[2016] UKFTT 95 (TC)

TC 04885

Appeal number: TC/2015/03556

EXCISE – seizure of plants – failure to hold CITES import notification form – refusal to restore – was the decision taken unreasonably? – yes – was the decision disproportionate – yes – appeal allowed and directions given.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACQUES ARMAND INTERNATIONAL LTD **Appellant**

- and -

HOME OFFICE **Respondents**
DIRECTOR OF BORDER REVENUE

TRIBUNAL: JUDGE AMANDA BROWN
DAVID EARLE

Sitting in public at Fox Court, 30 Brooke Street, London, EC1N 7RS on 6 January 2016.

Jacques Armand of and for the Appellant

James Jackson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Jacques Armand International Ltd ("the Appellant") against the refusal by the Border Force ("Border Force") to restore 989 Arisaema tortuosum and 494 Arisaema nepenthoides bulbs ("the Bulbs") which had been seized on 19 January 2015 following detention at the Port of Southampton on 11 January 2015.

CITES legislation and regulation

2. International trade of certain animals and plants is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The purpose of CITES is to protect endangered species of fauna and flora through controlling the international trade in specimens of those species. CITES has three Appendices:

> (1) Appendix I – which, in essence, lists species which are either threatened with extinction or are so rare that any level of trade would threaten its survival as a species;
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> (2) Appendix II – which, in essence, lists species that are not necessarily now threatened with extinction, but which may become so threatened unless trade of such specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival
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> (3) Appendix III – which lists species that have been included at the request of one country that already regulates trade in the species and which needs the cooperation of other countries to prevent unsustainable or illegal exploitation.

3. CITES is enforced in the EU by Council Regulation EC/338/97 ("Reg 338/97") which has direct effect in the UK. Reg 338/97 has four Annexes, A – D. Annexes A – C broadly reflect Appendices I – III of CITES. Annex D lists a limited number of Appendix III species but is predominantly concerned with species that do not have a CITES equivalent but for which unmonitored trade could lead to conservation concerns. Annex D represents a monitoring system to ensure sustainable trade.

4. Article 4 Reg 338/97 provides:

> (2) The introduction into the Community of specimens of the species listed in Annex B shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination.

(4) The introduction into the Community of specimens of the species listed in Annex D shall be subject to completion of the necessary checks and the prior presentation of an import notification at the border customs office at the point of introduction.

Article 4 also provides in relation to importation of Annex B specimens that the applicant must provide "an export permit issued in accordance with the Convention by a competent authority for the country of export.

5. In essence Annex D represents only an administrative process for notification of international trade in items which are not currently at risk.

6. The classification of flora and fauna within the CITES appendices and Reg 338/97 Annexes is subject to change with species moving between the categories.

Background

7. On 11 January 2015 a shipment from India arrived at the Port of Southampton. In container CRSU5017065 were a number of plant bulbs imported by the Appellant.

8. On 19 January 2015 Border Force officers examined a shipment of plant bulbs. All the bulbs in the shipment had been entered with the same commodity code as hyacinths. However, within the shipment were four categories of orchid bulbs (including the Bulbs) which, by reference to the letter accompanying the notice of seizure dated 22 January 2015, the Officer considered were bulbs of a type which were listed in Reg 338/97 as amended by Commission Regulation 709/2010 Annex B and which required a valid export and import permit. The Officer considered that as no export or import permit accompanied the shipment vis a vis the four categories of bulb they were liable to forfeiture. On 22 January 2015 the Notice of Seizure was issued.

9. The Notice of Seizure stated on its face:

"**Section 49(1)(b) of the Customs and Excise Management Act 1979**

If you claim that the said goods are not so liable, you must within one month of the date of this Notice of Seizure give notice in writing in accordance with paragraphs 3, 4, and 5 Schedule 3 to the Customs and Excise Management Act 1979.

….

If you do not give notice of a claim within the said period of one month or, if any requirement of the above mentioned paragraph 4 is not complied with, the goods in question will be deemed to have been duly condemned as forfeited.

If you do give notice of a claim in proper form, the Commissioner will take legal proceedings for the condemnation of the goods."

10. The Appellant did not, at that time, or at any point, give notice and the goods were therefore condemned on 22 February 2015. The Tribunal understands that in the

case of goods such as the Bulbs condemnation does not result in destruction but rather they are taken by Royal Botanical Gardens at Kew.

11. By an undated letter, acknowledged by Border Force on 28 January 2015, the Appellant sought restoration of the seized goods.

12. That request was passed to and dealt with by the Border Force National Post Seizure Unit which, by letter dated 12 February 2015, requested that the Appellant provide: "A copy of a retrospective CITES Export Permit from India and a retrospective CITES UK Import permit for the goods".

13. In response to this request the Appellant wrote (again by way of an undated letter which was date stamped as received on 13 March 2015) to Border Force explaining that as regards all four species of bulb seized it was his view, which he had confirmed with Animal and Plant Health Agency Centre for International Trade, they were not CITES Annex B listed but were, in fact Annex D listed and hence did not require export or import permits though they did require a CITES D notification document. The CITES D notification was attached to the letter.

14. On 19 March 2015 there is a letter from Border Force which states that it attaches an amended seizure letter and explanation for seizure; however attached to that letter appeared to be the Notice of Seizure dated 22 January 2015 and identical in all regards to the original Notice of Seizure of that date.

15. By a letter dated 20 March 2015 the Appellant wrote to Border Force having undertaken further research and having identified that two of the types of bulb seized were not included within the then current CITES listing, a copy of Annex D was provided.

16. A formal response to the request for restoration was provided by Border Force on 23 March 2015. The response sets out:

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

The letter goes on to conclude that as regards the Bulbs there were no exceptional circumstances. However, the other two species of bulb which, by this point it had been established were not liable to any import restriction or notification requirements, would "**exceptionally**" be restored free of charge.

17. By two letters (one dated 25 March 2015 and a second which is undated but was noted as faxed to Border Force on 1 April 2015) the Appellant stated that it wished to "appeal the decision" vis a vis the Bulbs. The Appellant considered that the non restoration of the Bulbs was a draconian outcome for a minor infringement.

18. It appears from the correspondence then issued by Border Force that the second letter was considered to represent both a request for review of the decision on

restoration and as an appeal against seizure. As regards the appeal against seizure by letter dated 1 April 2015 Border Force replied:

> "For an appeal against the legality of seizure to be valid under Paragraph 6 Schedule 3 of the Customs and Excise Management Act 1979, it must be received, by Border Force in writing within one month of the seizure. I note in your particular case that the goods were seized on 19 January 2015, therefore any appeal request should have been submitted by 19 February 2015. **This time limit is dictated by statute and cannot be altered or extended**. As your request was received on 1 April 2015 it is outside this time limit, therefore I regret we are unable to accept your appeal"

19. The Appellant responded to this letter indicating that it was not his intention to appeal the legality of seizure but requesting review of the decision to refuse restoration.

20. On 13 May 2015 Border Force provided the review decision concerning the refusal to restore. The letter, much to the irritation of the Appellant, referred to the seized Bulbs incorrectly as a piano as follows:

> "In considering restoration I have looked at all of the circumstances surrounding the seizure but **I have not considered the legality of the correctness of the seizure** itself. If you are contesting the legality or correctness of the seizure – and that includes any claim that the piano was properly imported – then you should have appealed to the Magistrates' Court within one month of the date of seizure (or notice of seizure) as no one else has the jurisdiction to consider such a claim."

The letter went on:

> "I have to consider whether there are exceptional circumstances in your case for restoration. I accept in isolation, this case may have warranted a variation of the decision of non-restoration. However, records available to me show that Jacques Armand International Ltd is no stranger to HMRC/Customs/Border Force and have previous seizures recorded against the company for similar breaches in CITES regulations. With this history I would expect your company to ensure that the import regulations are adhered to the letter. This you clearly had not done.
>
> **Conclusion**
>
> Taking all the above into account, and trying to apply a sense of **proportionality** and **reasonableness** to the circumstances and seriousness of the offence: I conclude that the original decision should be upheld and the seized items will not be restored to you"

Evidence taken and facts found

21. The Tribunal heard evidence from Mr Jacques Armand of the Appellant and Mr Raymond Brenton, Higher Officer of Border Force. From the evidence the Tribunal finds the following facts.

22. The Appellant is a propagator, importer, wholesaler and retailer of flower bulbs. It is a family business. It has won awards at international prestigious flower shows including Chelsea Flower Show.

23. The Appellant imports bulbs on a regular basis. Mr Armand estimated that the Appellant imports approximately 15-20 shipments per annum which are subject to CITES restrictions. Mr Armand is aware of and entirely supportive of the rationale for and requirements of the CITES regulation. Not all of the shipments received by the Appellant will contain either Annex B or Annex D specimens, some might contain both and some one or the other. The Tribunal were not informed of any items which might have been listed in Annex C.

24. In relation to Annex B specimens the Appellant will place an order with its growers or suppliers. It then submits the necessary application for an import permit. When the permit is granted it confirms the order but if the permit is not granted it simply cancels the order. All the import documentation will be provided by the Appellant to its agent (Trans Global) for entry of the specimens when they arrive.

25. In relation to Annex D specimens before arrival the Appellant will provide Trans Global with the entry documentation and a completed import notification document.

26. The Tribunal understands that Trans Global will not necessarily identify if the required CITES information is provided because it will not verify each shipment against the CITES listings. The absence of, for instance, an Import Notification document would not necessarily be obvious to Trans Global.

27. In 2012 the Appellant placed an order for 550 orchids of a particular species which required an Annex B import permit. When the application for the permit was completed however a transposition error was made with the consequence that the permit was requested for 500 rather than 550 plants. After the import permit had been granted it was identified by the Appellant that the order and invoice were for 550 plants. The order had been dispatched with the correct export permit and it was considered too late to seek to amend the import permit. Mr Armand notified the relevant authorities and requested that the excess 50 plants be subject to forfeiture.

28. On another occasion in 2013 goods arrived apparently in the Appellant's name. The Appellant had followed its usual procedures for placing an order and then submitting the application for an import permit. Without the order having been confirmed it was shipped and arrived with no import or export permit. As soon as the

Appellant became aware that the plants had been shipped by the supplier in error Mr Armand invited the authorities to seize the plants.

29. Mr Armand's experience of dealing with Border Force is generally that where documents are missing at the time of import the Border Force officers contact Trans Global which then contacts Mr Armand and the position is remedied by the relevant documents being immediately faxed over. Anomalies and discrepancies are, where possible, resolved quickly and without seizure.

30. In December 2014 Mr Armand placed an order to be shipped from India. This was the shipment that arrived in Southampton on 11 January 2015. Included within the shipment were four species that Mr Armand believed were listed on Annex D and for which an Import Notification was prepared. As a hard copy of the document is required Mr Armand completed it and sent it to Trans Global. His evidence, which the Tribunal accepts, is that the notification did not arrive. Trans Global did not realise it was necessary and so did not contact Mr Armand prior to the shipment arriving in Southampton.

31. On 19 January 2015 when the shipment was inspected Mr Armand received a call from Trans Global regarding the missing Import Notification. Mr Armand immediately faxed a duplicate notification to Border Force. It listed all four species that he believed required to be notified.

32. There is nothing in the papers that were provided by Border Force that indicates what was done with this faxed copy of the Import Notification. It was not itself included within the papers provided. However, Mr Armand, in correspondence referred to it on several occasions and on no occasion did Border Force deny or challenge that the document had been so provided. The Tribunal finds that on 19 January 2015 when the absence of the Import Notification was first identified Border Force were provided with the necessary documentation.

33. Despite the document having been provided on 19 January, the specimens were seized as liable to forfeiture. The reason for seizure was stated to be because "The importation of Orchid Bulbs listed in Commission regulation (EC) 709/2010 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein – Annex B, must be covered by a valid CITES export permit issued by the CITES Management Authority of the government of India and a valid UK CITES import permit issued by (Animal Health) DEFRA."

34. The Tribunal examined copies of the note books and documentation associated with the seizure. In the bundle there is a copy of the C88 customs clearance document dated 8 January 2015 but bearing a fax transmission record of 15 January 2015 which has a handwritten note "no notification at time of entry" on it. That document of course predates the inspection of the shipment which led to the seizure. Apart from this wording, there is nothing in the documentation which indicates whether the officers concerned actively considered whether the species seized were Annex B or Annex D listed.

35. Mr Brenton was questioned by the Tribunal as to the procedures that would have been followed by the officers at the point of entry. In particular what communication there would normally have been with the importer and the agent in a circumstance such as that under consideration by the Tribunal? Unfortunately, Mr Brenton did not seem to have any detailed knowledge of the administrative procedures in place for the receipt and processing of CITES paperwork. He did not seem to even know that CITES paperwork must be provided in hard copy form nor how such paperwork was received or processed and thereby attributed to any particular import. In answer to a question put by the Tribunal Mr Brenton stated that where the necessary paperwork was absent the goods would be liable to forfeiture but he was unaware whether, in the apparent absence of the necessary documentation, there was communication between the Border Force officers and either the agent or the importer.

36. As subsequently became apparent the four seized species were in fact not Annex B listed. Two species were not listed in any of the Annexes (having been removed from Annex D at some point prior to January 2015) and the Bulbs were Annex D listed.

37. Mr Brenton was unable to provide any explanation for what appeared to be a pretty fundamental mistake on the face of the Notice of Seizure which made reference to an incorrect justification for the seizure. Mr Brenton appeared to accept that the legality of the Notice of Seizure could have been challenged by the Appellant on the grounds that it had proceeded on the potential misapprehension that all four types of blubs were listed in Annex B but that as the Appellant had not so challenged the potential illegality of seizure it was not a factor that was relevant to his decision to restore. He was also clear that whilst the Notice many have been defective there was a clear statutory basis justifying seizure for all four specimens. This the tribunal accepts.

38. From Mr Brenton's evidence the Tribunal determines that Border Force accept that there was no intention by the Appellant to mis-declare or misrepresent the importation. However, having established that there were two previous incidents in which the Appellant had contravened the CITES importation requirements he would have expected a higher level of vigilance to compliance and as such there were no exceptional circumstances. Mr Brenton acknowledged the error in the review letter and the reference to a piano stating that it was an oversight which had arisen as a consequence of using a corrupted template.

39. Mr Brenton could offer the Tribunal no explanation concerning the document which purported to be an amendment to the notice of seizure. It was issued at a point in the chronology after which Mr Armand had identified that the species in question were not Annex B listed; however, as noted above it is apparently the identical document to that issued on 22 January 2015. Mr Brenton did not know why it was in the form it was or indeed what had been purportedly amended. However, he did assert that the amended Notice of Seizure did not have the effect that the appropriate time limits for challenge to legality recommenced. No basis was given for this assertion.

40. The Tribunal pressed Mr Brenton as to what had and had not been considered by him when undertaking the review of the decision to refuse restoration of the Bulbs. His starting position was the general policy that seized goods are not restored save in exceptional circumstances. He did consider the two previous noted occasions of seizure but he had not reviewed the circumstances of those seizures. He stated that had this been a first offence he would have restored the Bulbs.

Tribunal's jurisdiction

41. The Customs and Excise Management Act 1979 ("CEMA") lays down the provisions for forfeiture in connection with importation. Under s49(1) CEMA where any goods are imported contrary to any prohibition or restriction the goods will be liable to forfeiture.

42. CEMA s152 allows for the restoration of goods which have been forfeit at the discretion of Border Force and subject to such conditions as they consider appropriate.

43. Section 14(1)(a) Finance Act 1994 ("Finance Act 94") provides for a right to require a review of a restoration decision.

44. A review carried out in accordance with section 14(1)(a) and confirmed under section 15(1) Finance Act 94 is appealable under section 16. The appeal in relation to a refusal to restore is classified as an appeal in relation to an "ancillary matter" with the consequence that the jurisdiction of the tribunal is limited. Section 16(4) provides:

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say:
>
> > (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
> >
> > (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
> >
> > ….

45. For the purposes of the present appeal the above provisions apply to the decision of Border Force.

Submissions of the parties

46. On behalf of the Appellant Mr Armand submitted that the refusal to restore was "completely unreasonable" with regard to what was a failure to notify that had been rectified as soon as the failure had been identified. There was no loss of tax. Further

Border Force too had been 'guilty' of a series of administrative and procedural errors which should set the Appellant's error in context. He accepted that he had made an error but that a refusal to restore was, in all the circumstances, disproportionate.

47. On behalf of Border Force Mr James submitted that Border Force policy had been applied fairly. Mr Brenton had properly considered the fact that there had been two previous occasions on which the Appellant had been subject to a seizure. That the decision was entirely reasonable.

48. Mr James reminded the Tribunal that following the judgment of the Court of Appeal in *HM Revenue and Customs v Lawrence and Joan Jones [2011] EWCA Civ 824* the Tribunal had no jurisdiction to consider the legality of seizure.

Decision

49. The Tribunal were not referred to any case law concerning the application of the CITES provisions. The Tribunal was, however, aware of the recent decision of Judge Anne Redston in the matter of *Sabine Smouha v The Director of Border Revenue [2015] UKFTT 0147* concerning the refusal to restore a crocodile skin handbag a product requiring an export and import permit by virtue of Council Reg 338/97 Annex B.

50. Judge Redston undertakes at paragraphs 90 – 135 a detailed analysis of the approach to be taken by the Tribunal in appeals of this type. At paragraphs 136 – 158 she considers the application of the principle of proportionality.

51. Consistent with the approach taken by Judge Redston it is this Tribunal's role to consider the reasonableness of the decision refusing to restore and the proportionality of the outcome.

52. The approach to considering the reasonableness of the decision is commonly referred to as *Wednesbury* reasonableness stemming from a 1948 judgment of the High Court in *Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223*. A decision is considered to be unreasonable where the decision maker has:

> "taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take account of matters which they ought to take into account"

53. At paragraphs 100 – 102 of *Sabine Smouha* the application of these principles to Border Force decisions on restoration are considered:

> "100 The discretion of the Border Force in relation to restoration decisions is given by CEMA s152(b), which provides that Border Force can "restore, subject to such conditions (if any) as they think proper, anything forfeited or ceased under these Acts". That is a very broad discretion.
>
> 101 The Border Force are also the body charged with levying sanctions on those who do not comply with Reg 338/97. Article 16(1) of that Regulations

provides that there must be "appropriate measures to ensure the imposition of sanctions" on those who, *inter alia*, introduce specimens without the necessary documents. Article 16(2) states that the sanctions must be "appropriate to the nature and gravity of the infringement and shall include provisions relating to seizure and, where appropriate, confiscation of specimens".

102 The broad discretion in CEMA s152(b) is therefore narrowed in the context of CITES importations by the requirements that (a) a sanction be levied for non-compliance and (b) that the sanction complies with Article 16(2)…."

54. The provisions of Article 16(1)(e) Council Reg 338/97 essentially confirm that the above analysis applies in the context of a failure to produce an import notification under Annex D.

55. The stated policy of Border Force is only to restore goods where the circumstances are "exceptional".

56. Mr Brenton in his review decision set out the general policy but acknowledged that he would consider the individual merits in each case. In the present case he stated that he had expressly considered the fact that the Appellant had been subject to two prior seizures.

57. Mr Brenton did not, by his own evidence, consider the circumstances of those seizures. He did not consider the error of Notification of Seizure or the chronology of events as he considered these to be matters associated with the legality of seizure.

58. In addition, on the face of the correspondence it is not apparent that he considered the purpose and role of Annex D listing.

59. Applying the Wednesbury test for reasonableness:

(1) Mr Brenton took account of the fact of two previous seizures but not the circumstances of those seizures. Investigation into the circumstances in which those seizures arose would have revealed that in both instances Mr Armand had effectively invited the seizure and had notified Border Force in advance of entry that an error had arisen. In the Tribunal's view, in neither previous case, was there a failure to comply in a strict sense with the CITES obligations as at the point of entry the position had been managed. Absent those previous seizures Mr Brenton accepted that he would not have refused restoration.

(2) In addition, in relation to the present matter whilst it is clear that at the point of entry the relevant CITES Import Notification was not in Border Force's possession it was supplied immediately the Appellant became aware that the notification that had been prepared and sent had not arrived.

60. The Tribunal has concluded that the decision has been taken unreasonably having failed to take account of relevant factors and having taken into account irrelevant factors.

61. Turning to the question of proportionality

62. Again by reference to the judgment in *Sabine Smouha* it is clear:

"136 The Preamble to Reg 338/97 says that its purpose is "to ensure the broadest possible protection for species covered by this Regulation". This is our starting point. The Border Force has the important responsibility of policing compliance with Reg 338/97.

137 However, the Preamble also says at [17] that (emphasis added):

> "in order to guarantee compliance with this Regulation, it is important that member states impose sanctions for infringement in a manner which is *both sufficient and appropriate to the nature and gravity of the infringement.*"

138 Article 16 of Reg 338/97 deals with sanctions. It opens by saying that "Member States shall take appropriate measures to ensure the imposition of sanctions" and paragraph 2 provides that the sanctions:

> "shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens."

139 These are explicit requirements that penalties for non-compliance with Reg 338/97 be proportionate as well as effective. Proportionality is also one of the general principles of EU law, see for example *R v Minister for Agriculture, Fisheries and Food Ex p Fedesa (C-331/88)* at [13].

….. [a careful analysis of the case law on proportionality in the context of seizure which, by its very nature is to deprive the right of possession under the Convention on Human Rights]

145 Drawing this together, the Border Force must exercise their discretion proportionately as that term is understood both under EU law and under the Convention, and that failure to so will make the decision unreasonable. In considering our jurisdiction under FA94 s16(4) we are therefore required to consider not only the traditional *Wednesbury* test but whether Mr Brenton exercised the discretion given to the Border Force in a proportionate manner.

146 We respectfully agree with the summary given by Sir Stephen Oliver QC in *Yuan Shui v C&E Commrs [2004] C00187* where he said at [35] that:

> "The power to restore in section 152(b) of the Customs and Excise Management Act 1979 is of an essentially discretionary nature. As such, the power must be exercised reasonably and in the *Corbitt* sense and, following *Lindsay*, in a manner that produces a proportionate result. A decision satisfying those conditions will meet the requirements in Regulation 338/97 for an enforcement regime in the domestic laws of the

member state that operates in a manner that is sufficient and appropriate to the nature and gravity of the infringement. Moreover, if a way can be found of dealing with the request for restoration that is less invasive than a complete denial of the appellant's property rights, that should be adopted"."

63. The facts in *Smouha* were that Mrs Smouha had ordered a crocodile skin handbag from Japan. She believed that the CITES requirements would all be complied with by the supplier. However, at the time of import neither the supplier nor Mrs Smouha had applied for or obtained an import permit. Annex B applied. The tribunal in that case found that Mrs Smouha had not ignored CITES but understood that the requirements had been complied with. Whilst Annex B applied the crocodile skin from which the handbag was made was farmed and all export licences had been obtained vis a vis the trade in the skin and then in the handbag. Had she applied for the licence she would have been granted it, even though a retrospective licence was denied. Mrs Smouha was not in business, this was a birthday present, she acted honestly and in good faith and did everything she could to rectify the position. The Tribunal found that the officer of Border Force in that case had failed to give adequate consideration to the factors identified. The decision to refuse restoration had been taken on the basis that a retrospective import permit had been refused.

64. Applying a similar rationale to that applied by Judge Redston the Appellant in this case was honest and acted in good faith, Mr Armand believed that the necessary paperwork was available at entry because he was unaware that the import notification had not been received by Trans Global. As soon as he became aware of the position he did everything in his power to rectify the position.

65. There are however, two differences of significance, firstly the Appellant is in business and is fully aware of its CITES obligations. Secondly, this is an Annex D contravention rather than an Annex B contravention. As indicated above Annex D does not arise from any obligation under CITES. It represents a monitoring requirement. It is an important requirement of the EC regulation but, in the Tribunal's view, is nevertheless a breach of a monitoring obligation which should carry a less significant consequence than the breach of a prohibition.

66. As indicated in paragraph 59 above the Tribunal is of the view that Mr Brenton did not take into account the circumstances of the two previous seizures though he expressly relied on their existence to determine that restoration would be refused. He also did not consider the fact that Mr Armand did, on the date on inspection, submit the Import Notification to replace the one sent to Trans Global in advance of importation.

67. Similarly to *Smouha* the present case is not a situation in which destruction of the goods is required (as is the case with seized tobacco or alcohol). Indeed the goods have not been destroyed, they are, as the Tribunal understands it, still at Kew Gardens. There is no risk to the UK flora population. It is a matter of noncompliance with a documentary process and one which is aimed at monitoring. In the

circumstances the Tribunal finds that a refusal to restore is, in all the circumstances disproportionate.

Decision and directions

68. The Tribunal has determined that the decision taken by Mr Brenton not to restore the Bulbs was unreasonable because: (a) it was reached on the basis of the general policy not to restore and the existence of two previous seizures, (b) it failed to take account of the circumstances of those seizures which were in fact invited by the Appellant prior to entry and upon identification what would become a breach of the CITES and Reg 338/97 requirements, (c) it failed to take account of the fact that Mr Armand had supplied the import notification as soon as he was made aware that the original had been lost in the post; (d) the failure to produce an import notification is a breach of a monitoring obligation only; and (e) the decision gave rise to a disproportionate outcome.

69. Border Force must therefore carry out, within 45 days of the release of this decision, a further review of the original decision in accordance with the following directions.

70. Border Force is directed:

(1) To the extent that it wishes to consider the previous seizures it should consider the circumstances in which they arose

(2) Have appropriate regard to the fact that the Appellant acted in good faith and sought to remedy what appears on the evidence accepted by the Tribunal to have been a failure in the postal system

(3) Have regard to the fact that this is an Annex D import notification failure rather than an import or export permit failure

(4) To act proportionately and in accordance with the requirements of Article 16(4) Reg 338/97

71. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 11 FEBRUARY 2016