TC04721

Appeal number: TC/2014/6057

EXCISE DUTY – refusal to restore – application for Tribunal to order a review of this decision out of time – **Data Select** ***applied – application refused***

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM HEDLEY GRAHAM **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, London on 17 November 2015

Mr C Marsh-Finch, Counsel, for the Appellant

Mr W Hays, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The parties were agreed that this hearing concerned an application made by the appellant for HMRC to carry out a review of their decision to refuse to restore to him a Mercedes sprinter Van registration number ND60 DZE ('DZE').

Background

2. I heard no oral evidence: Mr Marsh-Finch chose not to call any despite a letter from the Tribunal before the hearing explaining that evidence might assist his case. Nor was there any agreed statement of facts. However, I had in front of me letters and from the evidence of these I make the following findings.

3. HMRC seized a van driven by the appellant on 12 November 2010 with registration number NM07 JGV ('JGV') including the tobacco contained in the vehicle. On 4 February 2011, HMRC seized a second van owned by the appellant, DZE, including the tobacco contained within it. Another seizure of tobacco held in the appellant's garage was made on the same day.

4. So far as JGV was concerned, on 26 November 2010 the appellant's solicitors wrote to HMRC asking for the vehicle to be returned. Their letter said:

> "…[the appellant] clearly accepts that the tobacco in question needs to be confiscated and indeed it was not his in any event….
>
> We therefore ask in the circumstances of this case that the vehicle could be returned and clearly Mr Graham has learnt a lesson and will ensure that he checks the nature of the product that he is being asked to transport.
>
> He does not accept in any way that he was a party to any offence or that he was aware that he was carrying tobacco for which duty had not been paid."

5. By letter dated 4 January 2011 HMRC refused to restore JGV and explained the process of applying for a review of that decision. On 14 February 2011, the appellant's solicitors applied for a review. On 29 March 2011, HMRC upheld their decision refusing to restore JGV and notified the appellant of his right of appeal to this tribunal. On 19 April 2011, the appellant's solicitors wrote to HMRC saying:

> "We received your letter dated the 29th March. Having taken our client's instructions he does not wish to take this issue any further and accept (sic) your decision to seize his vehicle."

6. In the meantime, as I have said, on 4 February 2011 a second vehicle, DZE, belonging to the appellant had been seized. On 11 February, a different firm of solicitors to the one which acted on Mr Graham's behalf in respect of JGV wrote to HMRC. The copy of the letter in front of the Tribunal was very poor. However, it is clear that what text there is does not contain a challenge to the legality of the seizure. It does contain a claim to restoration of various goods including the van DZE. At the hearing Mr Marsh-Finch accepted it was a claim for the return of the van.

7. On 21 February, these solicitors sent a letter chasing a response to their letter of 11 February. In the meantime, it seems HMRC wrote a letter to the appellant on 17 February. The receipt of this letter was acknowledged in the solicitor's letter of 23 February which went on to say:

> "…As we understand it, items were seized by HMRC on 4th February 2011. We must within one month of the date of seizure serve notice on you whether we wish to dispute seizure and forfeiture. Can you please respond as a matter of urgency in order that we can take our client's instructions and proceed accordingly.
>
> Clearly we can not advise our client or serve the appropriate notice until we receive a response from you. Please also confirm on whom we serve the notice and whether there is a prescribed format."

8. It is not obvious to what the solicitors were waiting for a response other than possibly it was a reference to the first paragraph in which they were asking HMRC to acknowledge that they had been served with notice of acting by the appellant in favour of the solicitors.

9. On 25 February, HMRC wrote directly to Mr Graham. This letter makes no reference to the solicitor's letter of 21 February and it is not apparent whether or not the writer had seen it. Based on a letter written by HMRC on 11 March, it seems the 25 February letter was written in response to a verbal request made by Mr Graham in person.

10. In any event, the letter of 25 February acknowledged the notice of acting but pointed out it was only partly completed, which was why HMRC wrote direct to Mr Graham and not to his solicitors. It also referred to the letter of 11 February and went on to deal with the application made in that letter for the return of the van DZE. The writer summarised the facts of the case as he saw them and then concluded:

> "…it is our decision not to restore your vehicle registered ND60 DZE."

The letter went on to notify the appellant of his right to apply for a review of the decision within 45 days.

11. The appellant's solicitors wrote to HMRC on 8 March. This letter enclosed a signed authority from Mr Graham and said:

> "We look forward to receiving your response."

but it did not explain to what they were waiting for a response and referred to no other letters written by or to HMRC in this matter. It just asked for a copy of the interview tape so that "we can advise our client further."

12. The solicitors wrote again to HMRC on 11 March enclosing another signed authority and again stating that they were looking forward to a response from HMRC. Again they did not refer to any other letters nor explain to what they wanted a response.

13. On the same day, HMRC responded to their letter of 8 March. HMRC enclosed a copy of the letter they had written to Mr Graham on 25 February and dealt with the issue of the tape.

14. No other letters were produced to me which had any bearing on the seizure. The file included a copy of a much later letter written by HMRC to the solicitors who were dealing with the DZE van, from which it is apparent they were also the solicitors acting for him in respect of the concurrent criminal proceedings.

15. Mr Graham was prosecuted for alleged fraudulent evasion of duty on the cigarettes carried in his vans and found in his garage but acquitted. In a short hearing on 20 April 2012 before the Crown Court Judge and after Mr Graham's acquittal, the appellant's counsel asked for return of the two vans. The Judge ordered the forfeiture of the tobacco but the return of the two vans to the appellant.

16. By this time, a third set of solicitors were acting for Mr Graham. The bundle contained correspondence to and from this firm and HMRC over the issue of the return of the vans. HMRC refused to return the vans: Mr Graham's solicitors pointed out in various letters that the judge had ordered them to do so. Eventually, HMRC applied for another hearing before the Crown Court Recorder and this took place on 4 March 2013. At this hearing, on the grounds it was an order he had had no power to make, the Judge rescinded the order he had made a year earlier for the vehicles to be returned.

17. Then on 24 July 2013 the appellant lodged proceedings with this Tribunal. In summary, it asked this Tribunal to order that the appellant be paid the market value of both of the vans at the dates of their seizure (the appellant accepting that as HMRC had actually sold the vehicles in the meantime, actual restoration was impossible).

18. The first hearing took place in front of Judge Demack in May 2014 but was adjourned because:

> "the appellant wishes to rely on correspondence not currently before the Tribunal…."

19. The second hearing was before Judge Nowlan on 1 August 2014. He issued a direction that the proceedings be struck out automatically on 1 October 2014 unless, by the end of September 2014:

> (1) in respect of JGV an application was made for leave to appeal the review decision out of time was made with an explanation for the delay of over three years which would have some prospect of success; and
>
> (2) in respect of DZE the appellant confirmed "that it has correspondence that supports it case that a review was in fact requested in relation to the non-restoration decision made". The appellant was also given the alternative of notifying the Tribunal that it was applying to HMRC for a review out of time.

20. Nothing was heard from the appellant by the due date and so on 1 October 2014 proceedings 7979 were automatically struck out: in particular, no application was

made in respect of JGV and no correspondence was produced in respect of DZE, nor did the appellant notify the Tribunal that it was applying for a review out of time.

21. In fact, on 3 September 2014 the appellant did apply to HMRC for a review of the decision of 25 February 2011. Its failure to inform the Tribunal of this meant that the proceedings 7979 were struck out, but its later application before me today related to HMRC's refusal by letter of 18 September 2014 to carry out that review and are therefore new proceedings and not affected by the earlier strike out.

22. The new proceedings TC/2014/6057 were lodged on 11 November 2014 and like the earlier proceedings referred to both vehicles and again appeared to ask for the Tribunal to award the appellant the market value of both vans at date of seizure to be paid to the appellant. However, as I have said, at the outset of today's hearing the appellant's counsel clarified that he understood that today's proceedings only concerned DZE and could only be a challenge to HMRC's decision to refuse to carry out the review. I had no jurisdiction to order more.

23. I explain why.

The Tribunal's jurisdiction

24. The Tribunal's jurisdiction is granted by 16 Finance Act 1994. Section 16(1) and (1A) gives a right of appeal against *review* decisions of HMRC, whether actual or deemed:

> "**16 Appeals to a tribunal**
>
> (1)An appeal against a decision on a review under section 15(not including a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> (1A) An appeal against a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 75 days beginning with the date on which the review was required."

25. The rest of section 16 is lengthy and I shall not reproduce it in full here. S 16(1B) also gives the right of appeal against a "relevant decision" and such appeals can be made without a review decision. But the definition of 'relevant decision' does not include decisions refusing to restore property. In short, the only route to a challenge in this tribunal against a decision of HMRC refusing to restore vehicles is to first receive a 'review' decision by HMRC.

26. Now, it was accepted by all at the hearing in front of Judge Nowlan that the appellant had received a review decision in respect of JGV. That was the letter of 29 March 2011 (§5). It was open to the appellant to challenge that decision in this Tribunal. However, as set out in s 16(1) and in the letter of 29 March 2011 from HMRC, the appellant only had 30 days in which to do so. The appellant had not exercised this right of appeal: indeed his solicitors' letter of 19 April 2011 (§5) indicated that he would not do so. Nevertheless, in 2014 he chose to lodge proceedings (TC/2014/7979), as I have said, but these were struck out as he failed to

comply with the unless order which required an explanation of the delay of over three years to be given which had a prospect persuading the Tribunal to grant an extension of time. The appellant did not even attempt to comply with this order and the appeal was automatically struck out.

27. Mr Marsh-Finch, as I have said, accepted these proceedings did not relate to JGV whatever the Notice of appeal said. He was right to do so. The matter is 'res judicata' which means that it has been decided by a court and cannot be re-opened. There must be finality in litigation. Proceedings 7979 were the appellant's chance to challenge the review decision in respect of JGV, and by failing to comply with or challenge the unless order made by Judge Nowlan in 2014, the appellant lost its appeal in respect of JGV.

28. The challenge to HMRC's decision on 18 September 2014 in respect of DZE was not before Judge Nowlan and the current proceedings (6057) in respect of it are not res judicata and I have jurisdiction to deal with an application for HMRC to be ordered to carry out a review of their decision refusing to restore DZE.

Was notice of claim given?

29. Oddly, however, the appellant's first matter raised in support of these proceedings at the hearing before me was that the letter of 25 February 2011 (§9) was *not*, Mr Marsh-Finch said, a letter refusing to restore DZE. On the contrary, Mr Marsh-Finch claimed that it was a letter refusing not to forfeit the DZE in response, said Mr Marsh-Finch, to a challenge to forfeiture by the appellant.

30. I pointed out that *if* Mr Marsh–Finch was right, HMRC had not taken a decision on restoration and could not therefore be ordered to review a decision they had not made. In which case, this Tribunal could do nothing at all. Mr Marsh-Finch accepted this but appeared to consider that it would be to the appellant's advantage if I decided that the letter of 25 February 2011 related to a challenge to seizure rather than to a request for restoration. He accepted (in my view rightly on any reading of the letter) that it did not relate to both.

31. His point seemed to me that if the appellant had challenged seizure and HMRC had failed to take condemnation proceedings in the magistrates court (and all were agreed there had been no such proceedings) then HMRC would now be obliged to restore the vehicles. Whether or not this is right is something outside the jurisdiction of this Tribunal.

32. In any event, I did not accept that the letter of 25 February 2011 dealt with a challenge to seizure. There were many reasons for this:

(1) The letter itself did not mention any challenge to seizure;

(2) The writer was clearly under the impression he was dealing with a claim to restoration as (a) he expressly said so – see §10- and (b) if he had thought he was dealing with a claim to seizure, the procedure would have been different. He would not have written a decision letter but commenced proceedings in the Magistrates Court. He would not have referred, as he did, to a 45 period in

which to apply for a review as that is also inapplicable where a notice of claim is given.

(3) There was a clear claim to restoration made in the letter of 11 February 2011 and so it was very likely that that was the subject matter of the letter of 25 September in reply.

33. In any event, on the basis of the correspondence before me, which was the only evidence I had, I find that no claim to seizure was ever made in respect of DZE. None of the appellant's solicitor's letters made such a claim. The letter of 23 February 2011 (§7) referred to taking Mr Graham's instructions on it but none of the subsequent letters made a claim despite the solicitor's clear knowledge of the rules and the one month time limit.

34. Indeed, the letters of 8 and 11 March (§§11-12) did not even refer to a possible claim for seizure even though the one month time limit would have expired on 4 March and the solicitors must have known this. And while all 3 letters ask for a response from HMRC, it is not clear to what: the most likely response expected was an acknowledgement of the notice of acting.

35. Mr Marsh-Finch also claimed that a letter written by HMRC on 15 May 2012 in relation to the Crown Court order for return of the van treated HMRC's letter of 25 February 2011 as a letter dealing with a Notice of Claim. I have read that letter and I reject that suggestion: the letter of 15 May 2012 clearly treats the earlier letter as a letter refusing restoration.

36. A notice of claim must be made in writing: paragraph 3 of Schedule 3 of Customs & Excise Management Act 1979. There is no such claim in any papers before the Tribunal. While there is evidence that Mr Graham telephoned HMRC (see §9) and the contents of that phonecall is unknown, it could not have included a valid challenge to seizure as a notice of claim must be in writing.

37. There were claims in the earlier proceedings 7979 that the appellant had relevant correspondence which was not before the Tribunal. This led to an adjournment of the original hearing (§18). The correspondence was not produced to Judge Nowlan, and Judge Nowlan's unless order which permitted the production of correspondence was not complied with. So I conclude the appellant has had ample time to produce relevant correspondence and has never produced a copy notice of claim. I conclude this is because none was made.

38. For all these reasons, I find as a fact that the appellant did not challenge the seizure of DZE.

Power to order HMRC to carry out review

39. So I find that contrary to Mr Marsh-Finch's submissions, the letter of 25 February 2011 was a decision on restoration. I also find an application to review that decision was not made until 3 September 2014. Therefore, despite the appellant's counsel's submission to the contrary, I do have jurisdiction to order HMRC to carry

out such a review if the legislative requirements are satisfied. This is because of s 14A Finance Act 1994 which provides:

> **14A Review out of time**
>
> (1) This section applies if -
>
> (a) a person may, under section 14(2), require HMRC to review a decision, and
>
> (b) the person gives notice requiring such a review after the end of the 45 period mentioned in section 14(3).
>
> (2) HMRC are required to carry out a review of the decision in either of the following cases.
>
> (3) The first case is where HMRC are satisfied that –
>
> (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and
>
> (b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.
>
> (4) The second case is where –
>
> (a) HMRC are not satisfied as mentioned in subsection(3) and
>
> (b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.

40. In other words, HMRC's decision on 25 February 2011 was a 'decision' and although (3) was not fulfilled, (4)(a) was fulfilled in that HMRC's decision on 18 September 2014 was a decision that HMRC were not satisfied that the appellant had a reasonable excuse for failing to give notice requiring a review within time.

41. So I was able to determine under s 14A(4)(b) whether to exercise my jurisdiction in the appellant's favour and order HMRC to undertake an out-of-time review of their decision of 25 February 2011. If I did make such an order, the outcome for the appellant would be either:

> (1) HMRC would reverse their decision of 25 February and order restoration (which would mean payment of an equivalent amount as the car has long since been sold); or
>
> (2) HMRC would uphold their decision of 25 February 2011, in which case the appellant would then have the right to appeal that decision to this Tribunal.

42. If I refuse to exercise my jurisdiction in the appellant's favour, the appellant's only recourse at that point will be to appeal my decision to the Upper Tribunal.

What is relevant to a decision under s 14A(4)(b)?

43. Mr Hays' primary case was that, as s 14A(3) gave HMRC the obligation to review any case where they were satisfied that there was a reasonable excuse for the late application, then I should interpret the Tribunal's discretion under s 14A(4)(b) similarly to be limited to cases where there was a reasonable excuse for the failure to ask for an in-time review.

44. His fall back position was that I should apply the principles applied in *Data Select* [2012] UKUT 187 (TCC):

> "[34]…Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well-established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions (1) what is the purpose of the time limit? (2) how long was the delay (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? And (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes it decision in the light of the answers to those questions."

45. I do not agree with Mr Hays' primary case on the legal test to be applied. There is no reason to suppose Parliament intended this Tribunal's powers to extend time to be limited to cases where a reasonable excuse is proved because:

(1) The legislation does not expressly limit the Tribunal's powers in this way; but HMRC's powers are so limited, suggesting the distinction was intended;

(2) The structure of the legislation is different: the Tribunal is given a discretion, HMRC is not: where there is reasonable excuse HMRC *must* conduct an out of time review.

In conclusion, the Tribunal was given an unfettered discretion and theoretically could decide to order HMRC to carry out an out-of-time review even if there was no reasonable excuse for the request being made out of time.

46. I agree with Mr Hays' fall back position which is that the law outlined in *Data Select* applies in this case. In other words the Tribunal must consider all relevant matters and in particular will consider:

(a) The purpose of the time limit;

(b) The length of the delay;

(c) The reason for the delay; and

(d) The consequences of granting or refusing the extension of time.

47. I did not understand Mr Marsh-Finch to suggest that this was not the correct test. He did consider that there were other factors which ought to be considered in this case, which were:

(a) The appellant's expectations;

(b) The appellant's acquittal

(c) HMRC's behaviour/(alleged) wrongful forfeiture.

I will consider all of these matters and then reach my decision.

Purpose of time limit

48. Mr Hays' position is that the purpose of the 45 day time limit to seek a review was to protect HMRC's position so that, after the expiry of 45 days they would know whether a review must take place or the property in question could be disposed of and the proceeds accrue to the Crown.

49. I did not understand Mr Marsh-Finch to dissent from this view, and I consider that it is right. I would also comment that 45 days is a generous time limit: time limits in tax matters are normally only 30 days. I consider that the importance of finality in litigation is such that the 45 day limit must be respected by the Tribunal unless there are good reasons to extend time.

What was the delay?

50. As the original decision was dated 25 February 2011, and the application to HMRC made on 3 September 2014, the delay was just over three and half years. In my view, that is an exceptionally long period of delay and ordinarily the Tribunal would not order an extension of time after such a delay but all cases will turn on their particular facts, which I move on to consider.

What were the causes of the delay?

51. In this, the appellant's counsel's choice not to call evidence means that I do not actually have any evidence of why there was such a long delay. Mr Marsh-Finch advanced the proposition that the papers that were in evidence before me made it clear that the reason for the delay was that the appellant had been awaiting the outcome of the criminal trial before pursuing restoration of the vehicles, and he did not need to call evidence on this matter.

52. I do not agree. There is no reliable evidence in the correspondence that the appellant's reason for failing to pursue the restoration of DZE after February 2011 was due to any expectation that the matter would dealt with at the conclusion of the criminal proceedings. While Mr Marsh-Finch was able to point me to a report of what he himself had said to the Judge at the hearing on 20 April 2012 in which he had said to the judge that his client, having been acquitted, was entitled to have his property back, that is not good evidence of anything other than the fact Mr Marsh-Finch believed that to be the case in 2012. It was not evidence of what his client believed in February 2011.

53. On the contrary, so far as JGV was concerned, his solicitors had on 19 April 2011 expressly disavowed an intention to pursue restoration of JGV at a time when the criminal proceedings were still on-going (§5) suggesting that <u>at that time</u> Mr Graham was well aware that the two matters were quite separate. If he understood that about JGV, it follows that it is most likely he understood that about DZE, even though of course, the solicitors who advised him on JGV were not the same as those who advised him on DZE.

54. Moreover, it was made quite plain to Mr Graham in the letter of 25 February 2011 that the route to challenge the decision was to request a review of it. If the appellant had considered at that time that restoration of the vehicle would only be

finally resolved after the criminal hearing, it would have been rational to challenge what was said in the letter rather than simply fail to meet the time limit for applying for a review.

55. So I do not accept that the evidence shows that Mr Graham's failure to ask for a review in the 45 day period allowed and which expired 11 April 2011 was because he believed it would be resolved in the criminal proceedings. It seems more likely that the failure to ask for a review of the decision contained in the letter of 25 February by the latest date of 11 April 2011 was a deliberate choice not to pursue the restoration of DZE, as this was the same choice he made at the same time with respect to JGV, which was notified to HMRC by his solicitors by letter dated 19 April 2011 (§5).

56. I note in passing that even if I had accepted that the reason for the delay was a belief that it would be determined in conjunction with the criminal trial, I would not have accepted that the delay was reasonable: the true position was explained in HMRC's letter of 25th February and is clear in the legislation. It was not reasonable to think that the letter of 25th February could be ignored and the matter raised again at the conclusion of the criminal proceedings.

57. I also note in passing that what little evidence I have would suggest that no action was taken after 24 July 2013 because the appellant (from his grounds of appeal) appeared at that point in time to consider that he was pursuing the matter by lodging proceedings in this Tribunal. However, this is irrelevant. It is irrelevant as an explanation for the last 14 months of the delay is pointless when there is no good explanation for the first 2 years and 2 months of delay.

The consequences of my decision?

58. Mr Hays' view was that, whichever way I exercised my discretion, the ultimate outcome would be the same and that outcome would be that Mr Graham's van DZE would not be restored to him. Nevertheless, if I ordered a review that would involve HMRC, the Tribunal and Mr Graham in more, pointless, costs. This was because it was his view that, even if HMRC were ordered to carry out a review, it was virtually inevitable that restoration would be refused and that, even if appealed to this Tribunal, that review decision would be upheld.

59. In other words, in Mr Hays' view the merits of Mr Graham's application for restoration of the van were very poor. Mr Marsh-Finch, needless to say, did not agree with this forecast.

60. Again, I had a lack of evidence. So I was unable to determine the facts. Nevertheless, even assuming that the facts were as the appellant represented them to be to HMRC and as reported in the decision of 25 February 2011, I consider it unlikely that the appellant would succeed in obtaining restoration. His case was that he was an innocent dupe transporting tobacco belonging to others. So far as JGV was concerned, he admitted he had not taken any care to check what it was he was being paid to transport (§4). HMRC's policy is not to restore save in exceptional cases. Here, there are no exceptional circumstances in Mr Graham's favour. When DZE was forfeited, it was the second time this had happened to Mr Graham so it would be

quite reasonable to refuse restoration, as even on Mr Graham's version of events he had not learnt his lesson and had for the second time ended up carrying non-duty paid tobacco.

61. And in any event, HMRC might reasonably consider that there were flaws in the appellant's story. Non-duty paid cigarettes were also discovered in a lock up garage used by the appellant at the same time and these were forfeited without challenge. The appellant also refused to name who it was who paid him to transport the goods. And Mr Graham was, on his story, caught out a second time doing the same thing, despite losing his van the first time. For these three reasons, HMRC might reasonably consider that the appellant actually had guilty knowledge and was not an innocent dupe.

62. So it seems to me very likely that, if ordered to carry out a review, HMRC would still refuse to restore DZE. And assuming HMRC refused to restore, Mr Graham's only recourse is to this Tribunal, whose only power would be to overturn such a decision if it found it to be unreasonable. And for the same reasons, I do not consider it at all likely that this Tribunal would overturn such a decision.

63. All in all, I agree with Mr Hays' assessment that Mr Graham has virtually no chance of succeeding were I to order HMRC to carry out a late review. So it would save everyone time and money if I refuse to extend what will almost inevitably be pointless proceedings.

The acquittal

64. Mr Marsh-Finch placed a lot of weight on Mr Graham's acquittal saying that HMRC would be bound to take it into account when carrying out a review and that it ought to lead HMRC to restore DZE.

65. I am unable to agree. The criminal proceedings dealt with a very different matter: they concerned whether Mr Graham fraudulently evaded excise duty. These proceedings concern whether HMRC ought *in their discretion* restore a vehicle which was rightfully forfeited. (I deal with the appellant's case that the forfeiture was unlawful below). Even if the jury was right to acquit Mr Graham, that does not mean that the vehicle ought to be restored. On the contrary, HMRC's policy on the exercise of this discretion is not to restore save in exceptional circumstances. Being *not guilty* is not exceptional: it is the normal position.

66. Moreover, HMRC do not have to accept that Mr Graham was innocent of fraud for civil purposes. The jury could not convict unless they were satisfied of guilt beyond reasonable doubt: HMRC (and this Tribunal) need only consider guilt on the balance of probability.

67. For these reasons, I consider that the acquittal would be *irrelevant* to any decision reached by HMRC on restoration of DZE. For the reasons given at §§59-60 above I consider that HMRC would be unlikely to order restoration despite the acquittal.

HMRC's behaviour/alleged unlawful forfeiture

68. There were a number of grievances that the appellant had over HMRC's behaviour.

69. *Unlawful forfeiture?* At the root of the appellant's criticisms of HMRC was the claim that the van DZE should not have been forfeited. It was accepted by all parties that the legal basis for its forfeiture was as follows.

70. S 139 Customs and Excise Management Act 1979 ("CEMA") provides that "any thing liable to forfeiture" under customs and excise legislation can be seized by HMRC; S 141 CEMA provides that where "any thing has become liable to forfeiture" then "any…vehicle…which has been used for the carriage…of the thing so liable to forfeiture" shall also be liable to forfeiture.

71. So if the tobacco was liable to forfeiture, so was the van DZE. The tobacco was considered by HMRC to be liable for forfeiture because it was not duty paid. Mr Marsh-Finch did not put a positive case that it was duty paid but said that HMRC had failed both here and in the Crown Court to prove that duty had not been paid on it.

72. S 154 CEMA provides:

> **Proof of certain other matters**
>
> (1) [not relevant]
>
> (2) Where in any proceedings relating to customs or excise any question arises as to …whether or not –
>
> (a) any duty has been paid or secured in respect of any goods; ….
>
> then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, …the burden of proof shall lie upon the other party to the proceedings.

In short, this means that this Tribunal must assume that the goods were not duty paid unless the appellant proves that they were duty paid. The appellant has not proved anything in these proceedings and so I must assume the tobacco was not duty paid.

73. Mr Marsh-Finch considered s 154 breached the European Convention on Human Rights Article 6 and the right to a fair trial. Even if he is right on this (on which I make no comment as I had no submissions), it is irrelevant. The Convention is not the law in this Country: the law, so far as the Convention is concerned, is contained in the Human Rights Act 1998. If s 154 is incompatible with the Convention, a senior court (not this Tribunal) can do no more than make a declaration of incompatibility: the enforceability of s 154 is unaffected: s3(2)(b). Secondly, Article 6 and the right to fair trial does not apply to civil tax cases. Proceedings concerning restoration are civil tax cases because they do not involve the imposition of a criminal sanction (even if the forfeiture of the car is equivalent to a criminal sanction, the proceedings concerning restoration do not involve the imposition of the penalty).

74. In conclusion, s 154 does apply in this Tribunal and I must take it that the tobacco was duty unpaid as the appellant has not proved otherwise. Indeed, what evidence there is supports that conclusion in any event, such as the circumstances of its transportation. (I note even the appellant originally accepted JGV was rightfully forfeited: see §§4-5).

75. So I must conclude that the forfeiture of DZE by HMRC was lawful. The van DZE was lawfully forfeited because the tobacco carried in it was lawfully forfeited as duty unpaid.

76. Indeed, irrespective of s 154 I must come to this conclusion. Paragraph 5 of Schedule 3 of CEMA provides that:

> If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the think in question shall be deemed to have been duty condemned as forfeit

77. No one suggested any notice of claim had been given in respect of the tobacco. It was under this paragraph to be deemed to be duty forfeited. Which means that the van was also duly forfeited. So I reject this criticism of HMRC.

78. *Failure to initiate condemnation proceedings?* Another but related ground of criticism of HMRC by the appellant was the allegation that HMRC behaved unlawfully because they failed to initiate condemnation proceedings in respect of DZE. But I have found no notice of seizure was given in time or at all (see §§29-38). The effect of paragraph 5 CEMA (above) is that therefore DZE was duly forfeited. HMRC were only bound to commence condemnation proceedings if a notice of claim was given, and it wasn't.

79. I note in passing that for the reasons given above HMRC were bound to win the condemnation proceedings had the appellant challenged the forfeiture: in any condemnation proceedings, s 154 for the first of the two reasons above would apply despite the ECHR, even though condemnation proceedings should no doubt be properly classed as criminal. The tobacco would therefore be found to have been lawfully seized and so, it would follow, the van was lawfully seized too.

80. *Sale of vans before criminal trial:* the appellant was also angry that HMRC had sold the vans before the trial and any order for their return could not be given effect to other than by payment of compensation in lieu.

81. As I have already explained, an acquittal at the criminal trial was irrelevant to the civil proceedings for restoration. A conviction could have been relevant in the sense it could be a further reason to refuse restoration. But an acquittal could not justify restoration for the reasons given at §§64-67 above.

82. It was therefore quite appropriate for HMRC to take a decision on restoration without waiting for the outcome of the criminal trial.

Appellant's expectations

83. Mr Marsh-Finch said that the appellant expected, after being acquitted and after the order of the Crown Court Judge for the return of the two cars, that he would get back the two vans or at least the monetary equivalent of their market value as at the date of seizure. Despite the absence of any direct evidence of this, I accept that this was so: certainly the tone of his solicitors' letters following the court order (§16) clearly indicates that the appellant at this time believed that he was entitled to the return of the vans.

84. I have already considered the appellant's expectations in the regard to his reasons for making a late application for a review. I have already concluded that I do not accept that the appellant had this expectation at any time during the 45 days in which he ought to have applied for a review if he wanted a review: §§52-55. The only evidence of this expectation occurs on and after 20 April 2012 which is long after the expiry of the 45 day period.

85. I have already said (§56) that I do not consider that the expectation would have been reasonably held in the period up to that date: however, I accept that, once the Crown Court judge had ordered in April 2012 the return of the two vans, then it was reasonable for the appellant to expect that they would be returned.

86. Mr Marsh-Finch also seemed to be of the opinion that, even if the judge did not have the power to make the order he made, he would have been able to make the order had it not turned out that HMRC had already sold the vehicles. This is a misunderstanding of the law by Mr Marsh-Finch. The effect of Schedule 3 of CEMA is that, because notice of Claim was not received by HMRC within 1 month of the seizure of the two vans and three loads of tobacco they were all lawfully forfeited at that time. The later sale of the vans at auction had no effect whatsoever: they had become the property of the Crown 1 month after the Notice of seizure was given in each case. This was long before the criminal case and the Crown Court judge did not have the power to reverse that position.

87. This mistaken order for return of the vans was made at Mr Finch-Marsh's request, and, it seems, with the acquiescence of counsel for the CPS. In other words, the judge made an order he had no power to make at the invitation of the appellant's counsel. That counsel for the CPS consented to this does not alter the fact that the order was initiated by Mr Finch-Marsh. So the appellant's expectations arose because his counsel asked the judge to make an order he had no power to make. He cannot rely on the CPS's acquiescence in an order his own counsel should not have asked for.

88. In other words, any expectations which arose out of the Judge's mistaken order cannot be used to justify an order in the appellant's favour as the root cause of that mistaken order was an application by the appellant's counsel which should not have been made: appellant's counsel should not have asked the judge to make an order he had no power to make.

Overall conclusion

89. I have considered all matters drawn to my attention. I am not aware of any other relevant factors. My conclusion is that while I accept that the delay since August 2014 is explicable, there is no explanation at all for the failure to ask for a review of the decision of February 2011 at the time or in the subsequent period up to at the earliest 20 April 2012. That very long delay militates against the order the appellant seeks and indeed none of the other factors drawn to my attention supports it and some positively reinforce the view the order should not be made.

90. In particular, I do not think any of the reasons given by the appellant support the order being made: the acquittal is, for the reasons I have given, irrelevant; the appellant can only blame his own legal advisers for his own disappointed expectations and I do not accept that HMRC acted unlawfully or that the various seizures were unlawful.

91. The factors which, with the very long delay, militate against the order being made are: it would defeat the purpose of having a time limit, no reason has been given for the failure to ask for a review within the allotted 45 days, and lastly but not least, I consider that making the order would only delay the almost inevitable outcome which is that the van DZE would not be restored.

92. For these reasons I refuse to make an order that HMRC carry out the review out of time. The application is dismissed.

93. 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.

Barbara Mosedale
TRIBUNAL JUDGE
RELEASE DATE: 23 November 2015