[2017] UKFTT 0324 (TC)

TC05802

Appeal number: TC/2015/06238

EXCISE DUTY – alcohol – restoration sought and refused – whether the Respondents' decision not to restore was reasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BOOZE FACTORY (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR ANDREW PERRIN

Sitting in public at Centre City Tower, Birmingham on 6 February 2017

Ms Emma Pearce, counsel, instructed by Artis Legal Solicitors, for the Appellant

Mr David Griffiths, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is the Appellant's challenge to the Respondents' review decision, dated 2 September 2015, not to restore to it a large quantity of alcoholic drinks seized from its premises on 16 June 2015.

Parties' submissions

2. In brief, the Appellant challenged the decision not to restore the alcohol seized on the basis that the decision-maker, in reaching her decision, had taken into account irrelevant material, ignored relevant material and reached a conclusion which no reasonable decision-maker could have reached. The Respondents defended the decision-maker's conclusions. We consider the detail of these submissions when setting out our decision below.

Evidence heard

3. On behalf of the Appellant, we heard evidence from Mr Jaswinder Singh Doal, the Appellant's sole director. Mr Doal had submitted a witness statement prior to the hearing and this was taken as read when he gave his oral evidence. Much of what Mr Doal set down in his witness statement was not challenged by the Respondents. We considered Mr Doal to be a generally truthful witness although, as is inevitable with the passage of time, we consider that there are a few minor errors in his recollection of events.

4. On behalf of the Respondents we heard evidence from Ms Sharon Clydesdale, the review decision-maker. Ms Clydesdale also submitted a witness statement prior to the hearing which was also taken as read when she gave her oral evidence. We considered Ms Clydesdale to be a truthful witness and were impressed with the care and attention Ms Clydesdale gave to her evidence.

5. There was no apparent conflict between the evidence of these two witnesses.

6. We had expected a third witness to attend the hearing. However, it appeared that Mr Mark Curley, who was to appear for the Appellant, had misunderstood the hearing date of the hearing and was not available to attend. As Mr Curley did not make himself available for cross-examination, we give limited weight to the evidence contained in his witness statement. We note also that Mr Curley's statement contains a mixture of factual evidence and opinion evidence. We did not understand Mr Curley to be an expert witness and so we disregard his opinion evidence.

Findings of fact

7. On the basis of the witness evidence and the documents in our bundle we find the following facts:

Background

8. The Appellant was incorporated in 2005. In May 2011 the Appellant changed its name and Mr Doal was appointed as sole director. On 1 January 2012 the Appellant began trading as a wholesale supplier of wine, beer, spirits and other alcoholic drinks. Since that time the Appellant has purchased alcohol from approximately ten suppliers. The Appellant's strategy was to stock popular brands with a high rate of turnover, and each week it sold alcohol to around 300 customers. By the end of 2014 the Appellant's turnover was around £1.5 million each year. Mr Doal was responsible for the day to day affairs of the Appellant.

The Appellant's due diligence

9. Initially, the Appellant's due diligence process when contracting with new suppliers was for Mr Doal to seek the supplier's incorporation certificate, VAT certificate, bank statements, utility bills, photo identification from the owners of the business and (where possible) a written offer on the supplier's headed paper. Since 2014 the Appellant has used a due diligence specialist, Due Diligence Exchange Limited, to carry out more extensive checks on some of its suppliers.

10. We find that the Appellant did not invariably commission a due diligence report before contracting with a new supplier. Mr Doal told us in his oral evidence that the Appellant had not commissioned a due diligence report for Dhamecha Cash and Carry Limited ("Dhamecha") as he had checked this supplier on a credit checking website and established that Dhamecha had a turnover in excess of £500 million. Mr Doal told us that, as Dhamecha's turnover was so large, it was not necessary to undertake due diligence checks on it.

11. Mr Curley's witness statement confirms that the Appellant had commissioned reports on five of its ten suppliers, and provides the dates of these reports. These included a report on Simon Lloyd Limited ("Simon Lloyd") completed on 5 February 2015, a report on Wentworth Drinks Limited ("Wentworth") completed on 10 March 2015, and a report on Breanga Wholesales Limited ("Breanga") completed on 2 June 2015. Mr Curley noted that the first report prepared for the Appellant took eight days. The time taken to produce the subsequent reports was not noted. A copy of the reports for Breanga and Wentworth were included in our bundle.

12. Mr Curley explains in his statement that the checks his company undertakes, in addition to the basic checks undertaken by the Appellant, are to seek other registration certificates (such as WOWGR Dealers certificate and a Money Laundering Regulations certificate), a home utility bill for the main owner or director of the trader (although for both the Breanga and Wentworth reports the owner refused to provide this) and also to check on any cash couriers used. The documents and information obtained were checked against a number of databases to confirm the information provided was consistent and that there were no anomalies.

Due diligence report on Wentworth

13. In his witness statement Mr Doal stated that he had "had dealings with [Wentworth] in 2014 during which there were no problems". Subsequent to those 2014 dealings, the Appellant commissioned a due diligence report upon Wentworth. On 10 March 2015 the Due Diligence Exchange Limited produced their report for the Appellant. The covering letter states:

> You will note that we cannot provide the financial assessment as this time as we are currently awaiting receipt of references. This will be forwarded to you in due course and should be filed in the appropriate section of the file upon receipt.

14. We make no finding as to whether the financial assessment section for Wentworth was supplied to the Appellant at a later date but that section of the report was not provided in our bundle. The copy of Wentworth's VAT certificate in the due diligence report, shows it to be registered as a wholesaler of fruit and vegetable juices, mineral water and soft drinks.

Due diligence report on Breanga

15. On 2 June 2015 the Due Diligence Exchange Limited produced their report on Breanga for the Appellant. We do not know the date on which this report was commissioned. The covering letter states (in identical terms to that for Wentworth):

> You will note that we cannot provide the financial assessment as this time as we are currently awaiting receipt of references. This will be forwarded to you in due course and should be filed in the appropriate section of the file upon receipt.

16. Again, we make no finding as to whether the financial assessment section for Breanga was supplied to the Appellant at a later date. This section was not provided in our bundle. Breanga's VAT certificate shows it to be registered, as we would expect, as a wholesaler of alcoholic beverages.

17. In our bundle there are six Breanga sales invoices addressed to the Appellant. All six of these invoices predate the due diligence report upon Breanga. The total value of the goods purchased by the Appellant in these six orders was £370,128.61. We find that when the Appellant placed these six orders with Breanga, it could not have placed any reliance upon the (at that stage non-existent) Breanga report.

The Appellant's stock control system

18. Mr Doal told us that at the Appellant's premises there were five aisles, with each aisle allocated to a different supplier. Mr Doal did not explain what happened when the Appellant held goods from more than five of its suppliers at the same time, but he did state that there were also coloured stickers on the stock to designate the supplier. Pallets were put on the ground floor with further racking above them if room was required for further pallets of stock from the same supplier. This evidence was not challenged by the Respondents.

Visits by the Respondents

19. Mr Doal's witness statement provides details of five visits by the Respondents before the visit on 16 June 2015 when the seizure in dispute took place. These five earlier visits took place over the period March 2014 to May 2015.

20. On the first three of these visits some stock was seized from the Appellant because the Respondents were not satisfied that duty had been paid in respect of that stock. Mr Doal explained that he had been given paperwork at the time of the seizure, including a blue booklet, but the officers had not provided an oral explanation of how the Appellant could seek restoration of the stock which was seized. Mr Doal told us that when stock was first seized from the Appellant he was unaware of the process for seeking a review or how to obtain restoration of the Appellant's goods.

21. Mr Doal also stated that at the third visit (on 22 September 2014) the officers had taken documentation, including copies of due diligence reports. According to Mr Curley's witness statement, just one due diligence report had been prepared for the Appellant by this date and we find that only that one report was provided to the Respondents at this visit.

22. The fourth and fifth visits took place on 18 and 19 May 2015. The Appellant's warehouse was undergoing extensive renovation and refurbishment at that time. No stock was seized at these visits but the Respondents checked the stock held by the Appellant and took away some of the Appellant's records, including all recent purchase orders, for inspection. Mr Doal's unchallenged evidence was that he was increasingly frustrated by the number of unannounced visits but that he nevertheless co-operated fully with the Respondents on each occasion.

23. On 26 May 2015 the Appellant placed a further order for stock (from Wentworth in the amount of £43,333.52) which was delivered to the Appellant's warehouse. The Appellant did not pay for this stock. Thereafter no further stock was delivered to the Appellant until after the Respondents' sixth visit on 16 June 2015.

Visit on 16 June 2015

24. It was common ground that the Respondents made an unannounced visit to the Appellant's premises on 16 June 2015. The Respondents' officers informed Mr Doal that alcohol supplied by Simon Lloyd, Breanga and Wentworth was subject to forfeiture and would be seized, due to concerns that UK duty had not been paid.

25. The Breanga invoices state on their face that UK duty has been paid in respect of the goods supplied. Mr Doal was asked about the due diligence he had undertaken with respect to Breanga. Mr Doal's evidence was that he had reminded the officers that he had already supplied them with a copy of the due diligence report into Breanga. We find Mr Doal to be mistaken in this regard as the Breanga report was only completed two weeks before this visit, and he made no mention of providing a copy of a due diligence report to the Respondents in these two weeks.

26. Mr Doal's unchallenged evidence was that the officers identified goods in the warehouse which had been supplied by Breanga by using the invoices Mr Doal had supplied to them at their fourth and fifth visits in May 2015. It is common ground that stock supplied to the Appellant by Breanga was seized by the Respondents' officers.

27. Mr Doal was asked about the due diligence he undertook in relation to Wentworth. We accept Mr Doal's evidence that he provided the officers with a copy of the most recent invoice from Wentworth and a copy of the Wentworth due diligence report. Mr Doal also told the officers that the stock supplied by Wentworth had not yet been paid for by the Appellant and remained the property of Wentworth.

28. Mr Doal's evidence was that the Respondents' officers were able to identify the Wentworth stock in the warehouse from the purchases invoices he showed them and that he did not need to identify the stock to the officers. However, Mr Doal also stated that the officers also began to seize stock which the Appellant had purchased from Dhamecha because they mistakenly believed that this stock also came from Wentworth. Given this apparent confusion, we find that the Respondents' officers were not able, in all cases, to identify correctly which stock in the Appellant's premises came from which supplier.

29. Mr Doal showed the officers invoices from Dhamecha for stock he had purchased from it. Exhibited to Mr Doal's statement are five invoices dated 5 February 2015 showing the Appellant's purchase of various goods from Dhamecha; we find that the Appellant purchased 160 cases of 24 x 500ml cans of Carlsberg, 360 cases of 24 x 500ml units of Stella and 90 cases of 24 x 500ml cans of Budweiser from Dhamecha on 5 February 2015. After the Respondents' officers had seen these invoices, they agreed not to seize some of the stock they were about to seize (the Carlsberg) as they were able to reconcile this physical stock with the 5 February purchase invoices and they accepted that this stock was purchased from Dhamecha, and not from Wentworth as they had originally believed.

30. The officers continued to seize other stock (including Stella and Budweiser) in the Appellant's premises. The seizure notices show that a large number of cases of Stella were seized. The size is not shown for 82 cases, the remainder is in sizes other than 500ml. The seizure notices show that 358 cases of Budweiser were seized. The size is not stated.

31. We bear in mind Mr Doal's evidence that the Appellant had a quick turnover of goods, that the goods bought from Dhamecha were purchased in early February 2015 and that the seizure was in mid June 2015. The officer's report of the seizure notes that Mr Doal told the officers he had sold later dated stock to prevent moving other goods but that the officers were unable to reconcile the physical stock with the 5 February purchase invoice due to an insufficient stock control system. There was no evidence before us as to how the Appellant linked physical stock to specific purchase invoices or how the Appellant identified which stock had been sold to customers. Neither party referred to the stock bearing the coloured stickers, mentioned by Mr Doal in his witness statement, which might have identified the supplier. In the

circumstances we are unable to find that the 82 cases of Stella in unidentified sized units seized from the Appellant, or 90 of the 358 cases of Budweiser seized from the Appellant, were supplied by Dhamecha.

32. In total the Respondents seized:

- 2,166 cases of wine
- 2,279 cases of various beers
- 162 cases of various ciders

33. Mr Doal valued the stock seized at approximately £180,000 (this includes the stock still owned by Wentworth to the value of approximately £43,000). All of the goods seized were listed on Forms ENF156 which were signed by Mr Doal on behalf of the Appellant. Mr Doal annotated the bottom of each from ENF156 to state his opinion that the goods seized had been seized illegally. The seizing officer noted that there was some minor dispute as to the precise amounts seized.

34. During the Respondents visit on 16 June 2015, Mr Doal told the officers that the Appellant was in the process of joining the Confex buying group in order to buy products directly from producers and to reduce the risk of joining supply chains where no duty had been paid.

Events post seizure

35. By letter dated 24 June 2015, the Appellant sought restoration of the goods seized and requested condemnation proceedings be commenced. By letter dated 26 June 2015 the Respondents refused restoration, refusing to deviate from the general policy not to return goods which had been seized, and pointing out that the Appellant was not the legal owner of all of the goods seized. On 2 August 2015 the Appellant sought a review of the Respondents' decision not to restore the goods seized.

36. On 18 August 2015 the Appellant's advisor withdrew the claim for condemnation proceedings. In that letter the Appellant's advisor noted:

> For the avoidance of doubt, in law only the owner of the goods can make a claim against a seizure and our letter to you was confined to making a Claim against the seizure of goods owned by our client and not any other goods. For the same reason, the application for restoration was made in respect of the goods owned by our client and not any other goods. These are the goods you seized that were supplied to our client by [Breanga].
>
> You advised the goods were seized because there was no satisfactory evidence of duty payment. [The Appellant] has made enquiries of it's supplier and has been unable to obtain any evidence of duty payment. This is not to say that duty has not been paid on the seized goods, rather that it has not been possible to trace evidence of duty payment.

37. There was no reference to goods the Appellant had purchased from Simon Lloyd or Dhamecha having been seized. The letter of withdrawal concluded:

> As you know in any condemnation proceedings it would be for [the Appellant] to prove that the duty has been paid on the goods. In view of the above, it will not be possible for [the Appellant] to discharge this burden of proof. [The Appellant] therefore withdraws the Claim against seizure and will limit its actions in this matter to pursuing restoration.

Decision under challenge

38. By letter dated 2 September 2015 the Respondents upheld the decision not to restore the seized goods. Ms Clydesdale outlined her understanding of the background facts, and referred to the legislation relevant to the seizure and to the Respondents' departmental guidance. Ms Clydesdale noted that she had considered all the evidence put forward by the Appellant and the seizing officers, including the Appellant's reasons for withdrawing from the condemnation proceedings. The Review conclusion was as follows:

> I have considered all the information presented to me and I do not consider that there has been any evidence presented that demonstrates that the UK excise duty on the seized goods has previously been paid, relieved, remitted or deferred.
>
> I have also considered if there were any exceptional circumstances in this case that would cause the Commissioners to deviate from their Departmental policy.
>
> I noted that Officer Gibson in her letter of 26 June 2015 advised that she had considered whether there were any circumstances in this matter that warranted making an exception to Departmental policy and concluded that none existed. I am in agreement with Officer Gibson's decision, I do not see any exceptional circumstances in this case that would cause the Commissioners to deviate from their Departmental policy.
>
> I am of the view that the goods are of a large commercial quantity and are likely to harm legitimate trade if returned to the home market without duty having been paid on those goods.
>
> I conclude that the decision not to restore the goods as made by Officer Gibson on the 26 June 2015 was correct and should be upheld.

39. On 9 October 2015 the Appellant appealed to this Tribunal on the basis that the review decision to refuse to restore was unreasonable.

Further interaction between the Appellant and Wentworth

40. On 7 September 2015 Wentworth's solicitors sent a letter before action to the Appellant seeking payment of £43,333.52 for the goods supplied on 26 May 2015 which had subsequently been seized by the Respondents. The draft reply included in

our bundle pointed out that it was Wentworth which should seek restoration and queried why Wentworth had refused to supply evidence that duty had been paid on the stock which had been seized, and also why Wentworth's company and VAT registration numbers did not appear on the invoice. We do not have a copy of the eventual response sent by the Appellant.

Discussion and decision

41. The Appellant's appeal to this tribunal is a challenge to the Respondents' decision to refuse to restore goods which were seized from the Appellant by the Respondents exercising their powers under Section 139 Customs and Excise Management Act 1979 ("CEMA 1979").

42. Section 152 of CEMA 1979 provides the Respondents with the discretion to restore goods which have been seized. The relevant part is as follows:

> **152 Power of Commissioners to mitigate penalties, etc**
>
> 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 [the customs and excise] Acts;

43. When exercising this wide discretion the Respondents follow their Alcohol and Tobacco Restoration Policy. That policy is that, in general, alcohol and tobacco which has been seized as liable to forfeiture will not be restored but that each case should be considered on its own merits to determine whether there are circumstances which would make it appropriate for restoration to be offered.

Tribunal's jurisdiction

44. The jurisdiction of the Tribunal on an appeal against a refusal to restore seized items is set out in Section 16(4) Finance Act 1994. This subsection (as it has applied since 1 June 2014) provides as follows:

> (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 review or further review as appropriate 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 review or further review as appropriate, 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.

45. Therefore, to be successful before this Tribunal the Appellant needs to satisfy us that the Respondents' decision not to restore the alcohol seized was one which could not reasonably have been arrived at. It is worth setting out the comments of Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) where it is helpfully noted:

> 6. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough us to declare that a conclusion reached by UKBA should be set aside.

46. So, we cannot conclude that the decision-maker here was unreasonable simply because we might reach a different conclusion. We can conclude that the decision-maker was unreasonable only if she took into account material she should not have taken account of, ignored material she should have taken into account, or reached a decision which no reasonable decision-maker could have reached on the material before her. The Appellant challenges the decision on all three bases as we set out below.

47. There are two points to make in relation to the jurisdiction and the burden upon the Appellant. The first of these is that, as the challenge to the legality of the seizure was withdrawn, the Tribunal must proceed on the basis that the goods were legally seized. The effect of this is that any facts necessary to the legality of the seizure must be assumed to be proved and those points cannot be re-opened, see *HMRC v Jones and Jones* [2011] EWCA Civ 824.

48. The second point is that the reasonableness of the decision-maker's decision is to be judged against the information available to us at the date of the hearing (even though in some cases this may include information which was not available to the decision-maker when the decision was taken). This unusual jurisdiction derives from the wording of Section 16(4) Finance Act 1994 and the Tribunal's fact-finding power, as conceded by the Commissioners of Customs and Excise in *Commissioners of Customs and Excise in Gora v CCE* [2003] EWCA Civ 525. The relevant part of the Commissioners' concession was set out in paragraph 38(e) of the judgment of Lord Justice Pill, as follows, with his view of that concession set out in paragraph 39:

> "e. Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient

> evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

> 39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3[8](e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph.

49. This jurisdiction was commented upon by Judge Hellier in paragraph 11 of *Harris*:

> 11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses.

50. So, having set out the Tribunal's jurisdiction, we will now consider the conclusion reached by the review decision-maker and our findings of fact (set out above), and decide whether, on all the facts available to us, the review decision reached was unreasonable.

51. As the decision was challenged for taking into account irrelevant material, for ignoring relevant material and for being a decision which no reasonable decision-maker could have reached, we consider each of these in turn.

<u>In light of the facts available to us, was irrelevant material taken into account?</u>

52. The Appellant's original submission was that three irrelevant matters had been taken into account: the legality of the seizure, reliance on the original decision-makers' view and the need for exceptional circumstances. As a result of Ms Clydesdale's oral evidence, the Appellant accepted that there had not been reliance on the original decision-maker's opinion and that this second matter was no longer in point.

53. We take the two remaining matters in turn. The first of these is the submission that the reason given for the decision not to restore was that no evidence had been produced to demonstrate that excise duty had been paid in relation to the goods seized, and that this was an irrelevant matter as the issue of whether the goods should be restored was separate from the issue of whether they had been legally seized.

54. In her evidence before us Ms Clydesdale accepted that she took into account the background to the seizure and that, by the time her review concluded, she was aware that the proceedings before the Magistrates had been withdrawn and that the goods were deemed to have been seized legally. Ms Clydesdale accepted that she had commented in the review decision letter on the grounds why the goods were seized and suggested that, with the benefit of hindsight, she should have restricted herself to a reference to Section 152 CEMA 1979 and the discretion to restore. However, Ms Clydesdale was clear that while she had considered the circumstances around the seizure, she did not accept that the legality of the seizure was an aspect she had taken into account.

55. We take the view that the reference to the absence of any evidence demonstrating that duty had been paid was part of setting out of the background to the seizure and an acknowledgment of the Appellant's reasons for withdrawing its request for condemnation proceedings. We accept Ms Clydesdale's evidence that the legality of the seizure was not an aspect which was taken into account in making her decision.

56. The second irrelevant point said to have been taken into account was the need for exceptional circumstances when having reference to the Commissioners policy on restoration. The Commissioners policy, included in our bundle, is that each case should be considered on its own merits to consider whether there are circumstances which would make it appropriate to offer restoration but that restoration would be the exception and not offered as a matter of course. The Commissioners' policy on mixed goods (i.e. goods found mixed with goods liable to forfeiture so to mislead or to conceal a fraud) is that they will be restored only in "very exceptional circumstances". The Appellant's argument was that in looking for exceptional circumstances, rather than circumstances which would make it appropriate to offer restoration recognising that this would generally be the exception, Ms Clydesdale set the bar too high.

57. The relevant part of Ms Clydesdale's decision letter is set out in paragraph 38 above. Had Ms Clydesdale recited the Respondents' policy word for word then she would have referred to "circumstances which make this case the exception" rather than "exceptional circumstances". However, we consider that the phrase "exceptional circumstances" was used by Ms Clydesdale as shorthand for "circumstances which

would make this case the exception". Ms Clydesdale's oral evidence was that she considered whether there were circumstances which would make it appropriate to restore the goods, recognising that such circumstances would arise only in exceptional cases. On the basis of that oral evidence we conclude that the way in which Ms Clydesdale approached the evidence was in line with the Respondents' policy. We do not consider that Ms Clydesdale applied a different or more rigid test when considering the matter before her.

58. Therefore we do not agree with the Appellant that the decision-maker took into account irrelevant matters which should not have been taken into account when reaching her decision.

In light of the facts available to us, was relevant material ignored?

59. The Appellant's submissions in this regard relied upon three matters which were said to be relevant but which the decision-maker had failed to take into account: the Appellant's efforts to ensure it purchased duty paid goods, the position of goods purchased from Dhamecha and the Appellant's continued efforts to ensure that the goods it bought were UK duty paid. We consider together the first and third of these points, the efforts made and the continuing efforts, and then consider the position of the stock said to have been purchased from Dhamecha.

60. There were a number of strands to the first of these points, all based upon the Appellant's place in the supply chain and the fact that it purchased goods only from UK based suppliers. It was argued firstly that it was reasonable for the Appellant to assume that a UK duty point had been triggered before it purchased the goods and that the decision-maker had ignored the facts giving rise to this reasonable belief, secondly that the decision-maker had ignored the Appellant's efforts to ensure that it dealt only with legitimate suppliers and thirdly that the decision-maker had ignored the Appellant's efforts to establish that duty had been paid and the difficulties which it faced in this regard given its place in the supply chain.

61. Taking these strands in the order they are raised, the Appellant's belief that a UK duty point had been triggered before its own purchase of the stock seized was based upon its practice of only buying from UK based suppliers and its position at or near the end of the supply chain. Ms Clydesdale's oral evidence, which we accept, was that she took into account all the circumstances of the case, including that the Appellant was in a supply chain.

62. The second strand of this submission is that Ms Clydesdale had ignored the Appellant's efforts to ensure that it only traded with legitimate suppliers. In this regard the Appellant referred to the due diligence it undertook and the fact that the purchase orders it received bore the endorsement that duty had been paid. Taking this latter point first, we have seen six of the purchase invoices from Breanga and found as a fact that they are marked clearly with a statement that duty has been paid. The Appellant's submission was that this statement could give a trader comfort that it was buying from a legitimate supplier. However, we do not consider that such a statement can provide the comfort suggested – an honest trader may make such a statement

under the mistaken belief that duty has been paid higher up the supply chain when in reality it has not, and a dishonest trader is unlikely to baulk at making a false statement on its purchase invoice. As Ms Clydesdale pointed out in her reply to a question on this point, a statement on a purchase invoice that duty has been paid is not evidence of payment.

63. We consider the due diligence undertaken and whether the Appellant's due diligence efforts were ignored or given insufficient weight by the decision-maker in reaching her decision. Ms Clydesdale was asked about the due diligence reports which the Appellant had commissioned, and she confirmed that she was aware of third party due diligence reports and had previously seen an example of such a report though she was unclear whether this was after she had reached her decision. In her witness statement Ms Clydesdale stated that she had examined all of the documents provided by the Appellant and the seizing officers in reaching her conclusion. This would have included the due diligence report provided to the Respondents by Mr Doal at the third visit in in September 2014. Therefore we conclude that Ms Clydesdale would have seen at least one example of a report as part of her consideration of whether the goods should be restored, though she possibly did not have the benefit of seeing either the Breanga or Wentworth reports provided in our bundle. In her oral evidence Ms Clydesdale agreed that the Breanga report in the bundle showed that questions had been asked but stated that she had not checked the responses given to those questions against any of the information available to her.

64. The Appellant invited us to find that its commissioning of due diligence reports demonstrated that it made efforts to ensure that it purchased goods only from legitimate traders. For the reasons set out below, we are unable to reach such a conclusion. As set out above, we have found that the Appellant commissioned due diligence reports for five of its approximately ten suppliers, including for Breanga, Simon Lloyd and Wentworth. However, we also found that the Appellant made (at least) six purchases of stock from Breanga before it received the Breanga due diligence report. Those six purchases were of goods totalling in excess of £370,000. The position was similar with Wentworth: Mr Doal stated that he had had dealings with Wentworth in 2014 but the Wentworth report was dated 10 March 2015. When delivered both reports also lacked references and a financial assessment.

65. For the Appellant to purchase goods in excess of £370,000 – approximately one quarter of its turnover – from a supplier before receiving a commissioned report into that supplier calls into question why the report has been commissioned. We do not consider that making significant purchases from a supplier before a due diligence report on that supplier has been received supports the Appellant's contention that it was making efforts to ensure its suppliers are legitimate traders. If the Appellant was serious in its efforts to avoid being drawn into illegitimate trade, and serious in placing any reliance upon the due diligence reports, then it would have waited until it had received the full due diligence report (including the missing financial assessment section) before purchasing goods from the supplier reported upon. We consider that the Appellant's purchases from Breanga and Wentworth before receiving the relevant due diligence reports significantly undermine its contention that the commissioning of

due diligence reports demonstrated its efforts to ensure it traded only with legitimate suppliers.

66. Given our conclusion that the Appellant made purchases before its received the commissioned due diligence reports, we do not agree that Ms Clydesdale gave insufficient weight to the efforts made by the Appellant to trade only with legitimate suppliers. If, as seems to be the case, Ms Clydesdale was aware that the Appellant commissioned due diligence reports but was unaware that the Appellant purchased alcohol from a supplier before receiving the relevant report, then the additional awareness that purchases were made before the report could not possibly have resulted in Ms Clydesdale taking a more positive view of the Appellant's efforts to avoid illegitimate trade than the view she actually took when reaching her conclusion.

67. The third strand of this first point is that the decision-maker failed to take into account the Appellant's efforts to establish that UK duty had been paid at an earlier duty point in the supply chain. Mr Doal confirmed in his witness statement that some of the Appellant's suppliers would provide the Appellant with evidence that duty had been paid, but that some suppliers would not. Ms Clydesdale's evidence, which we accept, was that in circumstances where a duty point had been triggered earlier in a supply chain and duty had been paid then traders were able to supply her with evidence of that payment. Ms Clydesdale had seen no evidence of duty payment at an earlier duty point in this case but was aware, from the Appellant's letter withdrawing its request for condemnation proceedings, that the Appellant had asked Breanga to provide evidence of duty payment but that no evidence was forthcoming.

68. We do not consider that Ms Clydesdale failed to take into account, or give sufficient weight to, the Appellant's position in the supply chain or the Appellant's efforts either to ensure that its suppliers were legitimate or to provide evidence that duty had been paid.

69. The third relevant matter said to have been ignored by the decision-maker was the Appellant's continuing efforts to ensure duty payment. Under this heading the Appellant relies upon its co-operation with the Respondents and upon the steps it has taken to improve its systems. The two examples given of the systems improvements are the due diligence reports the Appellant commissioned (discussed above), and that it had joined the Confex buying group in July 2015.

70. Taking the Appellant's co-operation first, Ms Clydesdale's oral evidence was that as far as she was aware Mr Doal had been co-operative with the Respondents and that she had taken that co-operation into account when reaching her conclusion that it was right not to restore the seized goods. We conclude that co-operation was taken into account when the decision not to restore was made

71. Next we look at the steps the Appellant had taken to improve its systems. Ms Clydesdale was also asked about the Confex buying group and confirmed that she had seen it mentioned in the Respondents' visit report which noted the Appellant's intention to join the group. We conclude that this was taken into account.

72. We have already considered the due diligence reports, received by the Appellant after it had traded with the supplier reported on. As above, we conclude that awareness of the detail of the two reports included in our bundle could not possibly have resulted in the decision-maker taking a more positive view than was actually taken of the Appellant's efforts to purchase duty paid goods. We conclude that the decision-maker has not given insufficient weight to the efforts made by the Appellant to avoid illegitimate trade.

73. Finally under this heading, we consider the Appellant's second point, the submission that the decision-maker had failed to take into account the position of the goods said to have been supplied by Dhamecha. The Appellant's submission was that its stock control system was sufficiently good for goods from specific suppliers to be identified and yet the officers seizing the goods had continued to seize stock supplied by Dhamecha, a large and reputable supplier.

74. We have found that the seizing officers were not, in all cases, able to identify which physical stock came from which supplier. The seizing officers mistakenly thought that Carlsberg, purchased from Dhamecha on 5 February, had been supplied by Wentworth on 26 May. Therefore we do not accept that the Appellant's stock control system was good enough for specific suppliers to be identified correctly in all cases. As we noted, there was no evidence as to the system the Appellant used to link physical stock to each purchase order, and we did not make a finding that any of the Stella or Budweiser seized by the officers on 16 June 2015 was stock supplied by Dhamecha on 5 February 2015. The Appellant's advisor, when withdrawing from the condemnation proceedings, stated that the seized goods which the Appellant owned were supplied by Breanga. When she was questioned Ms Clydesdale said that she had not attended the premises and did not know what the stock control system was like but that it did not seem to her strange that the officers were able to identify which trader had supplied some stock but not identify the suppliers of other stock. Ms Clydesdale had access to the transcript of the officer's report, in which it was stated that the officers could not reconcile the goods with the invoices due to an insufficient stock control system. In the circumstances we do not consider that Ms Clydesdale failed to give sufficient weight to the position of the goods said to have been purchased from Dhamecha. The view she reached in relation to these goods on the material before her was not an unreasonable view.

75. Therefore we do not agree with the Appellant that the decision-maker failed to take into account, or give sufficient weight to, matters which should have been taken into account.

<u>Was the review decision one which, in the light of the facts available to us, no reasonable decision-maker could have reached?</u>

76. The Appellant made two submissions in this regard. The first of these was that the decision not to restore was disproportionate in that the decision-maker set too high a test for herself in thinking that she must look for exceptional circumstances to restore rather than circumstances which would make this case the exception. As set

out above, we have concluded that the test which Ms Clydesdale applied was in accordance with the Respondents' stated policy.

77. The Appellant's second submission was that the decision-maker failed to reach a fair balance between the legitimate aim of the Respondents' policy and the actual risks in this case given the Appellant's efforts to avoid illegitimate trade.

78. The Appellant accepts that the Respondents' policy has the legitimate aim of preventing alcohol diversion and its negative impact upon UK trade, but contends that insufficient weight was given to its own efforts to support that aim by taking action such as joining Confex. We have already concluded that Ms Clydesdale did take into account the Appellant's intention, expressed during the seizure, to join the Confex buying group. Each decision on restoration must be a balancing act. The facts available to us with regard to the Appellant's efforts are slightly different from those available to the decision-maker as we have had the benefit of seeing two of the five due diligence reports, both dated after the Appellant had traded with the supplier concerned. Our view on the Appellant's commissioning of those reports is set out above. Clearly the Appellant hoped that commissioning due diligence reports would demonstrate it took care to investigate the legitimacy of its supply chain but, by making purchases before receiving those reports, unfortunately it has demonstrated the reverse.

79. We have considered the aim of the Respondents' policy, and bear in mind that the alcohol seized was valued at £180,000, of which the Appellant owned approximately £140,000 worth, and that no evidence was available to the decision-maker that duty was paid in respect of any of this alcohol. We bear in mind that the Appellant made purchases from UK based suppliers, that it is at, or near the end of, the supply chain and that at least two of its suppliers (Breanga and Wentworth) would not or could not supply the Appellant with evidence that duty had been paid at a duty point further up that supply chain. We have considered the background to the seizure, the number of visits to the Appellant and the facts we have found with regard to the Appellant's efforts to avoid illegitimate trade. We have taken into account that the Appellant undertook basic checks before making purchases from suppliers, but made significant purchases from suppliers before receiving due diligence reports. The amount of alcohol seized is a commercial quantity and its free circulation would cause harm to legitimate UK trade. The Respondents policy is that restoration should be the exception rather than the norm. In all the circumstances of this case we do not consider that the decision-maker's decision not to restore the goods seized from the Appellant was disproportionate.

Conclusion

80. We conclude that the decision-maker did not take into account irrelevant matters or place insufficient weight on relevant matters. In light of all the facts available to us, we conclude that the decision not to restore the seized goods was not disproportionate and was not a decision which no reasonable decision-maker could have reached. For the reasons set out above, we dismiss this appeal.

81. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2017