[2017] UKFTT 0233 (TC)

TC05721

Appeal number: TC/2016/02689

CITES – Convention on International Trade in Endangered Species - Importation of prohibited goods – Non-Restoration of Ivory Tea Set seized under Customs and Excise Management Act 1979 – reasonableness and proportionality of review decision – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAYFAIR GALLERY LIMITED **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE RUPERT JONES
JACQUI DIXON

Sitting in public at Fox Court on 5 December 2016

Andrew Banks, Stone King LLP, representative for the Appellant

Joseph Millington, Counsel instructed by Border Force for the Respondents

DECISION

1. Mayfair Gallery Ltd (hereinafter "the appellant") appeals against a decision of Border Force ("the respondent") contained in a letter dated 14 April 2016.

2. The decision letter notified the appellant that the respondent would not restore a six piece Qing dynasty ivory mounted silver tea, water and coffee set (hereinafter the "Tea Set") purchased for £5,250.

3. The Tea Set was seized on 1 December 2015 by the respondent having arrived at Heathrow Airport in a crate sent from Hong Kong without a valid import permit to enter the UK in compliance with the Convention on the International Trade in Endangered Species 1973 (CITES).

The Facts

4. The Tribunal received a bundle of documents from the respondent. Mr James Sinai, gallery manager of the appellant, gave oral evidence on its behalf at the hearing of the appeal and Helen Perkins, review officer, gave oral evidence on behalf of the respondent. The Tribunal finds the following facts.

5. On 29 October 2015 a crate containing the Tea Set arrived at Heathrow Airport. On 16 November 2015 the consignment was declared by Williams and Hill Forwarding Ltd. There was no valid United Kingdom Convention on International Trade in Endangered Species 1973 ("CITES") import permit in place.

6. The Tea Set contained elephant ivory (Loxodonta Africana), a species listed in Annex A(I) of Council Regulation (EC) No 338/97, and therefore required both an export/re-export certificate from Hong Kong and a CITES import permit issued by the United Kingdom Animal and Plant Health Agency.

7. The Animal and Plant Health Agency (APHA) confirmed that the application for the permit was received on 30 October 2015, after the consignment had been imported. The CITES import permit was only issued on 13 November 2015 which was two weeks after the consignment had arrived into the UK.

8. APHA also stated that they had not been made aware, prior to issuing the permit, that the consignment had already been imported. Furthermore, the import permit was invalid due to an incorrect declaration made by a representative of Williams and Hill Forwarding Ltd. The licensing team did not believe that a retrospective permit should be issued.

9. The respondent also requested sight of the original CITES re-import permit said to have been obtained after which request it received a phone call from Williams and Hill Forwarding Ltd stating that it had been lost. On 28 November 2015 the respondent received a replacement re-import permit, which stated that the shipment was exported on 29 October 2015.

10. The consignment was inspected on 1 December 2015 and found to contain the Tea Set. The Tea Set was seized under section 139 (1) of the Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture under s.49 (1)(b) because it was not accompanied by a valid CITES import permit.

11. Additionally, the consignment also included a pair of silver tongs, a silver bowl, a suitcase containing empty watch boxes and a crocodile watch strap (which was subject to CITES controls) that did not comply with the customs entry.

12. The appellant was sent a Notice of Seizure and a Customs Notice 12A ("Goods and / or vehicles seized by Customs") on 1 December 2015. The notice explained that a challenge could be made to the legality of the seizure in a Magistrates Court by sending Customs a notice of claim within 1 month of the date of seizure.

13. On 5 December 2015 the respondent wrote to the appellant asking for an explanation for the pair of silver tongs, the silver bowl, the suitcase containing empty watch boxes and the crocodile watch strap.

14. By letter dated 14 December 2015 the appellant provided further information about the consignment.

15. On 22 December 2015 the respondent issued a notice of seizure in relation to the silver tongs, silver bowl, and crocodile watch strap.

16. By letter dated 22 December 2015 (received on 31 December 2015) Williams and Hill Forwarding Ltd contested the seizure. They stated that the import permit had been applied for 24 hours before the consignment was due to arrive and that there had been no attempt to clear or remove the consignment until the paperwork was in hand.

17. By letter dated 24 December 2015 the appellant requested restoration of the Tea Set.

18. By letter dated 31 December 2015 the respondent acknowledged the request.

19. On 6 January 2016 Williams and Hill wrote to withdraw the challenge to the legality of seizure and to request restoration of the Tea Set. The Tea Set was therefore duly condemned as forfeit to the Crown by the passage of time under paragraph 5, schedule 3 CEMA.

20. By letter dated 12 January 2016 the appellant wrote to authorise Williams and Hill to act on their behalf.

21. By letter dated 27 January 2016 the respondent refused restoration of the Tea Set. The respondent stated that it adopted a general policy as follows:

'The general policy regarding the improper importation of prohibited or restricted items into the UK is that they will not be offered for restoration. However, each case is looked at on its merits to consider whether there are any exceptional circumstances that would warrant a departure from that policy'

22. The respondent's decision included the following reasons in support:

'Having examined the documentation tendered in respect of this case it is clear the goods are not covered by the Appropriate CITES permits. The exceptional circumstances that have been put forward relate to the culpability being on the shipping company rather than Mayfair Gallery Limited. You as the importer retain ultimate responsibility for the movement of the goods and the correct presentation of the required permits. I conclude that there are no exceptional circumstances that

would justify a departure from the Commissioner's policy and I can confirm on this occasion ***the goods will not be restored****.'*

23. By letter dated 22 February 2016 the appellant requested a review of the non-restoration decision of 27th January 2016. In essence, the appellant declined to accept responsibility for the absence of the required CITES import permit. The appellant asserted it had done everything in its power to secure compliance. It continued that *'accident and mistakes are a fact of life, and sometimes we are powerless to stop them'*. The appellant stated that the original export permit had been lost in transit, and the appellant's agent had confirmed all paperwork would be in place.

24. By letter dated 29 February 2016 the respondent wrote to the appellant explaining the review process and inviting any further information in support of the request for a review.

25. By letter dated 4 March 2016 the appellant wrote to the respondent asking for restoration of the silver tongs, the silver bowl and the suitcase.

26. Following the review, by letter dated 14 April 2016, the respondent upheld the decision not to restore the Tea-Set (which included the tongs). The decision of 14 April 2016 is the review decision of Officer Perkins which is subject to the appeal.

27. The matters considered by the reviewing officer in reaching her decision included the incorrect importation of goods by the appellant on two previous occasions: 31st October 2014 and 14th June 2015. On both occasions goods were imported without a valid CITES permit. On both occasions restoration was made to the appellant subject to payment of a restoration fee. Officer Perkins observed:

> On two separate occasions BF (Border Force) has exceptionally agreed restoration upon payment of a fee that has been paid. However, this perpetual cycle of breach and payment cannot continue and your company must take responsibility for failing to comply properly with the CITES Regulations, in relation to UK CITES import permits.

The Previous Seizures

28. Mr Sinai gave evidence about the two previous seizures of goods imported by the appellant prior to 29 October 2015.

29. In relation to the first seizure, he stated that Williams and Hill were their regular shipping agent who handled many importations on their behalf. He stated that the item seized on 31 October 2014 was a pair of Louis XIV console tables, worth about £145,000, imported from Switzerland. These contained ebony and tortoiseshell so that CITES import and export licences were required. There had been no valid import licence for them despite there having been an export licence. When this happened at the time, employees of the appellant were informed there was a problem and the items had been seized by Border Force.

30. Employees of the appellant spoke to Williams and Hill in relation to the restoration of the items who told appellant not to worry and that they would handle it. The appellant authorised Williams and Hill to handle the matter on their behalf and at the time tried to ascertain what the problem was. Williams and Hill stated one of the forms was not stamped correctly hence there had been an issue with CITES paperwork. The explanation put forward by Williams and Hill to the respondent was

that ‘our client was of the understanding that as the goods were destined for USA no CITES import licence would apply…..’.

31. On 3 March 2015 the items were restored to the appellant for a fee of £5,835 which sum the appellant paid to the respondent but was refunded by Williams and Hill thereafter.

32. The second previous seizure occurred on 14 June 2015. It did not involve Williams and Hill – on that occasion the appellant used GMT transport as shipping agent. Fifteen items were purchased from an auction house in Switzerland – Kroller and Company. Mr Sinai’s father, the director of the appellant, bought a number of pieces from Kroller on the understanding that if they required CITES licences that Kroller would obtain them on the appellant’s behalf.

33. Kroller and their agents applied for the licence in respect of two of the items, an ivory inlaid table and an Ebony commode with boulle tortoiseshell and brass marquetry. The appellant instructed Kroller to release the non-CITES items and keep the Ebony commode in storage until they had obtained the CITES paperwork and it could come back on a separate shipment. Kroller had been given instructions to make sure the CITES paperwork was in place. Unfortunately, Kroller released the commode to GMT transport when they should not have done so because no permit had been obtained. The tortoiseshell commode was therefore seized on importation. The value of the item was around £11,312.

34. Mr Sinai, on behalf of the appellant, wrote to the respondent in a letter received on 1st July 2015 asking for the goods to be restored. In that letter he stated: “...We have arranged with a private shipper to collect our purchased goods from KROLLER auction house.....To our regret, our shipper had mistakenly omitted to apply for a CITES license for the import of this commode and we fully accept that it has been legally seized.....We correctly applied for a CITES for an ivory inlaid table from the same auction, who had warned us of the need of the CITES. However, they did not mention the need of one on this piece.....” Enclosed with the letter were documents with regard to the importation.

35. On 6 October 2015 the respondent refused to restore the goods. In a letter received on 13 November 2015 Mr Sinai wrote asking for a review of the decision dated 6 October 2015. Enclosed were documents already provided. In the letter he stated that:

“.....I believe the mistake was likely to have been made because the invoice refers to the item as containing ‘Boulle marquetry’, an antique technique for inlaying brass and tortoiseshell”. The fact that tortoiseshell is not mentioned in the title is most likely to have caused the oversight from Kroller and GMT Transport. Mayfair Gallery is not at fault.....Whilst the mistakes in this instance were not those of Mayfair Gallery; I accept that ultimately we are responsible for the safe shipment of our items.....”

36. On 15 December 2015, the appellant was granted restoration of the items on payment of a fee of £3,393.60. That sum was paid by the appellant but Mr Sinai thought that perhaps Kroller waived some other fees in lieu of the payment.

Mr Sinai’s evidence regarding the seizure of the Tea Set

37. Mr Sinai gave evidence about the events leading up to and following the seizure of the Tea Set. He and his father took it to Hong Kong where they were exhibiting at an antiques fair in September 2015. It formed part of a shipment of 35 pieces – five of which contained ivory and required CITES licences. They instructed Williams and Hill to put these in place. The shipment was probably sent in July or August 2015.

38. Following the appellant suffering the second seizure in June 2015, the appellant was on heightened alert and Williams and Hill had been instructed to complete all paperwork carefully. The five CITES items were split out from other items. Williams and Hill arranged CITES paperwork for export out of the UK and import to Hong Kong.

39. The day the fair finished, 22 September 2015, was the first day of Yom Kippur so Mr Sinai and his father had to leave to prepare for the day. They stayed in Hong Kong but were not permitted to do any work. Williams and Hill were charged with reimporting the items to the UK from Hong Kong and they used their agent Baltrans to bring all the unsold goods back.

40. Mr Sinai and his father were fully aware of their responsibilities and the paperwork which needed to be in place. They issued instructions to Williams and Hill to obtain all necessary licences to export the items to the UK. They identified the Tea set as being an item that required licences to be imported to the UK.

41. Mr Sinai stated that the ivory content of the Tea Set was less than 1% - it was a silver six-piece set with tiny amounts of ivory in the finials on the lids and bands on the arms. The set was purchased for £5,250.

42. Between 5 October 2015 and 1 December 2015 there were many emails between employees of the appellant, Baltrans and Williams and Hill regarding the importation of the consignment and the seizure of the Tea set.

43. On 8 October 2015, Rachel Assous, an employee of the appellant, emailed Kayleigh Duke of Williams and Hill to remind Baltrans that the item needed to return with the CITES paperwork but that they would already have the existing licence. In an email in reply, Ms Duke explained to Ms Assous that the existing CITES paperwork was insufficient as this only covered export to Hong Kong and not import to the UK.

44. On 22 October 2015 Elisa Lam, an employee of Baltrans, emailed Ms Assous to say that the application for a CITES permit had been approved already but they were still waiting for AFCD (the Hong Kong Authority) to issue the CITES permit. On 23 October 2015 Ms Lam emailed Ms Assous to confirm that the CITES permit had been approved and would be collected on the following Monday. On 26 October 2015 Williams and Hill sent an email to the appellant stating that their agent (Baltrans) had received the CITES documents and the flight would be booked for the importation of the Tea Set.

45. The appellant expected Williams and Hill to understand what the appellant needed in place and the appellant had good reason to believe everything was in hand to comply with CITES requirements. The appellant had paid shippers to complete all the paperwork and had received confirmation it had been done on their behalf.

46. On 29 October 2015, the day of importation of the Tea Set, Steve Leakey of Williams and Hill emailed Ms Assous to state they urgently required the invoices as they needed to apply for the UK Import CITES licence.

47. On 2 November 2015 Mr Leakey emailed to stated that he had applied for an import CITES licence on the previous Thursday and it should take approximately 10-15 days to process.

48. Ms Perkins, the Review Officer, considered the set of emails supplied by the appellant and while it was clear that they discuss the need for a CITES permit and confirm that one has been approved, the confirmation appears to have been for the re-export permit from the authorities in Hong Kong, AFCD, and not the UK import permit from APHA. The Tribunal agrees that there is nothing in any of the emails to confirm that an import licence was in place from UK APHA before the importation on 29 October 2015.

49. In the Tribunal's view the appellant's belief that all the paperwork was in place was not a reasonable one. The appellant should have monitored the situation more closely, particularly as the appellant stated that further measures had been implemented to ensure no reoccurrence of previous incidents.

50. As set out above, APHA only received the application for a CITES import permit on 30 October 2015 and issued the licence on 13 November 2015 so the necessary permit was not in place prior to the importation.

51. On 1 December 2015 a notice of seizure was issued by the respondent in respect of the goods. Further emails between the appellant and Williams and Hill following seizure made it clear to the appellant that an Import CITES licence had not been granted prior to the importation but only an export licence from Hong Kong.

52. Williams and Hill suggested that the original export CITES permit issued from Hong Kong had been lost which delayed their application for the import permit but they had applied for it before the shipment's arrival and it was deemed a valid permit by the time it came through. The appellant queried why the item had been sent before an import CITES permit had been obtained in the first place.

53. Mr Sinai gave evidence that following the second seizure in June 2015, and even more so following the third seizure on 1 December 2015, the appellant had tightened up its procedures to avoid breaches of CITES requirements as it could not risk further seizures.

54. It took steps to train its employees to make sure that CITES requirements were complied with. It implemented more precise communications with shipping agents and systems of control to prevent a breach of the requirements. Even though Mr Sinai believed that the mistakes were not the responsibility of the appellant in any of the seizures, he accepted the appellant needed to improve its systems.

55. Mr Sinai stated that some time after June 2015 the appellant had sought to check and double check that the appropriate paperwork and CITES permits were in place for all importations. At a later date, following the third seizure on 1 December 2005, it even insisted on seeing stamped paperwork from shippers prior to instructing or authorising any importation of CITES goods. The appellant would not simply rely

on the confirmation from shippers that the paperwork was in place. This had led to some shippers considering the appellant to be acting in a way which was 'over the top'.

The appeal to the tribunal

56. On 13 May 2016 Mr Sinai, on behalf of the appellant, appealed against the decision of 14 April 2016.

57. By email dated 8 July 2016 the appellant requested that the ivory be removed from the Tea Set and then the Tea Set restored. This was refused by the respondent in a letter dated 15 July 2016.

The law

58. Loxodonta Africana (African Elephants) are listed in Appendix I of the Convention on International Trade in Endangered Species of wild fauna and flora ("CITES") and in Annex A of Commission Regulation (EC) 338/97 as amended by Regulation (EC) 709/2010.

59. Article 4 of Commission Regulation (EC) 338/97 (as amended) sets out the requirement for an import permit where specimens from Annexes A and B are imported into the community. The rules concerning the implementation of this regulation are set out in Commission Regulation (EC) 865/2006.

60. Article 16, "Sanctions," includes the following:

> "1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:
>
> (a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorization by the issuing authority...
>
> (b)-(m) ...
>
> 2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens."

61. Section 49(1) of the Customs and Excise Management Act 1979 ("CEMA") provides:

> "Where-
>
> (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.

62. Section 139(1) of CEMA provides:

> "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."

63. As the legality of the seizure was not contested, the Tea Set has been lawfully seized and was liable to forfeiture under paragraph 5, Schedule 3 CEMA.

64. The Tribunal lacks jurisdiction to reopen the legality of seizure, the decision in *HMRC v Lawrence and Joan Jones 2011 EWCA Civ 824* applies.

65. Section 152(b) of CEMA provides

The Commissioners may, as they see fit—

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

66. Sections 14 to 16 of the Finance Act 1994 provide:

Section 14 (2):

"(2) 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 whom, 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."

Section 15(1):

"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."

Sections 16 (4) to (6):

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(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.

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

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

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above, shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

The appellant's case

67. The appellant's grounds of appeal can be summarised as follows:

a. The appellant appointed experienced and respected specialist shippers to bring the items back to the UK. They were appointed to prepare both the re-export permit and the import permit into the UK. The shippers had previously been instructed to export the items from the UK and had done so properly, obtaining the relevant paperwork.
b. Members of staff had been in regular telephone communication with the shipping agents to check on the progress of the shipment and were informed that everything was in order.
c. The appellant had worked closely with the shipping agents for many years and had complete faith that all the permits were correctly obtained on their behalf.
d. The problems with the permit could not have been foreseen by the appellant.
e. The date of the importation in this matter predated the appellant's substantial review of their systems and processes surrounding shipments requiring CITES permits. The warning from the Border Force regarding future importation transgressions (made on 14 December 2015) was made after the date of this importation.
f. The decision not to restore the Tea Set was both unreasonable and disproportionate. The appellant was not at fault for the error, which resulted from a technical breach that was outside of the appellant's control.
g. The appellant takes its responsibility to comply with CITES very seriously.
h. The Tea Set is extremely rare and is an item of cultural and historical importance. It would be a tragic loss to the art world and Chinese cultural heritage were it to be condemned. The item was seized on a technicality and the intention was always to import the Tea Set in accordance with regulations.

The respondent's case

68. As the legality of the seizure was not contested, the respondent submitted that the starting point is that the Tea Set has been lawfully seized and was liable to forfeiture under paragraph 5, Schedule 3 CEMA.

69. The respondent submitted that the Tribunal lacks jurisdiction to reopen the legality of seizure. The respondent contends that the decision in *HMRC v Lawrence*

and Joan Jones 2011 EWCA Civ 824 applies. In any event, the appellant does not seek to contest the legality of the initial seizure.

70. The respondent contended that the review decision not to restore the Tea Set was one that was reasonably arrived at for the following reasons:

71. It was submitted that the Review Officer applied the respondent's reasonable policy on the restoration of goods, but was not fettered by it. The general policy is that improperly imported prohibited or restricted items will not normally be offered for restoration.

72. However, each case is examined on its merits to determine if there are exceptional circumstances that merit departure from the policy; the respondents submitted that the following points apply.

73. The CITES legislation is intended to control the trade in endangered species and requires an import permit.

74. It was submitted that is the importer's responsibility to obtain an import permit.

75. The import permit in this case was applied for only after the Tea Set had been imported. The application was therefore for a retrospective permit (although this was not made clear in the application). Any application for a retrospective permit ought to include an explanation as to why it was not made prior to importation and be supported by evidence – the appellant's application did not.

76. Correspondence from the appellant makes it clear that it relied upon the shippers to obtain the permits. The shipping agent, William and Hill, stated in correspondence that they were not told of the fact that the Tea Set contained ivory until the day the consignment left Hong Kong. It was also clear from the correspondence that the need for a re-export CITES permit was discussed but the need for an import permit to be obtained from APHA was not. It ought to have been clear, if the situation was being properly monitored, that the correct permits were not in place. An importer ought to communicate properly to the shippers the need to correctly comply with CITES regulations. When considered in the round, the Review Officer reasonably concluded that the appellant did not make all reasonable efforts to ensure that the permits were in place prior to importation into the UK.

77. It was submitted that the appellant had a record of importing goods incorrectly. In October 2014 the appellant imported a pair of console tables made with tortoise shell without a CITES permit which were then seized. In June 2015 an ebony commode was seized on import for lack of a CITES permit. On those occasions the goods were restored for a fee, but the appellant was warned that further transgressions would likely result in non-restoration of the goods.

78. The respondent submitted that the cycle of importation transgressions and restoration payments should not be allowed to continue. The harder sanction of non-restoration was therefore appropriate in this case.

79. It was further noted that the consignment in question also included an undeclared item (the silver bowl) that was included in the shipment by accident and a pair of crocodile skin watchstrap's that were not accompanied by CITES permits.

This demonstrative of a lack of responsibility being taken by the appellant when monitoring the importation in question.

80. This was the third seizure in 12 months whereby items were imported without any or any valid CITES permits. No exceptional circumstances were presented to justify restoration. The respondent was justified in enforcing CITES transgressions robustly in these circumstances.

81. Although the potential hardship resulting from the seizure was raised, no evidence of the same was produced. The matter cannot be treated therefore as one involving exceptional hardship to the appellant.

82. The Review Officer reasonably considered that the policy treated the appellant no more harshly or leniently than anyone else in similar circumstances.

83. The respondent therefore contended that this decision was fair, reasonable and proportionate in the circumstances.

Discussion and Decision

84. The Tribunal's jurisdiction is to decide whether the decision of the review officer, Helen Perkins, not to restore the Tea Set is one that could reasonably have been arrived at and whether it is proportionate.

85. The respondent's general policy is that goods should not normally be restored. However, each case is considered on its own merits to determine whether there are exceptional reasons to support restoration. It was not submitted that the policy itself is unreasonable or disproportionate.

86. In our view the reviewing officer considered all relevant matters and disregarded all irrelevant matters in arriving at her decision not to restore the Tea Set.

87. The officer was entitled to have regard to the appellant's historic non-compliance with the importation regime when critically evaluating the evidence presented, and was reasonably entitled to make the following observations:

> Taking all these factors into account I am not satisfied that the emails demonstrate the company did not make all reasonable efforts to ensure the correct documentation was in place prior to import into the UK'

88. The appellant did not seek to confirm with Baltrans and William Hill that both a re-export CITES permit from the Hong Kong authorities and an import CITES permit from APHA were in place prior to shipping and importation. It did not seek to see copies of the permits. The email did not provide sufficient assurance for the appellant to rely upon reasonably in light of it suffering two recent previous seizures.

89. Ultimately the appellant is responsible for importations and its compliance with all laws and regulations. It cannot delegate this responsibility to third parties.

90. The concluding comments of Officer Perkins contain a useful summary of the decision making process:

> Furthermore, on this last occasion I am also aware that an undeclared item, a silver bowl was located by BF in this shipment (this restoration request is being dealt with under separate cover). The explanation provided for this is that it was mistakenly added to the shipment. The bowl was displayed in the warehouse together with a 3-piece silver tea-set and was wrongly presumed to be part of it. This was a simple mistake by a staff member and further checks will be introduced to prevent this happening again. In addition to this a crocodile skin watch strap was also located in a suitcase with this consignment, Mr. M Sinai has explained with regards to this that he was not aware that a CITES licence was required and therefore accepts it was legitimately seized. These further incidents reinforce my view that the company is not acting in a responsible manner with regards to complying fully with CITES regulations.
>
> ……
>
> I have considered that this is the third seizure involving BF, within a period of 12 months, where goods have been imported without valid UK CITES import permits and no exceptional circumstances have been presented. You are a commercial business who Mr. Sinai has explained has over a period of 40 years imported many items from outside the EU and always declares everything. In this instance not only were the import permits not valid but a further two items were contained within the consignment that were not declared, one of which was a crocodile watch strap that required a CITES permit. BF takes this matter seriously and given the above factors it is not unreasonable that in these circumstances I refuse restoration. I conclude the decision not to restore these goods in this circumstance is both reasonable and proportionate.

91. The Tribunal considers these to be reasonable reasons to rely upon in refusing restoration.

92. The Tribunal accepts the respondent's position that no exceptional circumstances exist in the present case justifying a departure from the general policy that goods lawfully seized should not normally be restored.

93. The Tribunal is satisfied that the decision accords with the public policy and the legitimate purpose in upholding the CITES legislation which controls the trade in endangered species by placing the responsibility on the importer to obtain the necessary permits. The restriction imposed by CITES itself serves an important public policy in regulating the trade in endangered species.

94. The sanction of non-restoration in this case is reasonable and proportionate given that the appellant has benefitted on two previous occasions from a departure from the general policy of non-restoration.

95. The Tribunal also relies upon the following further reasons.

96. The appellant is a commercial trader who regularly imports goods requiring compliance with CITES. The appellant was aware of the previous seizures and had taken steps to treat shipments requiring CITES permits with extra care. Unfortunately, the steps it took before 29 October 2015 were not such as to prevent the seizure.

97. It would have been reasonable to undertake tighter controls following the second seizure in June 2015 than those which the appellant instituted. It appears that as of 6 October 2015, the appellant's employee, Rachel Assous, was unclear as to the

precise requirements of CITES. She failed to ensure that she obtained an assurance from William and Hill that both export and import CITES permits were in place prior to the importation and was even reminded by Willams and Hill that the previous export licence to Hong Kong could not be relied upon.

98. The value of the goods seized, £5,250, was not disproportionate to the breach of the CITES requirements involved. The review officer reasonably considered the principle of proportionality in engaging with the facts of the case and considering the absence of any financial hardship or other serious financial consequences to the appellant. The loss to the appellant can reasonably be considered proportionate where there have been two previous seizures with graduated responses to both. The sanction of non-restoration could reasonably be considered proportionate therefore.

99. The appellant must accept its share of responsibility for the failure to ensure a CITES import permit was in place prior to importation, the breach was not simply as a result of the actions or inaction of Baltrans or William and Hill. The appellant rightly accepts that ultimate responsibility for any importation falls upon it rather than its agents.

100. As Mr Sinai accepts, more could have been done, as it is now done, by the appellant to insist on seeing copies of permits being in place before authorising importations to take place. It is the appellant's responsibility to comply with CITES. It is a commercial trader regularly importing goods which attract CITES restrictions.

101. The appellant should have been on 'high alert' from July 2015 onwards following the two recent previous seizures and certainly have been so by the time of the third importation. It could reasonably have undertaken the further measures it later undertook following the first seizure in October 2014 and certainly following the second seizure in June 2015. To the extent steps were taken from December 2015 following the third seizure, these were too late to prevent breaches of CITES requirements occurring.

102. The substance and timing of the new measures implemented by the appellant is not totally clear. In Mr Sinai's letter of 22 February 2016, he suggests that as a result of the second seizure (ie following June 2015) he implemented further measures to ensure that breaches would not be made again. He stated that he spoke to colleagues about the need to treat CITES shipments with extra care and they should communicate the need to correctly comply with CITES regulations to shippers and suppliers. However, he gave evidence that the impetus to put new procedures in place, such as inspecting stamped copies of CITES permits before authorising importation, only occurred following the third seizure on 1 December 2015. In any event, whatever new measures had been implemented by 29 October 2015, these were insufficient to prevent the third seizure occurring.

103. As the review officer also noted, the failure to declare the silver bowl and obtain a CITES permit for crocodile watch straps also imported in the consignment with the Tea Set suggests that the appellant was not ensuring strict enough compliance with Customs regulations in its importation at that time.

104. The appeal should therefore be dismissed.

105. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 17 MARCH 2017