TC05664

Appeal number: TC/2016/02860

TYPE OF TAX – Road fuel duty. Fuel purchased abroad. Restoration. No issue estoppel or res judicata arising from deemed forfeiture. E. U. principle and U.K. common law principle of proportionality applicable to restoration decisions. Section 16 Finance Act 1994 – Review Decision is the decision appealed against – not the initial decision.
Restoration – a necessary provision for Parliament to provide a proportionate forfeiture sanction.
Evidence – relevance of evidence of Reviewing Officer.

FIRST-TIER TRIBUNAL

TAX CHAMBER

MR SIGITAS PUSINSKAS **Appellant**

TRADING AS SIGITO EKSPRESO TRANSPORTAS

- and -

BORDER FORCE **Respondent**

TRIBUNAL: JUDGE GERAINT JONES Q. C.

MRS SHEILA CHEESMAN J. P.

Sitting in public at Fox Court, London on 06 January 2017.

Miss Gintare Diminskyte for the Appellant.

Miss Omar, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent.

DECISION

1. At the outset of this Determination we should record that although the appellant is shown as having been represented by Miss Diminskyte, she was not and did not purport to be a lawyer (in any jurisdiction whatsoever) or other professional. She attended to assist the appellant and, if we may say so, did so most courteously and competently. She also assisted with Lithuanian translation as and when necessary. We are conscious of the fact that neither the usual provisions relating to representation and/or the usual provisions relating to translation were strictly observed, but we took the view, bearing in mind that the Tribunal can regulate its own procedure, that it was in the interests of all concerned that Miss Diminskyte should be able to assist in the ways that we have just identified. It would have been in nobody's interests for this matter to go off for hearing on another date and we are entirely satisfied that there was no prejudice to either side in this relaxed procedure being adopted.

2. On 31 December 2015 the tractor unit of an articulated vehicle, with a Lithuanian registration number HUE 812, was seized at Dover docks whilst being driven by the appellant, the proprietor of the business known as Sigito Ekspreso Transportas; a business based in and operating from Lithuania. It is said in the respondent's Statement of Case, slightly inaccurately, that the tractor unit was seized by the respondent "*because it was detected using a rebated heavy oil as a road fuel and as such the tank had been modified in an attempt to conceal the rebated fuel"*.

3. The appellant did not appeal the seizure by way of requiring Condemnation Proceedings to be commenced. Accordingly, the lawfulness of the seizure is not a matter that we should consider. However, it is important that we remind ourselves that no issue estoppel arises from the mere fact that the goods are deemed forfeit pursuant to paragraph 5 of Schedule 3 of the Customs and Excise Management Act 1979 ("the 1979 Act"). Issue estoppel or *res judicata* only arises where there have been judicial proceedings in which findings have been made either on the basis of agreement or upon the tribunal of fact making findings after hearing relevant evidence.

4. Although the appellant did not require Condemnation Proceedings to be commenced, by letter dated 27 January 2016 he requested the respondent to restore

the tractor unit to him. At the hearing before us it was his oral evidence, which we accept, that he did not know about the provisions of Schedule 3 to the 1979 Act.

5. By letter dated 05 February 2016 the respondent asked the appellant to provide it with further information and requested proof that the appellant owned the tractor unit. That proof was provided, as we so find; it not being in dispute between the parties.

6. By letter dated 01 March 2016 one of the respondent's officers wrote to the appellant informing him that restoration was refused. By letter dated 16 March 2016 the appellant requested a statutory Review of that refusal decision. The Statutory Review was carried out by Mrs Karen Norfolk who, by her decision dated 26 April 2016, upheld the original decision and refused restoration.

7. The appellant has appealed to this Tribunal.

8. By section 16(1) Finance Act 1994 ("FA 1994") an appeal against a review decision may be made to this tribunal. The decision which must attract our attention is therefore that made on review, not the original decision. It follows that it is the reasoning process of the Review Officer, on the basis of the facts taken into account by him/her, that we must examine before arriving at our conclusion as to whether this appeal succeeds or fails. The reasoning and/or approach of the officer who took the original decision might be informative in respect of those matters considered by the Reviewing Officer, but can have no relevance other than that. Thus the essential evidence concerning the factors taken into account (or not take into account) in arriving at the Review Decision must necessarily come from the Review Officer, Mrs Norfolk, whose witness statement appears in the appeal bundle at pages 27 – 28. It is only she who can speak to the factors that she took into account, the facts as she understood them to be and whether or not she applied or took into account all relevant applicable legal principles. No other witness would be able to speak to what was in her mind and to what led Mrs Norfolk to formulate her conclusion. Indeed, extraneous or third-party evidence relating thereto would not be admissible as it would offend the best evidence rule and fail the test of relevance. Thus it is upon her evidence that we must focus; not the content of the respondent's Statement of Case, which has no evidential status.

9. By section 16(9) FA 1994, read with section 16(4), the power of this tribunal on any such appeal is confined to a power, if we are satisfied that the decision could not reasonably have been made, to

(a) direct that the decision is to cease to have effect;

(b) require HMRC to conduct a further review in accordance with our directions; and

(c) where the decision cannot be remedied, to give directions to secure that repetition of the unreasonableness does not occur in future.

By the concluding words of section 16(6) the burden of proof in any such appeal is on the appellant.

10. Thus the jurisdiction given to this tribunal is of a similar nature to that of judicial review; but not identical. A decision could not reasonably have been made if relevant facts were ignored, irrelevant factors were taken into account, a material error of law was made or the decision was otherwise such that no reasonable body could have made it. Furthermore, it could not reasonably have been arrived at if one or more of the principles of European or domestic law applicable to public law decisions, was infringed.

11. If an issue arises as to the facts by reference to which the reasonableness or otherwise of the decision should be judged there are three possible answers:

(1) the facts available to the person who made the original decision;

(2) the facts available to the person who makes the review decision, and

(3) the facts as found by this tribunal.

12. In *Balbir Singh Gora v HMCR* [2003] EWCA Civ 255 the Court of Appeal considered an appeal against a decision not to restore goods seized under the 1979 Act. The provisions of FA 1994 applied to that appeal in the same way as they apply in the circumstances of the current appeal.

13. Two preliminary points were considered by the Court of Appeal. One of these was whether the jurisdiction of the tribunal was sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights. In the course of argument, it emerged that HMRC took a broader view of the jurisdiction of the tribunal than had originally appeared. HMRC said that, although "strictly speaking" it appeared that section 16 limited the tribunal to considering whether there was sufficient evidence to support the appealed decision; in practice the tribunal could make findings of fact and then in the light of its factual findings decide whether the decision was reasonable. Pill L.J., with whom the other members of the Court agreed, said at [39] that he would accept that view of the jurisdiction of the tribunal subject only to doubting whether the "strictly speaking" limitation was correct, once it had been accepted that the tribunal had a fact finding jurisdiction.

14. In *Charles Miller Ltd v Home Office [2015] UKFTT 556 (TC)* the Tribunal (Judge Jonathan Richards) put the position admirably succinctly at [34] *"In Balbir Singh Gora v C&E [2003] EWCA Civ 525 Pill L. J. accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision of restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which, in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal."* We adopt that statement of principle.

15. Thus, in restoration cases, the function of the tribunal is to determine whether, by reference to the facts it finds (rather than the facts before the decision maker) which existed at that time, the decision was reasonable. The only caveat is that these must be facts in existence at the time when the Review Decision was taken.

16. There are other issues of law in this case which troubled us and upon which we were given only limited assistance. The first issue relates to the requirement of Community Law and domestic law that public law decisions must be proportionate. The second issue relates to the law applicable to what fuel might be used by the engine of a vehicle entering this country from abroad. We leave the second issue until we consider the facts, below.

17. So far as the first issue is concerned we remind ourselves of the following principles. Where the competent authorities of a Member State are acting within the scope of EU law, it is well established that:

a. The competent authorities of the Member States are required to comply with fundamental rights standards: see *Wachauf*.[1]

b. These rights include rights guaranteed by the ECHR. Article 6 of the Treaty on European Union, originally introduced by the Treaty of Maastricht in 1992, makes explicit reference to the ECHR as a source of such rights within the EU.[2]

c. The protection of fundamental rights arises as a matter of EU law independently of UK ratification of the ECHR and was applied long before the HRA 1998 was adopted to "bring rights home" in the United Kingdom. See, e.g., Case 29/69 *Stauder* [1969] ECR 419, para. 7.

d. The Charter of Fundamental Rights is incorporated into the Treaty on the Functioning of the European Union and is a source of rights and a guide to interpretation of EU law within its scope.[3] The rights protected by the Charter overlap to a considerable degree with the ECHR and are to be interpreted consistently with the ECHR.[4]

18. Similarly, the EU Treaties and secondary legislation made under those Treaties are to be interpreted in accordance not only with fundamental rights but also with the general principles of EU law, and in particular the principles of proportionality and legal certainty:

> "These principles have constitutional status. They are binding on the Community institutions and a measure, whether legislative or

[1] Para. 19: "the requirements of the protection of fundamental rights in the Community legal order … are also binding on the Member States when they implement Community rules"
[2] Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".
[3] See the 30th Protocol to the Treaty on the Functioning of the European Union, which specifically confirms this position in relation to the United Kingdom and Poland.
[4] Article 52(3) of the Charter.

administrative, which infringes one of them is illegal and may be annulled by the Court. They are also binding on the Member States".[5]

19. The proportionality principle is summarised in the following passage from the judgment of the ECJ in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa [1990] ECR I-4023, paragraph [13]:*

> "By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

20. In the present context that principle is applied, not to the prohibition of an economic activity, but to the proportionality of refusing restoration in the factual matrix which we consider below.

21. The ECtHR in *James v U. K. [1986] 8 EHRR 123* having found that measures designed to address "social injustice" could be "in the public interest", considered the next hurdle for compliance with A1P1:

> "*This, however, does not settle the issue. Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised…This latter requirement was expressed in other terms …by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*" [§50]

The ECtHR continued:

[5] Tridimas, "The General Principles of EU Law", 2nd ed., p. 6.

"*The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden*". [§50]

In *Barnes v Eastenders Cash & Carry plc [2015] A. C. 1* Lord Toulson JSC put the matter in this way :

"56. *In James v United Kingdom (1986) 8 EHRR 123 , para 37, the court clarified what it meant by A1P1 comprising "three distinct rules". The court said that the three rules were not "distinct" in the sense of being unconnected. The second and third rules were concerned with particular instances of interference with the right to peaceful enjoyment of property and were therefore to be construed in the light of the general principle clearly enunciated in the first rule. The court rejected an argument that the "public interest" test in the deprivation rule is satisfied only if the property is taken for the use or benefit of the public at large. It held that a taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest"; that the margin of appreciation open to a national legislature in implementing social and economic policies is a wide one; and that the court will respect its judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation: paras 39–45.*

57. However, in order for a taking of private property to be compliant with A1P1 , not only must the measure under which the property is taken pursue a legitimate aim in the public interest, but there must be a reasonable ****31*** *relationship of proportionality between the means employed and the aim sought to be realised. The court in the James case repeated its statement in the Sporrong case that a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and it added that the requisite balance will not be found if the person concerned has had to bear an individual and excessive burden: para 50.*

58. The court held that the requirement in the deprivation rule that the taking must be in accordance with "the general principles of international law" does not apply to a taking by a state of the property of its own nationals: para 66. However, the court stated that the requirement that any taking shall be "subject to the conditions provided for by law" refers not merely to municipal law but relates also to the quality

of the law, requiring it to be compatible with the rule of law and not arbitrary: para 67.

59. In Lithgow v United Kingdom (1986) 8 EHRR 329 the court held that the phrase "subject to the conditions provided for by law" requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions: para 110. As to the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and the requirement that a balance must be struck between the general interest to the community and protection of the individual's fundamental rights, it said that the taking of property without reasonable compensation would normally constitute a disproportionate interference: paras 121–151.

And

87. The critical question is whether in the circumstances of the present case an order that the receiver's costs and expenses should be met out of the companies' assets is disproportionate, in that it would not achieve a fair balance between the interest of the community and protection of the companies' right to their own property.

88. I start from the position that the taking of property without compensation will normally be a disproportionate interference with a person's A1P1 rights. Although this was said in a case about compulsory purchase, it is a general principle, but it is only a starting point. To give an obvious example, a confiscation order under POCA is a taking of property without compensation, but it is done for the salutary purpose of depriving a ****38*** *criminal of the proceeds of his crime. A restraint order and receivership order may also be proportionate if reasonably ancillary to that process.*

And

94. This case is distinguishable from Raimondo 18 EHRR 237 , Andrews 26 September 2002 , Hughes [2003] 1 WLR 177, Capewell [2007] 1 WLR 386 *and* Sinclair v Glatt [2009] 1 WLR 1845 *, because all those cases were decided on the premise that the original receivership order was rightly made. In Sinclair v Glatt the*

applicant was not the defendant, but the relevant property was in the defendant's legal ownership and was therefore held to be properly included in the receivership order. In the present case, however, not only were the companies not defendants, but at the time when the receiver's powers were activated there was no reasonable cause to believe that their assets were assets of the defendants. The question is whether on those facts it strikes a fair balance between the general interest of the community and the protection of the companies' rights to the peaceful enjoyment of their property that the companies' assets should be taken to pay for the costs and remuneration of the receiver. At this point I part company with Laws LJ and agree with Underhill J that this would not be a fair balance. As Lord Reed JSC observed in AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 *, para 128, the assessment of proportionality requires careful consideration of the particular facts. In this instance there was no good arguable case for assimilating the companies' assets with those of the defendants, and Underhill J aptly described it as simply a confiscation of a third party's assets to fund the execution of an order that should not have been made in the first place".*

22. Ld. Toulson specifically recognises that forfeiture may be a legitimate tool of the legislature to deliver a salutary message for the purpose of depriving a criminal of the proceeds of his crime. That does not chime with the present circumstances, because they do not involve a proceeds of crime case. We take from those authorities that although forfeiture may be designed to provide the salutary lesson referred to by Lord Toulson, Parliament recognised that a mechanism was required to address what might amount to disproportionate forfeiture in any given factual circumstances. It chose to address that by providing for restoration and although restoration is at the discretion of the respondent it is at that stage that the principle of European law which requires proportionality to be considered in an individual case, comes squarely into play. Without such a mechanism which is perhaps the only check and balance against the forfeiture regime being used oppressively by the state, the entire forfeiture regime would probably be disproportionate, at least in certain easily imagined factual circumstances.

23. It is also worth remembering that at common law there is a requirement of proportionality. In the recent Court of Appeal case of J P *Whitter (Waterwell*

Engineering) Ltd v HMRC [2016] EWCA Civ 1160 Henderson L. J. (with whom the other members of the court agreed) said :

"Although Mr Chacko did not place this at the forefront of his submissions, it is appropriate to begin by considering whether HMRC's power to cancel must be exercised proportionately as a matter of common law. As Lord Toulson JSC has recently stressed, in R (Ingenious Media Plc) v Revenue and Customs Commissioners [2016] UKSC 54, [2016] 1 WLR 4164 , at [28]:

"It is important to emphasise that public bodies are not immune from the ordinary application of the common law … The common law is multi-faceted and remains the bedrock of the English legal system."

Accordingly, if there was a common law requirement of proportionality in cases of the present type, it would have formed part of the background to the enactment of the CIS legislation, and it would need to be taken into account both in construing the legislation and in its application. (Emphasis added).

69 Mr Chacko argued that, because removal of registration would have a significant impact on the Company's business, the case was analogous to the removal of a licence, where a requirement of proportionality is imposed at common law. Mr Chacko referred us to the decision of the Court of Appeal in R v Barnsley Council, Ex p. Hook [1976] 1 WLR 1052 , which concerned the termination of a market trader's licence in the Barnsley market following an incident where he had been seen urinating in a side street after the market had closed in the evening and the public lavatories were locked. The principal ground of decision was that the rules of natural justice had not been followed in the procedure adopted by the council to revoke Mr Hook's licence, but two members of the court (Lord Denning MR and Sir John Pennycuick) also relied on the point that the punishment was wholly disproportionate to the offence: see 1057H — 1058B, and 1063B. As Lord Denning put it, at 1057H: "Now there are old cases which show that the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion … It is quite wrong that the Barnsley Corporation should inflict upon [Mr Hook] the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the magistrates could inflict. He is a man of good character and ought not to be

penalised thus. On that ground alone, apart from the others, the decision of the Barnsley Corporation cannot stand."

The third member of the court, Scarman LJ, while not founding his judgment on any requirement of proportionality (see 1062E), pointed out at 1058G-H that revocation of an existing licence is usually a more serious matter than refusal to grant a licence in the first place.

70 More recently, in Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591 , Lord Reed JSC, in the course of some helpful observations on the relationship between reasonableness and proportionality as principles of domestic administrative law, referred to the Hook case at [114] as a case "in which a finding of unreasonableness was based on a lack of proportionality between ends and means."

71 I am prepared to accept that there are many contexts in which the common law will require proportionality between ends and means to be observed by a public authority in the exercise of its functions, although whether such a requirement exists as an independent ground of review of administrative action, or only as an aspect of review for unreasonableness, remains a controversial question upon which the Supreme Court has yet to pronounce definitively. Even if that assumption be made, however, I do not think that it assists the Company in the present case".

24. We have already pointed out that the decision with which we are concerned is the Review Decision. That is a necessary and inevitable consequence of the express wording of section 16(1) Finance Act 1994.

25. We have read the decision of the Reviewing Officer in detail. It is striking that it makes no reference whatsoever to the principle of proportionality, nor is there any consideration whatsoever of whether, on the facts which the Reviewing Officer considered to be relevant and established, it was disproportionate to refuse restoration either at all or conditionally. In our judgement that is a fundamental flaw in the Review Decision. We should add that this is not a simple enquiry into whether or not the word "proportionate" or "proportionality" appears in any given Review Decision. The essence of the enquiry is to determine, after reading the Review Decision in its

entirety, whether the mind of the Reviewing Officer turned to the issue of proportionality, howsoever that might be expressed. We cannot, on any fair and proper reading of this Review Decision, find anything that suggests that the Reviewing Officer turned her mind to the issue of proportionality. That, of itself, renders this Review Decision flawed so that we must direct that it ceases to have effect.

26. We cannot ourselves undertake the proportionality consideration. The limit of our jurisdiction is to direct that the decision taken upon Review, refusing restoration, shall cease to have effect, and that a new Statutory Review must be undertaken by a different and wholly independent Reviewing Officer, in accordance with the Directions that we give below and in accordance with the Findings of Fact sets out below.

27. We now turn to the facts. In accordance with Directions that had been issued by the Tribunal, the respondent had informed the Tribunal that it intended to call as a witness, as is only to be expected, Mrs Karen Norfolk, the author of the Review Decision. Her witness statement appears in the bundle of documents at pages 27 – 28. It is a very short statement and singularly uninformative. It simply refers to those documents which she had available to her when arriving at her Review Decision. It ends with a stock phrase "I am satisfied that I considered every matter that was relevant and disregarded everything that was irrelevant". She does not disclose what matters are comprised within "every matter". As it is she who made this administrative decision it is her evidence and, importantly, her reasoning processes and state of mind that are of importance. The opinions and/or views of any other HMRC officer would be irrelevant. That much must flow from what Ld. Dyson explained in **R (*Lumba) v Sec of State for the Home Department [2012] 1 AC 245 at [65 & 66]* :**

"65. All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58* , 162 C – D : "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.

.66 The causation test shifts the focus of the tort on to the question of how the defendant *would* have acted on the hypothesis of a lawful self-direction, rather than on the claimant's right not *in fact* to be unlawfully detained. There is no warrant for this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington v British Transport Police [1999] 2 AC 143* , 158 D – E".

28. Thus it is the reasoning of the officer who took the decision on the basis of the facts and matters taken into account by her that is all important. No other officer of HMRC can speak thereto. Nonetheless, at the outset of the appeal hearing we were told that Mrs Norfolk would not be attending the hearing and, thus, without an adjournment, the appellant would be denied the opportunity to cross examine her. An application was made by counsel for the respondent that her statement should be read into evidence on the basis that without an opportunity for the appellant to cross examine the witness, we could consider what, if any, weight to place upon that read evidence.

29. The appellant and his representative, being rather unaware of the procedures normally adopted in this kind of litigation, effectively left this application to be determined by us, but did not put forward any cogent opposition to the application. After considering the content of the statement *de bene esse* we decided to allow it to be read into evidence. We arrived at that conclusion because, as set out above, it is singularly uninformative; contains very few relevant facts relating to what was found at Dover on 31 December 2015; and its final three sentences contain no factual information, but are in the nature of stock phrases designed to show that the Reviewing Officer discharged her duty properly. Accordingly, it is our judgement that the weight to be placed upon that read evidence is minimal.

30. The Decision of the Reviewing Officer is not evidence *per se*; it is no more and no less than the Decision that is being challenged on appeal. In this case it asserts various facts without disclosing their provenance. However, the appeal bundle contains extracts from various Border Force officers' notebooks, at pages 40 – 52. We know nothing about the contemporaneity with which any such notes were made relative to the events noted therein. We have not heard from the authors of any such notes. We know nothing about the provenance of the information recorded in any of those notebooks, except where the person making the note refers to observing a particular fact or facts for himself/herself. The tactic of exhibiting notebook entries and failing to serve a witness statement from the maker of those notes so that the relevant person becomes a witness who can be cross examined is, at the very least, unsatisfactory and must inevitably be something that we take into account when weighing the evidence that we accept and that which we feel we can properly act upon. Even if notes are made contemporaneously they are there to refresh the memory of a witness who might not be expected to have a good memory of events undertaken in the course of his/her employment many months ago; but the notes are not themselves witness evidence.

31. The appellant gave evidence and was subsequently cross-examined by counsel for the respondent.

32. The appellant acknowledged and accepted that the diesel fuel tank on the tractor unit identified above has been modified. He explained that it had been modified because, from time to time, he had experienced diesel being stolen from a previously undivided fuel tank with two consequences. The first consequence was the obvious extra expense to him and the second consequence was that if a tank was drained the tractor unit would not be able to travel at all or might not be able to make it to a fuel station.

33. The appellant also accepted and acknowledged that the respondent's officers might have found traces of red diesel in one half of the fuel tank because, he said, on an occasion between August – November 2015 one of his new drivers, a Mr Peciulis, had put red diesel into the tank at a filling station in Belgium. It was his evidence that in Belgium fuel stations sell both red and blue diesel; seemingly Belgium distinguishing between red and blue diesel, possibly in the same manner as it is

distinguished in this country. We say "possibly" because there is no evidence on the issue and it is not for us to make assumptions. The appellant explained that the fact that his driver put red diesel into the fuel tank on one occasion, at a filling station in Belgium, was an understandable error on the part of his driver given that he usually hauls refrigerated trailers which have a separate fuel tank to power the refrigeration equipment. That is fuelled with red, not blue, diesel. The appellant said that he noticed this because the receipt referred to the fuelling of 500 litres of fuel, whereas the tank for the refrigeration unit has a maximum capacity of 200 litres. His evidence is that he had told his driver not to use red diesel on any future occasion in the fuel tank that supplies fuel to the tractor engine.

34. The appellant's evidence was that the seized tractor unit was only five months old, having been manufactured and first registered in July 2015, and had been purchased at a cost of €70,000. That evidence is corroborated by the document at page 66 in the appeal bundle. He said that his business operates two other vehicles; an older one, and one that has been purchased recently. The recent purchase was made so that the business could continue operating given that the appellant does not have the seized tractor available for use.

35. The appellant had not turned his mind to financial evidence and had not disclosed any documents relevant thereto. Nonetheless, he was asked by us about the approximate level of profit within his business and said that for his year ended 31 December 2015 there was a net profit of around €40,000 and for the year ended 31 December 2016, a net profit of around €10,000, each of those profits being after he had drawn a monthly salary which he put at between €1000 – €1400 per month.

36. When the appellant was cross examined he again accepted that the fuel tank had been divided. He was asked when he had last experienced a theft of diesel from one of his lorries and said that it had been six weeks prior to the seizure in December 2015, whilst that vehicle was in the United Kingdom. He was asked whether he had reported any diesel thefts to the police in this country and said that he had done so.

37. The appellant was asked to look at page 59 in the appeal bundle, being a letter that was received by the respondent on 27 January 2016. In that letter the appellant says "Regarding petrol – yes, on one occasion my new driver made a mistake and

loaded the tank with red petrol". He was asked whether there was red diesel in the tank on 31 December 2015 to which he replied that there was none. He insisted that on 31 December 2015 the tractor unit was running on blue diesel and that he could be confident of that fact because it was only on the one occasion, referred to above, when red diesel had been put into the tractor unit fuel tank; as opposed to the refrigeration unit fuel tank. The appellant accepted that there could have been traces of red diesel left from the incident to which he had referred.

38. It was not put to the appellant that his evidence was untruthful in any material particular.

39. It is our judgement that the appellant gave his evidence without guile and with an openness and frankness which, taken with the appellant's demeanour and apparent candour, leads us to conclude that he was a witness of the truth. There is no evidence available to us which contradicts any material part of the appellant's evidence. In particular it is notable that there is no evidence about what, if any, quantity of red diesel or any trace of red diesel, was found on 31 December 2015.

40. We have to decide the facts of this matter, on the balance of probabilities. We find it more probable than not that each of the facts given by the appellant in evidence, as set out above, are true. We are fortified in that view given that although in a letter dated 26 April 2016, from the respondent to the appellant, it says "*My colleague has found red diesel in your tank and it appears to be sealed,"* there is no evidence of what, if any, measurable quantity of such red diesel was found. That is a remarkable omission given that the same letter says that "*the fuel tank (was) taken for further examination"*. Plainly, that would have afforded an opportunity for any measurable quantity of red diesel to be measured. There is no reference in any evidence before us to any such measurement taking place or of there being any measurable quantity of red diesel. In the respondent's Statement of Case, at paragraphs 2 and 6, there is an allegation (in paragraph 2) that the tractor unit was detected using "*rebated heavy oil as a road fuel*" and then (in paragraph 6) to the "*diesel in the concealed tank*" being "*tested and reacted positively as rebated fuel*". Neither of those assertions is supported by any evidence adduced by the respondent.

41. We must not lose sight of the actual reason given for the seizure. The reason given was not that the tractor unit was running on red diesel, but that the tank of the tractor unit had been adapted "for the purpose of concealing goods". Thus, it was said, the tractor unit was susceptible to forfeiture pursuant to section 88 of the 1979 Act.

42. The appellant does not dispute that the fuel tank had been adapted, but he very much disputes that it had been adapted for the purpose of concealing goods.

43. This raises another difficult issue upon which we were given no assistance. This appeal was argued by the respondent on the express basis that the tank had been adapted so as to conceal red diesel, which the engine of the tractor unit would consume when the vehicle was being used. The purpose of section 88 of the 1979 Act is to make various conveyances liable to forfeiture if they have been "*adapted, altered or fitted*" so as to conceal goods. Any such concealment has to be for the purpose of avoiding the payment of duty or tax and not simply for the purpose of concealing goods from those who might choose to breach the criminal law by committing theft.

44. This raises a difficult issue, which went unanswered during the appeal. It is this. If a tractor unit, inbound to the United Kingdom, enters this country using fuel purchased in a foreign country which has been perfectly lawfully purchased and which could lawfully be used in the vehicle in that country, can that be fuel of a type which it would be unlawful to use within the United Kingdom (for the purpose of running a tractor unit on the public road). We accept that from the appellant's evidence that he instructed his driver not to use red diesel, purchased in Belgium, in the fuel tank of the tractor unit, as opposed to the fuel tank for the refrigeration equipment it may not be lawful for that to be done in Belgium. Whether such distinctions obtain in other countries and, if so, under what circumstances, we do not know.

45. The difficulty that we have is that the concept of "rebated fuel" and/or "red diesel" may be quite different country to country. Indeed, some countries may draw no distinction. We have no evidence concerning the law in respect of the taxation and/or use of different kinds of diesel fuel in Belgium or, indeed, any other foreign country. We do not know whether the concept of "rebated fuel" exists in any other country than the United Kingdom. This may be a matter of significance because if a

person lawfully buys fuel in a foreign country for use in a vehicle which then enters this country, quite lawfully, it would be a surprising proposition if the mere fact of bringing that vehicle into this country rendered its use with the fuel then existing in its tank, unlawful. We do not need to resolve that issue, but we will direct the respondent, when undertaking a new Review, that it must not assume that the use of diesel purchased abroad, whatever its colour, would be unlawful in this country. We use the word "assume" advisedly.

46. It follows that, on the basis of the facts as we find them proved, the Review must be undertaken afresh because either material facts (as we have found them) have not been taken into account and/or facts which we do not find proved have been taken into account.

47. Accordingly, we allow this appeal not only on the basis of the want of consideration of proportionality (see above), but on the additional ground that we identify in paragraph 46 above.

48. The Review Decision not to restore ceases to have effect. A new Review must be undertaken within 45 days of the respondent receiving this Determination, by a Reviewing Officer, other than Mrs Norfolk, who is wholly independent and has had no prior involvement in this matter.

49. We direct that the new Review must be undertaken in accordance with the facts which we have found proved, as detailed above. For the avoidance of any doubt we set out those facts as follows :

(1) Each fact asserted by the appellant in his evidence, as summarised above.

(2) That no measurable quantity of "red" diesel was found in any part of the fuel tank of the tractor unit on 31 December 2016.

(3) That the fuel tank had not been divided, altered or configured for the purpose of concealing goods liable to duty and/or tax in, or upon entering into, this country.

(4) That there is no evidential basis for proceeding on the basis that "red" diesel purchased in a foreign country is or equates to "rebated diesel" in this

country. We say "evidential basis" advisedly. No assumption should be made to that effect.

(5) The appellant had not fuelled his tractor unit with red (rebated) diesel purchased, or otherwise acquired, in this country.

50. We direct the respondent, when undertaking a new Review, not to assume that the use of diesel purchased abroad, whatever its colour, would be unlawful in this country. We use the word "assume" advisedly.

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.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 13 FEBRUARY 2017