TC04447

Appeal numbers: TC/2013/04645
TC/2013/06498

EXCISE DUTY – whether appellant had the right to bring an appeal – seizure of goods – refusal to restore – decision based on alleged failure to prove ownership of the goods – whether unreasonable – held, no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WORX FOOD & BEVERAGE BV **Appellant**

- and -

THE DIRECTOR FOR BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE ANNE REDSTON
SHAMEEM AKHTAR

Sitting in public at the Tribunal Centre, Bedford Square, London on 17 July 2014

Ms Charlotte Hadfield of Counsel, instructed by Altion Law Limited, for the Appellant

Mr Will Hays of Counsel, instructed by the General Counsel and Solicitor to the UK Border Force, for the Respondent

DECISION

1. On 24 November 2012, the UK Border Force ("the UKBF") seized 24,079 litres of mixed beers. Four days later they seized a further 24,741 litres. They refused to restore the goods and confirmed that decision on review.

2. The issue before the Tribunal was whether the UKBF's decision not to restore the goods was unreasonable. This is not a case where UKBF were alleging fraud.

3. We found that the decision was not unreasonable and **DISMISSED** the appeal.

Preliminary issue: the position of the appellant

4. Worx Food & Beverage BV ("WFB") was incorporated on 18 December 2012. It appealed to the Tribunal against the UKBF's refusal to restore goods seized in November 2012, ie before the date it was incorporated. We therefore considered whether it had a right to bring these appeals.

5. Mr Derk Horsman, director of WFB, told the Tribunal that he began trading in alcohol on 1 August 2012. He was a sole trader, based in the Netherlands, operating under the business name "Worx Food & Beverages." In the Netherlands it is possible to register sole trader businesses with the local chamber of commerce, and Mr Horsman registered his business in this way.

6. Mr Horsman told the Tribunal that the trade, assets and liabilities of his sole trader business were transferred to WFB on a going concern basis. As part of that transfer WFB acquired any legal or other rights relating to Mr Horsman's previous trade. Mr Hays, for the UKBF, did not dispute this and we find it to be a fact.

7. However, no evidence was before the Tribunal as to when this transfer occurred. The day after the company was incorporated, Altion Law Limited ("Altion") requested restoration of the goods seized in the first seizure, and the following day requested restoration of the goods seized in the second seizure. Both requests were made on behalf of "Mr Horsman, t/a Worx Food and Beverages," not on behalf of WFB.

8. However, we observe that it is normal for the transfer of a company's trade to a newly incorporated company to take a little time to organise, and we find that the rights were transferred after the letters sent to the UKBF by Altion Law. Mr Hays did not seek to argue otherwise.

9. As a result of the transfer of rights between Mr Horsman's sole trader business and WFB, we find that the latter has a right of appeal against the restoration decision and that its appeals to the Tribunal were validly made. On behalf of the UKBF, Mr Hays said he accepted that WFB had the right to appeal to the Tribunal and had done so.

The Tribunal's jurisdiction

10. Finance Act 1994 s 16(4) provides that the Tribunal's power, when dealing with an appeal against a restoration decision, is limited to considering whether that decision "could not reasonably have been arrived at" by the relevant officer.

11. In *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones and Jones*"), the Court of Appeal clarified the extent of the Tribunal's jurisdiction. Once goods have been condemned as forfeit in the magistrate's court, the Tribunal has no power to overturn that decision, but has to deem the goods to have been legally seized. Mummery LJ, giving the judgment of the court, said at [71(7)] that "deeming something to be the case carries with it any fact that forms part of the conclusion."

The evidence

12. The UKBF provided the Tribunal with a bundle of documents, being:

(1) the correspondence between the parties and between the parties and the Tribunal, including the documentation stated to relate to the purchase and sale of the seized goods, which was provided to the UKBF before the review decision was made;

(2) the two electronic administrative documents relating to the seized goods;

(3) due diligence documentation for WFB, the Card Centre (London) Limited ("the Card Centre"), Howards International Ltd and Ecosys Europa.

13. The bundle also included the following exhibits to Mr Horsman's witness statement, none of which had been made available to the UKBF before the review decision:

(1) a document headed "Worx Food & Beverage," dated in manuscript 17/01/13. In large print in the centre of the document is the word "Payment." Some of the details are completed in manuscript, including the "amount" of £34,000. Under the heading "signed (for supplier)" is a stamp which begins "Irek Food & Drink's" [sic];

(2) a second document in the same format, dated 24 January 2013 and with an amount of £47,000;

(3) a document headed "Worx Food & Beverage," dated 28 November 2012 and stating on its face that it is a Credit Note, for an amount of £11,535.60, which is addressed to the Card Centre; and

(4) a second document in the same format. The date is 30 November 2012 and the amount £11,527.

14. Mr Horsman gave sworn oral evidence. We did not find him to be a credible witness. Much of his evidence was vague and some of it contradictory. For example, he first said that the warehouse used by WFB could not identify the specific items listed on the documentation, but later said that the delivery note reference number would have been attached to each pallet.

15. Mr Mark Collins, the Higher Officer of the UKBF who made the review decision, also gave sworn oral evidence. We found him to be a credible and honest witness.

16. On the basis of this evidence we make the findings of fact set out in the next part of this decision.

The facts

17. Mr Collins gave unchallenged evidence about the background to this case, without making any allegation of fraud:

(1) Alcoholic goods can be moved within the European Union (EU) under what are known as "duty suspension" arrangements. No duty is charged on goods moving between specific locations, known as bonded warehouses. It is only when the goods leave a bonded warehouse for a destination other than another bonded warehouse that duty becomes payable.

(2) Since 1 January 2011, UK traders have been required to use the computerised Excise Management Control System ("EMCS") when receiving and dispatching duty suspended excise goods moving within the EU. When goods are to be moved between warehouses, EMCS issues an Administrative Reference Code ("ARC"). Once issued, an ARC is valid for 4-5 days.

(3) In some cases, the original load (with its ARC number) enters the UK legally, but is followed by a second load, which "borrows" the ARC of the first load. The second load is made up to match as closely as possible that which made up the first load. On cursory inspection the second load may look legitimate, and in reliance on the "borrowed" ARC number, may pass through border control without being seized. Once in the UK the second load is then illegally sold free of duty.

18. On 22 November 2012, an ARC number was accepted for a load of mixed beers. The details on the ARC were as follows:

(1) Goods: 24,079.44 litres of mixed beer

(2) Consignor: Opale Totale Negoce, France

(3) Consignee: Seabrook Warehousing Ltd

(4) Transport arranger: WFB, Nootdorp

(5) Transporter: Howards International Ltd.

19. On 23 November 2012, a trailer ("TR12") carrying a load matching the above description entered Dover from Calais. On 24 November 2012, the same trailer tried to import a further load of mixed beer using the same ARC number. This load was seized at Calais by the UKBF ("the first seizure"). The vehicle and trailer were also seized. A Seizure Information Notice was handed to the driver.

20. On 27 November 2012 a vehicle with trailer RT6 travelled to Dover carrying alcoholic drinks. It had its own ARC number; the other details were the same as in

the ARC of 22 November 2012, other than in relation to the quantity, which was 24,741.28 litres. On the following day, a vehicle with the same trailer tried to import a further load of alcoholic drinks, using the same ARC number. These goods were also seized by the UKBF ("the second seizure"), together with the vehicle and trailer.

21. Howards International Ltd ("Howards"), the haulier, subsequently informed WFB that the goods had been seized.

22. On 1 December 2012 the UKBF wrote to Howards telling them that they had one month from 24 November 2012 to claim that the goods, vehicle and/or the trailer were not liable to forfeiture. The letter provided details of Notice 12A, which explains the legal position relating to forfeiture. It ended by saying "if you do not own the seized goods, vehicle or trailer, you should make every effort to contact the owner and pass this letter on to them."

23. On 12 December 2012 the UKBF wrote another letter in similar terms in relation to the second seizure.

24. On 19 December 2012, Altion wrote to the UKBF requesting restoration of the goods in the first seizure. The request did not extend to the vehicle or the trailer. This appeal is therefore concerned only with the goods.

25. Altion attached the following documents to its restoration request. It is WFB's case that, taken together with the other documents described later in this decision, they were sufficient to establish ownership of the seized goods. We therefore set them out in some detail.

(1) A document on the headed paper of "Worx Food & Beverage" dated 22 November 2012, which stated on its face that it was a "Purchase Order." The supplier is given as "Irek Food & Drink", Niedchobrz, Poland. The document lists over 20 different beers, with details of each, for instance, the first beer is recorded as "Fosters 4% 24x50cl"; the quantity, unit cost, and total cost for the Fosters was also given. The cost of all the beers taken together was £9,668.56. VAT is given as £0.00.

(2) A document headed "Facture" – the French for "invoice" – from "Irek Food and Drinks" (sic) of the same date, addressed to Worx Food & Beverage. It gives a list of the same beers, the same unit price, and the same total cost for each beer as is on the "Purchase Order." However, it does not provide the detailed information relating to each beer which was on the "Purchase Order," so the first product is simply listed as "Fosters." The total cost of the beers is the same as on the "Purchase Order," being £9,668.56 and the VAT is £0.00. However, the total shown at the foot of the document is "10,635.42" – a difference of £966.86, being a 10% increase. There is no explanation on the face of the document as to what this 10% relates. At the foot of the document is a note which includes the words "Goods remain the property of Worx Food & Beverage until payment for all dues has been received in full."

(3) A second document headed "Worx Food & Beverage," also dated 22 November 2012 and stating on its face that it is a "Sales Order." The customer

is stated to be the Card Centre, and the place of delivery, Seabrook Warehousing Ltd ("Seabrook"). The details of the goods on the document are identical to those on the "Purchase Order," but the price of each beer has been increased by exactly 22 pence per unit. In addition, the total includes an amount of £1,400 for "freight, documentation, handling," making the total on the invoice £11,535.

(4) A third document headed "Worx Food & Beverage," also dated 22 November 2011 addressed to the Card Centre, and stating on its face that it is an "Invoice" but otherwise identical to the Sales Order.

(5) A fourth document headed "Worx Food & Beverage," dated 22 November 2012 and stating on its face that it is a "Delivery Note." Below that is a reference number WB 1234. Under "description" is the same list of beers, with the same detail, as was present on the other Worx Food & Beverage documents. This document has no price information.

(6) A document headed "Bon de livraison," which is the French for "delivery note" or "delivery slip." The company named on the document is "OTN Opale Total Negoce." The goods listed are identical to those on the document headed "Delivery Note" but a lot number is given for each. For example, the lot number for the "Fosters 4% 24x50cl" is 121100025496. The document also states how many pallets are needed for each listed beer, together with the total number of pallets, which is 28.

(7) All the documents are in English except that headed "OTN Opale Totale Negoce," which is in French, and the word "facture" on the document from Irek. Where prices are given, they are in sterling, not euros.

26. On 20 December 2012, Altion wrote a second letter to the UKBF requesting the restoration of the goods seized in the second seizure. Again, the request does not extend to the vehicle or trailer. No documents were included with that letter.

27. On 7 February 2013 the UKBF wrote to Altion saying:

> "before consideration can be given to your client's restoration request, we require proof of ownership of the goods. This should not only include proof that your client has made payment for the goods, or a copy of the contract showing payment terms, but that the goods held by our Queen's warehouse can be physically shown to be those your client is claiming.
>
> To that end, please supply us with the system used to identify your client's goods and the numbers on this particular consignment, ie lot numbers, rotation numbers or pallet numbers. These can then be checked against the goods we hold to help confirm ownership."

28. On 8 April 2013, the UKBF refused to restore the goods from the first seizure. The refusal letter states that the decision maker has "looked at all the circumstances surrounding the seizure" and concluded (emboldening in original):

> "there are no exceptional circumstances that would justify a departure from the Commissioners' policy as you have not provided any proof of

> ownership for the alcohol and I can confirm that on this occasion **the goods will not be restored to someone who has not proved ownership**."

29. On 12 April 2013, the UKBF refused the request to restore the goods in the second seizure. Under "my decision" the letter states that the decision maker has "looked at all the circumstances surrounding the seizure" and concluded:

> "there are no exceptional circumstances that would justify a departure from the Commissioners' policy this was the second trip of trailer TR12 within the life of the ARC and the goods did not tally with the EMCS. I can therefore confirm that on this occasion as am not satisfied [sic] that your client has provided sufficient proof of ownership the goods will not be restored."

30. The letters of 8 and 12 April both informed Altion that WFB had a right to request a statutory review of the decisions and said that "your client should give reasons for the request and include any information or evidence that they require to be considered…"

31. On 21 May 2013 Altion wrote two letters to the UKBF. It requested statutory reviews of both seizures and attached the following documents relating to the second seizure:

(1) A document headed "Worx Food & Beverage" dated 26 November 2012, which stated on its face that it was a "Purchase Order." The supplier is again Irek, and the format is the same as that for the goods seized in the first seizure. Again, over 20 different beers are listed, together with the quantity, unit cost and total cost. The value of all the beers taken together is given as £9,666.44.

(2) A document headed "Facture" from "Irek Food and Drinks" [sic] also dated 26 November 2012. It has the same format as the document headed "facture" which relates to the first seizure. Again, the total value has been increased by 10% to £10,633.08 without explanation.

(3) A second document headed "Worx Food & Beverage," also dated 26 November 2012 and stating on its face that it is a "Sales Order." This too follows the format of the similar document relating to the first seizure. The price of each type of beer has again been increased by exactly 22p per unit, and the cost of "freight, documentation and handling" is identical, being £1,400.

(4) A third document headed "Worx Food & Beverage," stating on its face that it is an Invoice, also dated 26 November 2011 and addressed to the Card Centre, but otherwise identical to the "Sales Order."

(5) A fourth document headed "Worx Food & Beverage," with the same date and stating on its face that it is a "Delivery Note." Below that is a reference number WB 1237. The format of the document is the same as that for the goods seized in the first seizure.

(6) A document headed "Bon de livraison," again with the same date and format as the similar document relating to the goods seized in the first seizure.

(7) Again, all the documents are in English except that headed "OTN Opale Totale Negoce," which is in French, and the word "facture." Where prices are given, they are in sterling, not euros.

32. By attachment to one of Altion's letters sent on 21 May 2013, the following further documents were also sent to the UKBF:

(1) A document headed "bill payment history." The "supplier" is given as Irek and five amounts are listed. The amount relating to 22/11/2012 is for £9,668.56. However, this is the figure on the "Sales Order," not the 10% higher figure of £10,635.42 on the *facture* from Irek. The total of the five amounts is £34,000, the same as the figure on the first of the two "payment" documents attached to Mr Horsman's witness statement.

(2) A second "bill payment history" totalling £47,000, the same as the amount on the second "payment" document. One of the amounts making up this total is dated 26 November 2012, but it is for £8,750.96, not £9,966.94 (the amount shown on the "Sales Order") or £10,633.08 (the amount shown on the *facture*).

(3) A further document with the heading "the Card Centre (London) Ltd" dated 26 November 2012, listing the goods seized in the second seizure, the can size, the number of cans in each case, and the number of cases. The covering letter from Altion simply describes this as "document from the Card Centre (London) Ltd."

33. On 3 June 2013 the UKBF responded to the statutory review requests, saying *inter alia* "if you have any further evidence or information that you would like to provide in support of your request, then please send it to the Review Officers..." Neither the "payment" documents nor the two "credit notes" were provided.

34. On 14 June 2013 Mr Collins completed the statutory review. He first summarised the UKBF's restoration policy for excise goods:

> "the general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

35. Mr Collins said he had carefully considered the correspondence from Altion to see whether "a case for disapplying the BF policy on restoration has been presented" but had found no "exceptional circumstances" which would justify restoration. He went on to say (emphasis in original) that "the <u>first</u> step in the restoration process is to establish who has title to the goods at the time of seizure," and:

> "comparing the documents to the information that has been requested, there is a common theme. Despite the clear request from the NPSU [National Post Seizure Unit] there is nothing to identify the individual excise goods that have been seized by the Border Force. A list of beer products that matches brands does not identify the physical consignments held by Border Force.
>
> The Queens Warehouse, who are in control of the goods for the Border Force, were requested to examine the products and supply lot numbers,

> rotation numbers or any identifiable markings. A list from the Queens Warehouse was supplied which I checked against all the documents you tendered on behalf of your client. There were no markings matching any of the paperwork sent in in support of your client's assertion that they own the goods…your client has not satisfactorily proven they have legal title to the excise goods seized."

36. Having heard Mr Collins' cogent oral evidence as to the nature of his checks for matching markings, evidence which was tested by cross-examination, the Tribunal finds as a fact that he carried out the checks which he sets out in the review letter, and further finds that there were no markings on those goods which matched anything on the paperwork supplied by Altion on WFB's behalf. In particular, we accept his evidence and find as facts that:

(1) the lot numbers shown on the documents headed "Opale Total Negoce" were not matched to any beer held in the Queen's Warehouse;

(2) the reference numbers WB1234 (in relation to the first load) and WB1237 (in relation to the second load) were not on any pallets in the Queen's Warehouse. In so finding, we reject the evidence of Mr Horsman, given in the hearing (but not in any previous correspondence or submissions) that he had understood these numbers to be on the pallets.

37. We also accept Mr Collins' evidence that, when making a restoration decision, establishing ownership is normally the first stage of the process; when that is satisfied, the UKBF will move on to consider other matters.

38. Mr Collins' review decision also cited *Jones and Jones* in the context of the Tribunal's jurisdiction, together with *Clear v HMRC* [2011] UKFTT 11 ("*Clear*"), a decision of Judge Blewitt and Mr Bennett, in support of the reasonableness of the UKBF's restoration policy. He concluded his decision by stating that in the circumstances, non-restoration was "proportionate and fair."

39. On 12 July 2013 WFB made separate appeals to the Tribunal in relation to both seizures. The two appeals were joined by the Tribunal, with the consent of both parties.

40. WFB has not contested the seizures in the Magistrates Court so both loads are deemed to be legally seized.

Submissions by or on behalf of WFB

41. In her skeleton argument, Ms Hadfield submitted that Mr Collins' decision was "seriously flawed" because:

(1) it failed to take into account the overwhelming evidence that WFB was the owner of the seized goods;

(2) it failed to consider whether WFB was an innocent third party. This was particularly relevant because each seizure had been triggered by the use of the same trailer by the haulier on two successive occasions. WFB was "asserting

his innocence in respect of any impropriety that had taken place" and that as the UKBF's policy was to restore goods to innocent third parties, either at no cost or on payment of the duty "the extent of the Appellant's knowledge and participation in any inappropriate conduct was directly relevant to the review exercise and yet was not considered"; and

(3) it failed to have regard to the hardship caused to WFB by the refusal to restore. Under the heading "hardship" in its Notice of Appeal to the Tribunal, WFB said it had suffered "a loss of profit" and that its inability to complete its contract to supply the goods "could in turn affect the Appellant's business and/or reputation in the future."

42. Before the Tribunal, Ms Hadfield concentrated on the first of those arguments and relied on the documents set out in the previous part of this decision. She drew our attention to the note at the end of the *facture* which stated that "Goods remain the property of Worx Food & Beverage until payment for all dues has been received in full." She also relied on Mr Horsman's oral evidence, which was as follows:

(1) There was no need for goods to be identified by lot numbers or otherwise, as long as the type of beer, quantity and can size were identified on the paperwork.

(2) The warehouses where the goods were stored did not distinguish between those belonging to different owners, but stored them by type, so they would, for example, store all the Stella Artois in one part of the warehouse. When they had to make up a load for delivery, they simply took those pallets of Stella Artois which were to hand.

(3) Under cross-examination from Mr Hays, Mr Horsman said that when ordering goods he never specified that a certain minimum period of time must remain before expiry. He said expiry dates were not a problem with most beers, because the turnover of these products was so fast. Expiry dates were only an issue with specialist beers, and he rarely dealt in these; if he did, volumes were very small. Mr Horsman said that the expiry dates of specialist beers might be checked "on the docks" and he would then be contacted. If his customer received goods which were out of date, or close to the expiry date, he would ring Mr Horsman, who would issue a credit note. However this had never happened.

(4) Mr Hays asked Mr Horsman what would happen if some of the goods were damaged in the warehouse: was it not important to know whose goods had been damaged? Mr Horsman said that the insurer would pay the warehouse owner and that damage was irrelevant to the owner of the goods.

(5) The Tribunal asked Mr Horsman what would happen if some (but not all) of the goods in the warehouse were stolen: if there was nothing on the goods to identify the owner, how would the warehouse owner know whose goods had been stolen and whose remained? Mr Horsman again said that any such losses would be claimed by the warehouse owner on his insurance and that it wouldn't be an issue for the owner of the goods.

(6) Again, in answer to cross-examination, Mr Horsman said didn't know why OTN had put lot numbers on their document, or what these numbers signified. He said that there was no need for each pallet of goods to be identified. He had understood that the reference numbers from the delivery notes were on the pallets, but he was a salesman and not involved in the detailed operation of the warehouses. The only proof he had that WFB owned the seized goods was that they corresponded with the descriptions set out on the paperwork.

(7) His overall submission was that he had made about 600 shipments using this system and it worked perfectly well.

43. In essence, the main plank of WFB's case was that the UKBF had acted unreasonably in not restoring the goods, given that they matched the description set out in the documents provided.

44. Ms Hadfield acknowledged that there was a difference between the amount shown on the 22 November *facture* from Irek, which showed £10,635.42 as payable by WFB, and the £9,668.56 shown as paid by WFB on the "bill payment history." However, she said that as this had not been relied on by the UKBF in making their decision, it was not a relevant factor.

45. Ms Hadfield challenged Mr Collins on cross-examination about the UKBF's procedures for tallying and storing the goods once they had been seized. Mr Collins accepted that goods were not always tallied immediately on seizure because many loads arrive at night when staffing levels are low. However, he said that the UKBF had a strict control system for making sure goods do not go astray. He also pointed out that the UKBF had not been asked to provide evidence about the UKBF's control system for this appeal.

46. Ms Hadfield submitted to the Tribunal that because the goods were not always tallied on receipt by the UKBF, traders were being held to a higher standard of evidential custody control than the UKBF.

47. WFB's Notice of Appeal included the following additional submissions:

(1) the refusal to restore is not proportionate to the legitimate aim of preventing the evasion of excise duty;

(2) the UKBF's general policy not to restore goods is no longer reasonable, because it does not take into account the new EMCS system;

(3) the UKBF had relied on *Jones and Jones* and *Clear* as supporting that general policy, but these cases were no longer reliable because they pre-dated the introduction of the ECMS; and

(4) it was unreasonable to punish the owner of the goods when the trigger for the seizure was that trailer had been used twice. The trailer was owned by the haulier, a completely different legal entity from WFB.

Submissions of Mr Hays on behalf of the UKBF

48. Mr Hays said that the UKBF's decision rested on WFB's failure to prove that it owned the specific goods seized and now held in the Queen's Warehouse. In reliance on Mr Collins's evidence, he said that the policy was to require that people claiming ownership of goods must provide details sufficient to allow the UKBF to confirm ownership of *those particular goods*. Where goods such as cans of alcohol are seized, the UKBF require that the putative owner provide details of the lot numbers, pallet numbers or other markings, which can be used for identification purposes.

49. Mr Hays submitted that the requirement to prove ownership was reasonable because the UKBF had to ensure that the goods were restored to the legitimate owner. He drew an analogy with the Magistrates Court, where those who sought to contest condemnation proceedings had first to swear ownership.

50. He also drew the attention of the Tribunal to Regulation 4(1)(a) and (3) of the Revenue Traders (Accounts and Records) Regulations 1992, which reads as follows:

> (1) A revenue trader shall keep and preserve a record of—
>
> (a) the production, buying, selling, importation, exportation, dealing in or handling of any excise goods carried on by him…
>
> (3) The record, required of a revenue trader by paragraph (1) of this regulation, shall contain sufficient information, by way of cross referencing or otherwise, to enable an officer to trace readily any payments, made or received by that trader in respect of any excise goods or of any financing or facilitation described in sub-paragraph (c) of paragraph (1) of this regulation.

51. Mr Hays said that it was implicit in this regulation that a trader would have to be able to establish the precise "excise goods" for which payment had been made. At a minimum, it was at least reasonable of the UKBF to take this approach.

52. Since it was reasonable of the UKBF to conclude that WFB had not proved that it owned the specific goods which had been seized, it must follow that:

(1) it was irrelevant whether WFB was actually or constructively involved in the illegal importation of alcohol; and

(2) no issue of hardship arose.

53. Like Ms Hadfield, Mr Hays said that some obvious questions could be raised about the payment documentation, but also agreed that payments had not been a factor in Mr Collins' decision.

Discussion

54. The main issue in this case was whether it was reasonable for the UKBF to refuse to restore because WFB had not proved ownership. We consider that issue first, followed by the other submissions.

The ownership issue

55. WFB's primary case is simple: the documentation shows that the seized goods had been ordered by WFB from Irek in Poland, and were to be delivered to the Card Centre. They were seized as they travelled between OTN's bonded warehouse in France, and Seabrook, a bonded warehouse in the UK. The UKBF took the goods from the trailer and stored them in the Queen's Warehouse. WFB does not have a system for identifying the precise cans of beer; it simply relies on its suppliers, warehouse keepers and hauliers to work together so as to ensure that the requisite number and types of beer are delivered. The customers never complain, so the system has been shown to work in practice. It cannot be reasonable for the UKBF to refuse to restore simply because WFB cannot provide lot, rotation or pallet numbers.

56. The UKBF's case is equally straightforward. Before restoration can be considered, the customer has to prove ownership. That means providing evidence that the precise goods seized belong to the claimant. This is a reasonable measure, because otherwise the UKBF might restore goods to someone other than the owner. WFB have not shown that they own the precise goods which have been seized, because there is no way of linking the seized goods to the documents. Only OTN's "bon de livraison" has any lot numbers, and these do not correlate to any goods in the Queen's Warehouse. As a result, WFB have not discharged the burden of showing that they own the goods, and therefore the decision not to restore has to be reasonable.

57. We begin by agreeing with both Counsel that Mr Collins' decision rested entirely on the lack of specificity in the paperwork. He did not look beyond this, to consider whether the documents themselves were genuine; he did not challenge the evidence of payment.

58. Our starting point is that the UKBF's general policy of restoring goods only when satisfied that a person has proved ownership is self-evidently reasonable. The UKBF stores many thousands of items; it has to be a precondition of release that a person claiming a seized item must first show that it belongs to them.

59. The next question is whether it was unreasonable of Mr Collins to decide that the documents provided by WFB do not prove ownership, because they do not identify the particular items which have been seized.

60. Despite Mr Horsman's belated suggestion (which we did not accept) that there might be a link between the delivery note numbers and the pallets, the overall tenor of his evidence was that there was no need for a link between the documents and the seized items, other than generically. This, too, was the case presented by Ms Hadfield for WFB.

61. We found Mr Horsman's account of how his business was allegedly conducted to be wholly implausible. He told us that goods purchased by Worx from Poland were mingled indistinguishably with other goods owned by a variety of other unconnected persons in a warehouse; that the goods taken from that warehouse to be transported to another warehouse were most unlikely to be the same as the original purchased goods, but that neither the warehouse keeper nor the owners care about

this: all they are bothered about is that they receive the right number and type of alcoholic drinks.

62. Cans of alcohol are not like money: they are not fungible assets. Alcohol can be out of date, or close to expiry; newly produced cans might be swapped with damaged or counterfeit goods. It cannot be the case that owners are unconcerned as to whether the precise goods which they have bought from their supplier are the same ones as those shipped to their customer.

63. We also reject Mr Horsman's evidence that an owner of alcoholic drinks stored in a warehouse would not know or care if those goods were stolen or destroyed, because the owner of the warehouse would claim from his insurers and refund the owners of the goods. That, too, is inherently improbable. Each supplier has to deliver the goods ordered by his customers by a given date. If there is a theft from the warehouse, or part of it is destroyed by flood or fire, the owners of the goods held in that warehouse will not be indifferent as to whether they are provided (a) with the goods which remain, or (b) with compensation obtained after an insurance claim.

64. In short, owners of alcoholic goods must have a method to identify their particular stock, so as to distinguish it from that owned by others held in the same warehouse.

65. Ms Hadfield also placed some reliance on the statement on the *factures* which said that the "Goods remain the property of Worx Food & Beverage until payment for all dues has been received in full." It is true that the *factures* were provided to Mr Collins when he made the decision, and that he shows no sign of having given any weight to this statement.

66. However, no documentary evidence of payment, such as credit notes and bank statements, which might demonstrate that WFB had paid for these goods, was provided in advance of the review decision. This is despite the UKBF twice inviting WFB to submit any further relevant information; further, their letter of 7 February 2013 specifically required WFB to provide evidence that it had "made payment for the goods." In the absence of any such supporting information, we find that the statement on the *factures* that the goods were owned by WFB to be a bare assertion, and that it was reasonable of Mr Collins to place no weight on it.

67. On the basis of the foregoing, we find that ownership is not proved simply because (a) WFB has produced documents listing goods which are a generic match to those taken from the two trailers and (b) it has asserted ownership on the *factures*. On the contrary, we find it is reasonable for the UKBF to require that a person asserting ownership of alcoholic goods should provide evidence that he owns the precise goods which have been seized, and that this evidence should consist of some form of cross-referencing as between the paperwork and the goods.

68. The documents provided by WFB do not provide any such referencing and it was therefore reasonable for Mr Collins to decide that the goods should not be restored.

The "innocent third party" submission

69. Ms Hadfield submitted that Mr Collins' decision was unreasonable because he had not considered whether WFB was an innocent third party, given that "the extent of the Appellant's knowledge and participation in any inappropriate conduct was directly relevant to the review exercise."

70. Mr Hays gave short shrift to this submission, saying that since it was reasonable for Mr Collins to refuse to restore because ownership had not been proved, it was "irrelevant whether WFB was actually or constructively involved in the illegal importation of alcohol." In other words, the UKBF did not need to go on to consider this question.

71. We agree with Mr Hays. If ownership has not been established, then it is reasonable for the UKBF to stop there. They do not need to go on to consider whether the person claiming ownership was an innocent party in a fraudulent transaction.

72. This Tribunal, likewise, does not need to consider the facts as found, to see whether they support Ms Hadfield's submission that WFB was an innocent third party.

The hardship submission

73. Ms Hadfield also submitted that the decision was unreasonable because the hardship caused to WFB had not been considered. Mr Hays says, with commendable brevity, that "no issue of hardship arose."

74. Again, we agree with Mr Hays. If a person has not proved that they own the goods in question, it is reasonable for the UKBF to stop there. Indeed, it would be unreasonable for them to go on to consider hardship, because that carries with it the inference that the goods were owned by the person asking for restoration.

75. We also observe in passing that WFB's Notice of Appeal states that hardship was caused in part by "a loss of profit." If WFB were the owner, it would have lost the entire value of those goods when they were seized, not merely the profit. However, this point appears only in the Notice of Appeal, so it clearly arose after Mr Collins' decision. It is therefore irrelevant to either that decision or our decision.

The UKBF's general policy on restoration

76. WFB submitted that the general policy of the UKBF not to restore goods properly seized other than in exceptional circumstances was no longer reasonable, because it did not take the new EMCS system into account. We cannot agree. The EMCS is, as its name indicates, a "management and control system"; like all systems, it is fallible. The fact that the ARCs are valid for 4-5 days itself gives an opportunity for fraud, as Mr Collins explained in his oral evidence.

77. We also do not accept WFB's submission that the *dicta* of the Tribunal in *Clear* have ceased to be relevant now that EMCS is operational. Instead we respectfully endorse that Tribunal's statement at [53] that:

> "the general policy of the Respondents not to restore the goods where properly seized is reasonable. It is clear that the policy allows for situations where a distinction can be drawn between primary seizure of goods and secondary seizure, for example where an innocent driver has had his vehicle cynically made use of by others to import excise goods and in the Tribunal's view it has to be correct that a policy on restoration should draw the type of distinctions addressed in the Commissioners' policy."

78. We also reject WFB's submission that, for the same reason, *Jones and Jones* should be disregarded. First, *Jones and Jones* is a decision of the Court of Appeal, and so binding on this Tribunal. Second, since EMCS was introduced, *Jones and Jones* has been followed by the Upper Tribunal, and the decisions of that Tribunal are also binding on us. Third, the *ratio* of *Jones and Jones*, set out at [71] of the decision, turns on the extent of the Tribunal's jurisdiction rather than on the UKBF's general policy on restoration, so the relevance of WFB's submission is not entirely clear to us.

Proportionality

79. WFB's Notice of Appeal also submits that the decision is disproportionate. However, no case law was cited and no further submissions were made, either in Ms Hadfield's skeleton argument or at the hearing. We therefore deal with this point briefly.

80. The Court of Appeal considered proportionality in *Lindsay v HMRC* [2002] STC 588 ("*Lindsay*"), a case involving the seizure of a vehicle. At [52] Lord Philips MR, giving the leading judgment, said:

> "The commissioners' policy involves the deprivation of people's possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *Air Canada v United Kingdom* (1995) 20 EHRR 150, para 36). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

81. In this case, the decision is based on WFB's failure to prove ownership. Far from finding that the UKBF's policy is a breach of proportionality in the context of Article 1 Protocol 1 ("A1P1"), we find that it is compliant with A1P1. If the UKBF did not have a policy of requiring proof of ownership, there would be a high risk that goods would be restored to persons other than their owners, so depriving those owners of their possessions.

82. We therefore find that the UKBF's general policy of requiring proof of ownership is proportionate within the meaning of the Convention. We further find that it is proportionate in this case. The evidence provided by WFB in support of its claim to own the goods was inadequate, and Mr Collins' decision to refuse to restore was proportionate.

83. We have also considered the concept of proportionality in the context of Community law. However, we note that Lord Phillips MR in *Lindsay* at [53] said that, at least in the context of this type of case, the Court of Justice of the European Union does not have "anything significant to add" to the jurisprudence developed by the European Court of Human Rights. He did however refer to a passage from *Paraskevas Louloudakis v Elliniko Dimisio* (Case C-262/99) (2001), which so far as relevant to the instant case, reads:

> "The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty."

84. A refusal to restore may be regarded as an administrative measure; reading the second part of the above extract as if it applied in the same way to administrative measures as it does to penalties, we find that neither the UKBA's general policy, nor its application of that policy to the instant case, comes anywhere close to being an obstacle to the freedoms enshrined in the Treaty. Rather, it is a proportionate measure, reasonably applied.

Other issues

85. We agree with both Counsel that, although there are some clear discrepancies and difficulties with the payment documentation, these were not considered by Mr Collins and so were not a factor in his decision.

86. WFB submits, in its Notice of Appeal, that it was unreasonable to punish the owner of the goods, given that the trailer was owned by the haulier, a completely different legal entity. This is, in terms, a challenge to the legality of the seizure. The goods at issue in this case have now been condemned as forfeit, and this Tribunal has no jurisdiction to consider the legality of the seizure. The proper forum for this submission was the Magistrates' Court, although we note that (for whatever reason) WFB did not initiate proceedings so as to challenge the seizure.

87. Finally, we do not accept Ms Hadfield's submission that we should find Mr Collins' decision to be unreasonable on the basis that the UKBF were applying a higher standard of continuity to traders than they practised themselves. We have found that WFB has not provided sufficient evidence of ownership and that it was entirely reasonable for Mr Collins to refuse to restore on that basis. How the UKBF tallied the goods, and how they track the goods in the Queen's Warehouse, is not a relevant factor. Further, this was not a matter put in issue ahead of the Tribunal hearing, so the UKBF were not on notice to provide documentary evidence directed at rebutting Ms Hadfield's submission. We nevertheless accepted Mr Collins' oral

evidence that the Queen's Warehouse has a strict internal system for the control of the goods held within it.

Decision and appeal rights

88. For the reasons set out above, we find that Mr Collins' decision was one which he could reasonably have arrived at, and dismiss WFB's appeal.

89. 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.

90. 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.

ANNE REDSTON

TRIBUNAL JUDGE
RELEASE DATE: 2 June 2015

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 23 May 2015