



TC04914

Appeal number: TC/2015/02621

*EXCISE DUTY – seizure of commercial vehicles – whether decision to
refuse restoration was reasonable*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

UAB TRANSAGMA

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE VICTORIA NICHOLL
DAVID EARLE**

Sitting in public at Fox Court on 20 January 2016

**Mr Kong, Counsel, instructed by Thomas Boyd Whyte, Solicitors, for the
Appellant**

Mr Dean, Counsel, instructed by the Home Office, for the Respondents

DECISION

1. This is an appeal by the Appellant (“UAB Transagma”) under section 16 of the Finance Act 1994 against the review of a decision to refuse to restore a tractor unit registration GNK 827 and a trailer unit registration FB 864 (the “Vehicle”) that was seized by the Respondent (“Border Force”) on 4 November 2014 as it was being used to carry goods liable to forfeiture.

Background and facts found

2. The background and facts of this case are not in dispute. This appeal concerns the question of whether, on the basis of the facts, the review of the decision not to restore the Vehicles was reasonable. The facts are set out in the correspondence and documentation in the tribunal bundle, and in the witness statements of Mr Eitavicius, the driver of the seized Vehicle, and Mr Osinskas, a director of UAB Transagma. We also heard oral evidence from Mr Osinskas through a Lithuanian interpreter, and Mr Osinskas was cross-examined. We found that Mr Osinskas provided a clear and reliable account of his business and of the circumstances of this case. Ms Perkins of Border Force also gave oral evidence and was cross-examined. We found her evidence straight forward and reliable.

3. UAB Transagma is a family owned haulage business based in Lithuania. It transports part loads of goods between Lithuania and Great Britain, which means that one truck usually carries consignments for between six and ten clients. UAB Transagma has taken fifteen consignments from UAB Empire LT, the first of which was collected on 5 June 2014 and thirteen of which were deliveries on behalf of UAB Empire’s client GN Painters Ltd. All of the consignments were collected from UAB Empire’s warehouse in Lithuania and all contact was with UAB Empire LT (other than a telephone call prior to making the first delivery to GN Painters Ltd).

4. UAB Transagma carried out checks on UAB Empire LT and GN Painters Ltd before taking the first load. These included checking the www.cargo.lt system, the Lithuanian Commercial Register and further checks available online. The first of the consignments for UAB Empire LT was to be delivered to GN Painters Ltd in Chester. This cargo was inspected by Border Force on 10 June 2014 and, as no problems were raised, UAB Transagma was more confident that it could continue to work with UAB Empire LT and GN Painters Ltd.

5. On 31 October 2014 Mr Eitavicius, a driver for UAB Transagma, collected the fifteenth order from UAB Empire LT which was to be delivered to GN Painters Ltd in Chester. Mr Eitavicius is an experienced driver with good references. He joined UAB Transagma on 14 February 2014 and was briefed, and had signed agreements, about the company’s policy regarding the carriage of illicit goods. This included the requirement to inspect cargo and comply with Article 8 of the Convention Maritimes Routiers (the “CMR”). However GN Painters Ltd had made two complaints by email to UAB Empire LT about the damage to goods transported as a result of the driver (Mr Eitavicius on each occasion) opening the cargo to check it on 24 September 2014

and 8 October 2014. UAB Transagma was concerned not to lose the client and therefore Mr Eitavicius was told to limit his checks to a visual check, which he carried out without noticing anything suspicious on 31 October 2014.

5 6. On 4 November 2014 the Vehicle was intercepted by Border Force at Eastern Docks, Dover. The Goods and Vehicle were seized as they were being used to carry 166,000 cigarettes which attracted duty of £35,887.95 (“the Goods”). The CMRs for the two pallets containing the Goods had been completed in manuscript showed the consignor and consignee as G N Painters Limited. As the officer was satisfied that the Goods were held for a commercial purpose and that none of the proper methods of removing excise goods to the UK were used, the Goods and Vehicle were seized under section 139 Customs and Excise Management Act 1979 (“CEMA”) and the driver was given a Notice 12A explaining how the legality of the seizure could be challenged within one month of the seizure. UAB Transagma did not challenge the legality of the seizure within this period.

15 7. UAB Transagma owns two vehicles and leases two vehicles. The Vehicle seized is one of the two owned vehicles. The same Vehicle had been seized by Border Force on 12 November 2013 as it was found to be carrying 235,819 cigarettes concealed within insulation. On that occasion the vehicle was restored as it was the first occasion on which it had been seized. UAB Transagma agreed to implement stricter checks following this first seizure of the Vehicle, including assurances that in future trailers would be sealed and cargo would be subjected to more thorough inspections.

25 8. On 19 January 2015 Border Force informed UAB Transagma by letter that the Vehicle would not be restored as (i) they were not satisfied that Mr Eitavicius had carried out basic reasonable checks that would have identified the illicit load; and (ii) this was the second seizure within a 12 month period. On 28 January 2015 UAB Transagma requested a review of the decision not to restore under section 14(2) Finance Act 1994.

30 9. The decision was reviewed by Ms Perkins of Border Force under section 15(1) Finance Act 1994 and she informed UAB Transagma of the outcome of the review in a letter dated 13 March 2015. This letter confirmed the decision not to restore and advised that this was in accordance with Border Force’s policy. The letter referred in places to Border Force’s policy to refuse restoration as applying if the second seizure occurred within 6 months of the first seizure. Ms Perkins confirmed at the hearing that this was a mistake as a result of copying and pasting an older version of the policy. The current policy was adopted in 2011 and is to refuse restoration if the second seizure is within 12 months of the first seizure.

The law

10. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

40 “If in relation to any excise goods that are liable to duty that has not been paid there is -

a contravention of any provision of these Regulations, or
a contravention of any condition or restriction imposed by or under these
Regulations,
those goods shall be liable to forfeiture”

5 11. Section 139 (1) of the Customs and Excise Management Act 1970 (“CEMA
1979”) provides as follows:

“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.”

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12. Section 141(1) of CEMA provides that where any thing has become liable to
forfeiture:

“(a) any ship, aircraft, vehicle, animal, container (including any article
of passengers’ baggage) or other thing whatsoever which has been
15 used for the carriage, handling, deposit or concealment of the thing so
liable to forfeiture, either at a time when it was so liable or for the
purposes of the commission of the offence for which it later became so
liable,
...shall also be liable to forfeiture”

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13. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given
in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

“Any person claiming that anything seized as liable to forfeiture is not so
liable shall, within one month of the date of the notice of seizure or, where no
such notice has been served on him, within one month of the date of the
25 seizure, give notice of his claim in writing to the Commissioners...”

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14. If a notice of claim is given under Paragraph 1 Schedule 3 CEMA 1979
condemnation proceedings are heard in the Magistrates’ Court.

15. Section 152 CEMA 1979 provides:

“The Commissioners may as they see fit –

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(a)...
(b) restore, subject to such conditions (if any) as they think proper, anything
forfeited or seized under [the Customs and Excise Acts]...”

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16. Section 14(2) Finance Act 1994 makes provision for a person to require a review
of a decision made under section 152(b) CEMA 1979 not to restore anything seized
from that person.

17. Section 16 Finance Act 1994 makes provision for a person to appeal against any
review of a decision under section 152(b) CEMA 1979. It specifies that the power of
an appeal tribunal shall be confined to a power, where the tribunal are satisfied that
the review decision is one that the reviewing officer making that decision could not

reasonably have arrived at on the basis of the information provided, to do one or more of the following:

- 5 (a) Direct that the decision, so far as it remains in force, is to cease to have effect;
- (b) Require a further review of the original decision in accordance with such directions as the tribunal considers appropriate;
- 10 (c) Where the decision has already been acted on or taken effect, declare the decision to have been unreasonable and to give directions as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.

Submissions

15 18. Mr Kong submits that Ms Perkins' decision not to restore the Vehicle was unreasonable on the following grounds:

- (1) Reasonable checks were undertaken in accordance with paragraph A(1) of Border Force's policy.
- 20 (2) Paragraph A(2)(b) of the restoration policy states "On a second or subsequent occasion (within 6 months) the vehicle will not normally be restored." This was not the second seizure within 6 months. Whether or not a seizure is the second seizure within 12 months does not justify a finding that paragraph A(2)(b) applies.
- (3) Ms Perkins relied upon a number of matters which were irrelevant in making her decision. These were that:
 - 25 (i) There was more than one address for GN painters Ltd. UAB Transagma submits that it is entirely normal for a business to have different office and warehouse addresses;
 - (ii) There is more than one person and more than one telephone number associated with GN Painters Ltd. UAB Transagma submits that this is entirely normal. The second telephone number listed is in fact the number for UAB Empire LT;
 - 30 (iii) Another business has premises at the same postcode as GN Painters Ltd and GN Painters has no established business at the delivery address. UAB Transagma submits that it is normal for two or more businesses to be based at the same premises and that it had delivered to this address on twelve other occasions;
 - 35 (iv) UAB Transagma did not have direct contact with GN Painters Ltd. UAB Transagma submits that it does not have contact with its clients' clients as a matter of etiquette. It was able to make contact prior to making the first delivery;
 - 40

(v) GN Painters Ltd's lines of contact were "dead" after the seizure. UAB Transagma submits that this confirms that GN Painters Ltd is the guilty party. There was email contact through UAB Empire LT and telephone contact prior to the seizure;

5 (vi) There was no seal on the Vehicle as required following the first seizure which involved concealed cigarettes. UAB Transagma submits that although this was in breach of the assurances given, there was a padlock on the Vehicle and that there is no evidence to suggest that the cigarettes were in the load because of the lack of the seal;

10 (vii) Mr Eitavicius pledged (in his explanation following this seizure) to "check cargoes more carefully in the future". UAB Transagma submits that this was a natural response to the situation and did not represent an admission that his checks on this occasion were inadequate;

15 (viii) Transporting loads from several consignors creates a higher risk of carrying illicit loads. UAB Transagma submits that while this is correct, it is a question of the consignor. In this case other loads had been transported for the same consignor, and on one occasion inspected, without incident;

20 (ix) No reservations or comments were recorded by Mr Eitavicius on the consignment note in breach of paragraph 2 of Article 8 of the CMR. UAB Transagma submits that Mr Eitavicius checked the cargo as well as he could without opening the packaging. Article 8 does not require the packaging to be opened.

25 (d) The hardship suffered as a result of non-restoration is exceptional because UAB Transagma is a relatively small family business. Alternatively, it is disproportionate not to restore the vehicle.

30 19. Mr Dean submits that the decision was made in accordance with the relevant statutory provision. Border Force's policy allows every case to be considered on its merits and allows cases where there are 'exceptional circumstances' to be decided differently. The relevant section of the summary of the Border Force Restoration Policy for Seized Commercial Vehicles that was applied by Ms Perkins in the review decision is as follows:

35 "The policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross border smuggling and to disrupt the supply of excise goods to the illicit market. "Commercial vehicles" include not only 'Heavy Goods Vehicles' but any vehicle considered to be moving primarily for a commercial and business purpose. Each case is considered carefully on its individual merits so as to decide whether exceptions should be made and any evidence of
40 hardship is always considered.

A vehicle adapted for the purposes of smuggling will not normally be restored.

Otherwise the policy depends on who is responsible for the smuggling attempt:

A: Neither the operator nor the driver are responsible; or

B: The driver, but not the operator are responsible; or

C: The operator is responsible;

5 A: If the operator provides *evidence* satisfying Border Force that neither the operator nor the driver were responsible for or complicit in the smuggling attempt then:

10 (1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.

(2) Otherwise,

15 (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).

(b) On a second or subsequent occasion (within 12 months) the vehicle will not normally be restored.”

20 20. It is accepted that in this case neither UAB Transagma nor Mr Eitavicius were responsible or complicit in the smuggling attempt and so paragraph A of Border Force’s policy is in point. This is the second seizure within a year and this Vehicle has therefore placed UK revenue at a risk of in excess of £85,000 in lost duty. The assurances given after the first seizure have not been complied with in relation to this cargo and reasonable checks were not undertaken.

25 21. The circumstances of this case do not constitute exceptional hardship. UAB Transagma is a haulage business. The seizure is not disproportionate given the potential loss to UK revenue.

22. Ms Perkins, the reviewer, apologises for the error in referring to the policy not to restore where there is a second seizure within six months as the policy now refers to a second seizure within twelve months.

30 **Discussion**

35 23. The jurisdiction of this tribunal under section 16 Finance Act 1994 is supervisory and limited to determining whether the decision by Border Force was reasonable. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 Lord Salmon commented that the tribunal cannot substitute “its own discretion merely because it prefers its own discretion to that exercised”. As Lord Lane explained, a review of the exercise of discretion should consider whether “the commissioners had acted in a way which no reasonable panel of commissioners could

have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight.”

24. We therefore considered the facts in order to determine whether the decision not to restore the Vehicle was reasonable. In considering the facts we noted that as UAB
5 Transagma had not challenged the legality of the seizure in proceedings before the magistrates’ court, the Vehicle and Goods are “deemed” to have been duly condemned as forfeit. This was confirmed by Mummery LJ in *HMRC V Jones and Jones [2011] EWCA Civ 824* at paragraph 73. We also noted that Pill LJ accepted in
10 *Gora v C&E Comms [2003] EWCA Civ 525* that “given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself [the] 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.”

25. Ms Perkins applied the Border Force Restoration Policy for Seized Commercial Vehicles set out in paragraph 19 above. We considered that it was unfortunate that
15 Border Force had not advised UAB Transagma that the references in the review letter of 13 March 2015 to six months rather than twelve months was an error until the day before the hearing. Although there were references to twelve months in this letter and the original decision, as the policy is not published, Mr Kong understandably advised his client and prepared his submission on the basis of this error. However, as the
20 seizure on 4 November 2014 was within 12 months of the seizure of the same Vehicle on 12 November 2013, we consider that it was reasonable for Ms Perkins to apply the twelve month rule notwithstanding that the second seizure was only a few days short of twelve months after the first.

26. We agree with Mr Kong that the matters set out in paragraphs 18(3) (i) (ii) and
25 (iii) above did not establish facts from which adverse implications should be drawn. It is not unusual for a business to have a different warehouse address, more than one name to contact or a shared postcode. But these matters about GN Painters Ltd were easily outweighed by the relevant factor that there was no direct contact with them, even after they complained about the packaging being opened. For example, UAB
30 Transagma could have asked for an inventory in place of opening packaging. We also found that the other matters referred to in paragraph 18(3)(v)-(viii) above were more relevant in painting a picture of the risks involved and the assurances given as they affect what could satisfy Ms Perkins as basic reasonable checks in this case.

27. We find that it was reasonable for Ms Perkins to conclude that UAB Transagma
35 had not carried out basic reasonable checks. It is clear from the facts that UAB Transagma had made a decision not to open packaging to check cargo carried for GN Painters Ltd despite having given Border Force an assurance that cargo would be subjected to more thorough inspection. As this followed complaints from GN Painters Ltd about the damage caused on opening the packaging, Ms Perkins noted the absence
40 of direct contact with GN Painters Ltd as it is one of ways in which UAB Transagma could then have managed the risk.

28. With regard to paragraph 2 of Article 8 of the CMR, we agree that it was not a ‘breach’ of Article 8, but it was a breach of the higher standard of checks to which Ms

Perkins could refer as an additional point given the discovery of cigarettes concealed in the same Vehicle within the past 12 months. Article 8 states that where the carrier has no reasonable means of checking the statements made in the consignment note, he should “enter his reservations in the consignment note together with the grounds on which they are based.” Mr Eitavicius had checked the statements made on the consignment note (that there were two pallets to be delivered to GN Painters Ltd), but it was reasonable for Ms Perkins to refer to UAB Transagma failing to require the driver to enter his “reservations” that the goods had not been identified as it had told him not to open the packaging and it had not asked for an inventory or other checks to manage the risk in this case.

29. We find that Ms Perkins’ conclusion that basic reasonable checks had not been carried out in this case was one which could reasonably be made given the weight of the relevant matters to be taken into account. As this led Ms Perkins to consider paragraph A(2)(b) of the policy, the review decision that restoration should be refused given the previous seizure within 12 months was one which could reasonably be made.

30. The policy that was applied by Ms Perkins is intended to protect UK revenue and to deter smuggling. UAB Transagma has failed to show that basic reasonable checks were carried out in the circumstances of this case. The risks and penalties are the same for all hauliers and there is no exceptional economic hardship as a result of the loss of the Vehicle in this case. The loss of the Vehicle is proportionate to (and in fact significantly less than) the revenue risked by the seized cargoes transported in this Vehicle.

Decision

31. The appeal is refused.

32. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2016