tanks of the seized vehicles;

(3) She considered that the Appellant had attempted to 'refrain' (sic) the Officers from taking a fuel sample from the running tank of the Tipper.

64. (1) and (2) were mentioned, in very similar terms, in the Review Letter. (3) was mentioned in the Review Letter, as part of its conclusion, but was not developed.

65. It is a fair point that the Review Letter, in the section headed 'Conclusion', does not articulate any developed reasoning. It is also fair that the witness statement is fuller in this regard. However, we consider that the Review Letter can reasonably and sensibly be read (and was obviously read by the Appellant's representatives) against the backdrop of the Decision Letter and the Policy. We do not regard the reasons put forward at any stage as changing to the extent that it could realistically be said that the later reasons were different to the earlier reasons.

Other preliminary points

66. We need to clear away some other preliminary points. The running tanks of the Jeep and the Tipper both contained *rebated* fuel. Neither the Jeep nor the Tipper contained any *laundered* fuel:

(1) HMRC's Statement of Case is factually wrong when it states that the running tank of the Jeep contained laundered fuel;

(2) Likewise, Officer Bines' witness statement is also factually wrong when it says that the Jeep's running tank contained laundered fuel.

67. We accept that those were genuine mistakes. It would have been better had those mistakes not been made. But both mistakes were promptly corrected before us.

68. However, and significantly, the Review Letter does not say that the Vehicles contained laundered fuel. It does not proceed on any misapprehension of fact in that regard. Hence, if HMRC or Officer Bines did ever - and wrongly, since contrary to its

own field-tests and laboratory reports - believe that the Vehicles contained laundered fuel, no such belief seems to have played an operative part in Officer Bines' decision-making process.

Which head of the Policy?

69. We do not consider that the Review Letter should be read as if it were an examination paper on the law of restoration, nor that it should be subject to over-forensic linguistic analysis.

70. Having said that, it is nonetheless plain that Officer Bines treated the Vehicles as subject to the 'fuel laundering' limb of the Policy and not as subject to the 'misuse of rebated fuels' limb of the Policy (where, as a first offence, restoration could be offered on terms).

Inconsistent application of the Policy

71. We note that the third vehicle present was not seized.

72. This is relied upon by the Appellant as demonstrating that, since that vehicle did not contain any rebated fuel, then the only reason given for the seizure of the Jeep and the Tipper must (by inference) have been the presence of rebated fuel, and hence should fall under the rebated fuel part of the Policy.

73. We see the point, which is interesting and, at first blush, superficially attractive. But we think that it goes too far. Officer Bines was not the seizing officer. The extent of Officer Bines' power in this case was to review the decision concerning why these two particular Vehicles should not be restored to the Appellant. The question of restoration does not arise in respect of any vehicle which had not been seized. Since the third vehicle had not been seized, neither HMRC, nor Officer Bines, had any power over it.

74. Moreover, as Officer Bines made clear, she upheld the refusal to restore the Vehicles on the basis that the Vehicles were related to laundering plant, and not because of misuse of rebated fuel. On that matter, she was pinning her colours to the mast, and her stance in that regard was either reasonable or unreasonable. That is the very next issue which we come to consider.

Laundering Plant

75. The Appellant has not succeeded in persuading us that Officer Bines was unreasonable in concluding that there was a laundering plant present and in operation at the site:

(1) Laundered fuel was present in Tanks 1 and 3, and in the diesel tank pump;

(2) Sheds 2 and 3 contained what was, in our view, a complex of tanks, and other equipment and paraphenalia associated with a laundering plant.

76. We reject the Appellant's submissions that the Policy only engages in relation to laundering plants which are 'operational' - either in the sense of being in operation at the time of the seizure, or in an assembled state so as to be capable of being operated at the time. There is nothing in the Policy which says so, and it does not conform to common sense, especially in circumstances where fuel laundering can be a 'low-tech' enterprise, done with relatively inexpensive and readily available non-specialist equipment (such as that found in this case) which can be easily disassembled (and which, in the case of pipes and hoses, is specifically designed to be capable of easy disassembly). The Appellant has failed to show us that it was unreasonable for Officer Bines to treat the disassembled components present in this case, taken together, as a laundering plant within the meaning and effect of the Policy. Nor in our view does it matter that the Items were, for the most part, described as in 'poor' condition.

77. The Appellant's evidence was that he went to the yard on a daily basis. He confirmed in his evidence before us that he was aware of the tanks in the shed and had been 'in and out every now and again', but that it was 'none of my business why the tanks are in the shed'.

78. The Appellant has failed to show us (even on the balance of probabilities) that Officer Bines' conclusion that the Appellant knew that there was a laundering plant was unreasonable. It was not unreasonable for her to conclude (as we did, hearing from the Appellant and hearing his evidence) that it was not credible that the Appellant - through determined indifference and/or profound incuriosity - did not know what was going on within yards of where he parked his vehicles every day, in a building, which he went into, behind his parents' house.

'Related' vehicle

79. The question then becomes whether it was unreasonable for Officer Bines to have treated the Vehicles as 'related' to that laundering plant within the meaning of the Policy.

80. The Appellant has not succeeded in persuading us (even on the balance of probabilities) that Officer Bines' application of the Policy in this way was unreasonable.

81. We do not accept that 'related' should be limited to vehicles which are being used in the laundering operation (for example to smuggle fuel) or which contain concealments.

82. In our view, 'related' has a wider meaning, whether the policy is read literally or purposively:

(1) Read literally, it means having a connection or relation (sometimes, but not always, causal) to the thing specified;

(2) Read purposively, the Policy in this regard has an obvious, intelligible and proportionate purpose - to disrupt laundering operations and to act as a deterrent when those laundering operations are detected. Deterrence extends to the

removal of related vehicles (but not unrelated ones) since the loss of relatively inexpensive and easily replaced equipment such as tanks and hoses is unlikely to function as any deterrent.

83. Thus, and even though it was not asserted by HMRC that the Vehicles were being used to smuggle fuel, and neither Vehicle contained any concealment, there was nonetheless a clear link between the Items and the Vehicles so as to make the Vehicles, in our view, 'related' within the meaning of the laundering plant part of the Policy:

(1) The Vehicles were proximate in time and space to the laundering paraphenalia, of which there was a significant quantity;

(2) The Vehicles were only a matter of yards from the sheds, and, on the basis of the officer's sketch, it would not have been possible to access the sheds with a vehicle without moving one or both of the Vehicles;

(3) Even in the absence of the Appellant, the Vehicles could each have been moved by anyone at the property, given the presence of keys in the house and on the running tank of the Tipper;

(4) The yard where the Vehicles were parked was the Dorans' private property, behind their house, not part of the public highway, and it was under the same possession and control as the sheds;

(5) The laundering plant was not concealed. It had a permanent and visible presence in the yard - namely, the wooden cabinet containing the pump;

(6) There was a visible link to the plant in the yard, namely, the hose.

84. In our view, it was reasonable for the Officer to form the view that the Appellant knew or was aware of the presence of the laundering plant at the site.

Obstruction

85. In her Review Letter and evidence Officer Bines expressly took the Appellant's conduct (in lying about the location of the Tipper's keys) into account. Perhaps surprisingly, the Policy contains the qualification, set out above, concerning the need to exclude from consideration 'obstruction or violence' to officers.

86. There was discussion before us as to the width or meaning of that qualification. It seems to us that the answer is to be found in section 16 of CEMA, to which that paragraph refers, which insofar as material reads as follows:

"16 Obstruction of officers, etc

(1) Any person who—

(a) obstructs, hinders, molests or assaults any person duly engaged in the performance of any duty or the exercise of any power imposed or conferred on him by or under any enactment relating to an assigned matter, or any person acting in his aid; or

(b) does anything which impedes or is calculated to impede the carrying out of any search for any thing liable to forfeiture under any such enactment or the detention, seizure or removal of any such thing

87. Section 16 outlines criminal offences, and we are not a criminal court. But it suffices for present purposes for us to observe that the Policy, read in conjunction with section 16, is clear what sort of conduct is to be disregarded for the purpose of a restoration decision under the Policy.

88. Within the limits of our jurisdiction (and recognising that we are not a criminal court) we nonetheless find that Officer Bines reasonably - both as a matter of fact, and as a matter of law - formed the view that the Appellant's conduct was obstructive.

89. Even though Officer Bines' conclusion on that point was an entirely reasonable one to reach, it was nonetheless, given the terms of the Policy, wrong for her to have taken it into account. We accept that this is not a wholly intuitive conclusion to arrive at, but the Policy, read in the way we have done, appears to exclude from account the dishonesty of a person when the same amounts to obstruction or hindering.

90. Hence, Officer Bines, in her decision-making, had obviously and openly taken account of something which she should not have done. That meets the test of *Wednesbury* unreasonable.

91. However, that does not determine the matter. In our view, that does not automatically compel the setting aside of the Review Decision and a re-review. The reason for that is we consider that a further review, on the basis of the facts which we have found, would, in our view, inevitably lead to the same conclusion. In those circumstances, this Tribunal can still dismiss the appeal: see *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 at 953 per Neill LJ.

92. We consider that this is a case in which, even if a re-review were directed on the basis of the facts now found, and such re-review were to expressly exclude any consideration of the question of obstruction, and the keys, the remedy would serve no useful purpose since the outcome would inevitably be the same. In our view, although material would be omitted this time round, there would be no new material, favourable to the Appellant, which would cause any reasonably-minded officer to reach a different conclusion.

Proportionality

93. The Policy is clear that proportionality should be considered.

94. We cannot identify in the Review Letter any real consideration of the proportionality part of the Policy.

95. But HMRC cannot consider proportionality in a vacuum or in the abstract. It must therefore be the responsibility of the taxpayer to draw to HMRC's attention any particular facts (supported with evidence, where appropriate) which the taxpayer

considers to be relevant to the issue of proportionality in their individual case. It would not be enough for the taxpayer to say 'your decision is disproportionate' without saying *why*. If the taxpayer fails to say why, then it would be (at the very least) difficult to criticise HMRC for reviewing the case on the footing that there were no particular circumstances which proportionality demanded be taken into account: see the comments of the present composition of the Tribunal in *Jack Willis v HMRC: TC/2015/01761*

96. Mr McNamee submits that the Appellant cannot be held responsible for this, since the Policy was not to hand in mid-July 2014, and neither the Appellant nor Mr McNamee knew that proportionality formed any part of the decision-making.

97. We reject that submission. However it is described, the point is an obvious one. Indeed, on 20 August 2014 the Appellant's representatives wrote that the matter (being the stay for which HMRC had applied) *'has an extremely important and potentially hugely prejudicial impact on him and his business'*.

98. The point about impact of non-restoration had been made, but was not developed by the Appellant. There was no evidence before us that HMRC had ever been told the value of either of the Vehicles. Nor, so far as appears in the evidence before us, had HMRC ever been told anything else of an empirical character about the Appellant's financial circumstances, or those of the business with which he was involved, so as to substantiate any claim that the Vehicles, or either of them, should be restored. All that would have been information readily available to the Appellant, especially if, as he said, he has an accountant and a significant annual turnover.

99. It was a bad point for the Appellant to seek to argue that Officer Bines' decision was disproportionate when the Appellant had not put any material before her or HMRC to suggest that it was, even in the letter of 19 June 2014, which came between the Decision Letter and the Review Letter and which was therefore against the background that the Appellant already knew that HMRC had decided not to restore.

100. The Appellant cannot, in support of his appeal, rely on his own failure in this regard. If the Appellant's proposition were correct, then absurd outcomes immediately follow, including that an Appellant, by keeping silent, could, in effect, successfully frustrate the application of the Policy.

101. The Appellant's oral evidence, emerging only at the hearing, that the impact on his groundworks business (which he said was a 'one man business') was 'very bad - no way of shipping stuff' does not even remotely approach the sort of evidence which would be required. It was far from clear as to why that vague evidence, including as to the Appellant's need for the Jeep to attend to a few animals which he had, had not been put forward to HMRC sooner. The Appellant's oral evidence that the Tipper had cost £30,000 and the Jeep had cost £1,000 were entirely unsubstantiated by any documents.

Decision

102. In summary, and adopting the succinct way in which the Appellant's final submissions were put:

(1) There was a laundering plant;

(2) The Vehicles were related vehicles;

(3) The absence of information and material put forward by the Appellant to justify restoration cannot now be relied upon by him to attack the Review Decision for its failure to expressly consider proportionality;

(4) The consideration of obstruction by Officer Bines was an immaterial factor, but a re-review would make no difference.

103. For the above reasons, the Appeal is dismissed.

104. 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.

Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 9 FEBRUARY 2017