[2021] UKFTT 0078 (TC)

TC08063

EXCISE – seizure of vehicle – adapted for the purposes of smuggling – refusal to restore – application of policy on exceptional circumstances – factors considered – appeal refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00236

BETWEEN

KAT-TWELVE SPÓLKA z o.o **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 15 March 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Both parties consented to the appeal being determined in this way and the Tribunal considered that it was in the interests of justice to do so.

The Tribunal decided the appeal having first read the Notice of Appeal dated 8 January 2020 (with enclosures), HMRC's Statement of Case dated 13 March 2020, and the submissions on behalf of the Appellant made by Czupajło & Ciskowski Kancelaria Adwocka Sp p. dated 20 July 2020 (with enclosures), together with the other documents referred to in the main body of this Decision.

DECISION

Introduction

1. On 2 July 2019, a Volkswagen Crafter van ("the Vehicle") arrived at Dover. It was leased to the Appellant and driven by Maciej Palka. The Vehicle was seized by the Border Force because it had been adapted for the purposes of smuggling. The Border Force refused to restore the Vehicle to the Appellant and the Appellant appealed to the Tribunal.

2. In restoration appeals such as this, the Tribunal's jurisdiction is limited. It cannot order restoration, but if it decides that the Border Force's decision not to restore was unreasonable, it can direct that the Border Force make a new decision taking into account specific findings of fact. Even if the review decision was unreasonable, for instance because the Border Force did not consider all relevant factors, the Tribunal will not order a further review if the conclusion would inevitably have been the same had those further factors been considered, see *John Dee Ltd v C&E Comrs* [1995] STC 941 ("*John Dee*").

3. The review decision in this case was made by Officer Zoe Boote. Although there were further relevant factors in addition to those she considered, for the reasons set out later in this Decision the outcome would inevitably have been the same. I therefore refuse the Appellant's appeal.

The evidence

4. The Tribunal was provided with the following evidence:

(1) various documents relating to the lease of the Vehicle, including invoices;

(2) an agreement between the Appellant and a company owned by Mr Palka;

(3) a "Nuctech container inspection system image" of the concealment;

(4) Officer's Notebooks from the three Border Force Officers who were involved in the seizures;

(5) the Seizure Information Notice and Warning Letter issued to Mr Palka;

(6) Officer Boote's witness statement, by which she confirmed her review decision and exhibited the documents she had considered; and

(7) evidence contained in correspondence between the Border Force and Czupajło & Kieslowski Kancelaria Adwocka Sp p., the Appellant's representative ("the Representative").

The facts

5. On the basis of the evidence summarised above, I make the following findings of fact. I make further findings of fact later in this Decision.

The Appellant's business and the acquisition of the Vehicle

6. The Appellant is a small family company based in Katowice, Poland. It was first registered in 2016 and its shareholders are Mr and Mrs Woźniak. Until shortly before the events with which this Decision is concerned, its main business was the sale of rock salt and calcium chloride used for de-icing roads in winter. In an effort to expand into a less seasonal business, in January 2018 the Appellant contracted to buy the Vehicle, which it planned to use to transport a variety of goods all year round. The Appellant's expectation was that it would make a profit of around PLN 5,000 per month (around £1,000) on those loads.

7. The Vehicle cost a total of PLN 123,760.16, roughly £25,000. It was acquired under a lease agreement with a commercial leasing company, mLeasing LLP. Under that contract the Appellant agreed to pay a 10% deposit followed by monthly payments of PLN 2590.41 for 47 months.

8. The Vehicle was collected from the showroom by Mr Woźniak on 10 October 2018 along with two sets of keys. In submissions for this hearing, the Representative said that neither Mr Woźniak nor Mr Palka were aware of the concealment, and that as a result it was only possible to "presume that the modifications were made even before the Vehicle was picked up".

9. However, there was no support in the evidence for that presumption. The lease agreement with mLeasing stated that the Vehicle was provided to the Appellant with "standard equipment as per specification, additional equipment as per specification". The attached Protocol document, signed on the same date by Mr Woźniak on behalf of the Appellant, included a space in which additional equipment could be listed, but that space was blank. In other words, the independent third party evidence clearly shows that a new unmodified Volkswagen Crafter van was handed over to the Appellant on 10 October 2018, and that nothing additional had been added by the manufacturer before that handover.

10. I therefore find as facts that the Vehicle had no bespoke adaptations when it was acquired new from the showroom by the Appellant, and that the concealment was not present in the Vehicle at that time. Instead, it was incorporated in the Vehicle after it had been taken from the showroom by Mr Woźniak. I consider later in this Decision who made the adaptation, see §53ff.

Mr Palka

11. Mr Palka owns a small company called Maciej Palka Gosciniec Pomorski ("MPGP"). Like the Appellant, MPGP is based in Katowice. Mr Palka and Mr Woźniak were acquainted with each other before October 2018, and both live in or near Katowice.

12. Mr Palka was a driver. He told Mr Woźniak that:

(1) he had driven more than 300,000 miles in the four years before 2018, including entering the UK around 55 times; and

(2) during that time the vehicles he was driving were on occasion stopped by the Border Force and scanned, but no problems were detected.

13. That evidence was not challenged by the Border Force and I accept it. The Appellant also provided a certificate showing that Mr Palka did not have a criminal record in Poland, and that too was unchallenged. It was common ground that Mr Palka did not provide the Appellant with formal references in relation to his previous experience or any other matter.

14. On 11 October 2018, the day after the Vehicle was collected from the showroom, the Appellant signed an agreement with MPGP. It included the following:

(1) MPGP agreed to rent the Vehicle from the Appellant, but no rent was specified.

(2) There was no termination date, although the agreement could be brought to an end on the giving of 12 months notice.

(3) The Vehicle was to be used by MGPG for "transportation services" which were to be placed by telephone either by the Appellant or by "third parties that have been included in a particular order";

(4) MPGP was authorised to "deliver invoices…without the need for the [Appellant's] signature".

(5) MPGP was responsible for insuring the vehicle and for the Vehicle's "technical state based on normal wear and tear".

(6) The Appellant was responsible for "all running costs as well as MoT costs".

(7) The Appellant agreed to pay MPGP PLN 3,500 for driving services.

15. Thus, although described as a rental agreement under which MPGP agreed to rent the Vehicle from the Appellant, no money was payable by MPGP to the Appellant. Instead, the only payment between the parties was made *from* the Appellant *to* MPGP for the provision of Mr Palka's driving services..

16. A "Vehicle Acceptance Protocol" between the same two parties states that the Vehicle was supplied with only the following "additional equipment": a set of documents, the manual for the Vehicle; a tarpaulin and one set of keys. I infer and find as a fact that Mr Wożniak retained the other set of keys.

17. In subsequent correspondence, Mr Wożniak described Mr Palka as "our driver" and stated that transport orders were sent to the Appellant by the customers, and that the Appellant then forwarded the relevant details to Mr Palka by text. In addition, as noted above, the legal agreement allowed "third parties that have been included in a particular order" to communicate directly with MPGP, and that firm could also issue invoices to customers "without the need for the [Appellant's] signature".

18. Taking into account all the evidence, I therefore find that:

(1) orders from customers for the transportation of goods came into the Appellant and/or MPGP;

(2) Mr Palka drove the Vehicle to carry out the related deliveries;

(3) responsibility for the Vehicle was shared between both companies; and

(4) the Appellant paid MPGP a fixed monthly fee for Mr Palka's driving services.

19. The Appellant and MPGP therefore worked closely together in operating and running the transportation business which was carried out with the Vehicle. Although Mrs Wożniak was a shareholder in the Appellant, there is no evidence that she was actively involved in this transportation business, and I find that it was conducted by Mr Wożniak and Mr Palka, and that each had a set of keys for the Vehicle.

The seizure

20. On 2 July 2019, the Vehicle entered Dover. It was driven by Mr Palka and was stopped by Officers Renwick and Blanchand. Mr Palka told them he was carrying no cigarettes, alcohol or illegal goods. He was escorted to a waiting area and the Vehicle was scanned.

21. The scan identified "an area requiring further examination", and Officer Chantler entered the cab of the vehicle and removed a panel which had been screwed into the bulkhead of the cab unit. This disclosed a space of some 4.5in wide which extended for the width of

the cab. Inside the space was a wooden frame to which vertical elastic fabric bands were attached. No other items were inside the space – in other words, there were no dutiable goods or illegal imports within the concealment.

22. The Vehicle was seized by the Border Force on the basis that it had been adapted for the purposes of smuggling. Officer Renwick issued Mr Palka with a Seizure Information Notice and Notice 12A; these were translated into Polish using a mobile phone.

23. On the basis of invoices from mLeasing relating to the Vehicle for the period after the seizure, and banking information, I accept that the Appellant continued to make payments for the Vehicle after it was seized.

The restoration request and review

24. The Appellant did not challenge the seizure in the Magistrate's Court. On 3 July 2019, the Appellant made contact with the Border Force. On 12 September 2019, Mr Woźniak provided further information. On 2 October 2019, the Border Force refused to restore the Vehicle. On 15 November 2019, the Representative asked for a review of that decision.

25. On 12 December 2019, Officer Boote confirmed that the Vehicle would not be restored. She said that the Border Force's policy was that "a vehicle adapted for the purposes of concealing goods will not normally be restored, but in exceptional circumstances the vehicle may be restored for a fee to include the cost of removing the adaptation". She considered whether there were any such exceptional circumstances, and said:

(1) the concealment was contained in a "crude adaptation";

(2) although the Vehicle did not contain illicit goods, the presence of the concealment would have allowed such goods to be carried in the future, had it not been seized;

(3) the Appellant had not provided any information about any "reasonable checks" carried out on the loads or on the Vehicle;

(4) the Appellant had not sought references for Mr Palka before using him as a driver; and

(5) the Appellant had not attempted to explain "how the adaptation materialised, where clarification would have been expected".

26. Officer Boote also considered whether the Appellant had suffered hardship. She said that "hardship is a natural consequence of having a vehicle seized" and that restoration would only be considered if there was "exceptional hardship", and that was not the position here.

The appeal to the Tribunal

27. The Appellant made an in-time appeal to the Tribunal against the review decision. The listing of the appeal was delayed by the pandemic. On 14 October 2020, the Appellant consented to the appeal being decided on the papers, and the Border Force also agreed.

The law

28. The Customs & Excise Management Act 1979 ("CEMA") sets out the powers of the Border Force in relation to seizure and forfeiture. In that Act, and in other related statutes, the Border Force are called "the Commissioners".

29. CEMA s 88 provides that a vehicle is liable to forfeiture if it has been "constructed, adapted, altered or fitted in any manner for the purpose of concealing goods".

30. CEMA s 139(1) provides that "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard". The Vehicle at issue in this case was seized in reliance on this provision.

31. That seizure can be challenged by making a claim in the Magistrate's Court within one month of the date of the seizure, see CEMA s 139(5) and (6), together with Sch 3 para 3. If there is no challenge, "the thing in question shall be deemed to have been duly condemned as forfeited", see CEMA Sch 3, para 5. As noted above, the Appellant did not challenge the seizure of the Vehicle in the Magistrate's Court.

32. CEMA s 152 is headed "Power of Commissioners to mitigate penalties, etc". It reads:

> "The Commissioners may, as they see fit–
>
> (a) compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts."

33. If the Border Force refuse to restore a vehicle, the owner has been deprived of his possession, and Article 1 to the First Protocol of the European Convention on Human Rights ("A1P1") is therefore engaged. In *Lindsay v C&E Commrs* [2002] EWCA Civ 267 ("*Lindsay*"), the Master of the Rolls, giving the leading judgment with which Judge LJ and Carnwarth J (as he then was) both agreed, said at [55]:

> "Broadly speaking, the aim of the commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under art 1 of the First Protocol to the convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim."

34. He continued at [64]:

> "I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture."

35. If the Border Force refuse to restore a vehicle, Finance Act 1994, s 14 allows a person to request a review of that decision. If he is dissatisfied with the outcome of that review, he can appeal to the Tribunal under FA 1994, s 16.

36. Decisions, such as this one, which are made under CEMA s 152, are decisions about an "ancillary matter", see FA 1994, s 16(8), read with Sch 5. The Tribunal's powers on ancillary matters are set out in FA 1994, s 16(4):

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that

> the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision that has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

37. The meaning and effect of that section was summarised by the Master of the Rolls in *Lindsay* at [68], when he said that if the Tribunal finds that the restoration decision to have been unreasonable, the Tribunal has:

> "the power to direct that the decision appealed against ceased to have effect and to require the [Border Force] to conduct a further review of the original decision in accordance with the directions of the tribunal."

38. In C*&E Commrs v Corbitt* [1980] 2 WLR 753 ("*Corbitt*"), Lord Lane said that a decision would not be "reasonable":

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

39. In *John Dee* at [952(f)-(h)], the Court of Appeal outlined the principles in a similar fashion to *Corbitt*, but went on to acknowledge at [953]:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal…I cannot equate a finding 'that it is most likely' with a finding of inevitability."

40. In *Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide the facts and then go on to decide whether, in the light of those findings, the restoration decision made by the Officer was reasonable.

The submissions

41. On behalf of the Appellant, the Representative submitted as follows:

(1) Neither Mr Woźniak and Mr Palka were aware of the concealment, and the Appellant "can therefore only presume that the modifications were made even before the Vehicle was picked up" and the Appellant was "not able to detect" the concealment "despite its efforts".

(2) The Review Officer "completely ignored the fact that the disclosed space may be a normal equipment of this type of cars, installed by the manufacturer".

(3) No illegal goods were contained in the Vehicle at the time of the inspection, and there is no evidence that the Vehicle was ever used for smuggling.

(4) It was reasonable of Mr Woźniak, and therefore of the Appellant, to consider that Mr Palka was "a trustworthy person", and it was unreasonable of Officer Boote to decide that the Appellant "had not taken any steps to prevent the use of the car for smuggling".

(5) Officer Boote should have taken into account the fact that Mr Palka had an unblemished record.

(6) The position was similar to that of the appellant in *Szabala v the Director of Border Revenue* [2019] UKFTT 654, where the Tribunal (Judge Bedenham and Mrs Cheesman) had allowed the appeal, and this Tribunal should take the same approach.

(7) The Appellant had suffered the hardship of having to pay the monthly amount for the Vehicle, but had been unable to use the Vehicle to cover those costs, or to make a profit.

(8) The review decision breached the presumption of innocence and the right to a fair trial in Article 6 of the European Convention on Human Rights ("the ECHR").

(9) The refusal to restore breached the Appellant's right to peaceful enjoyment of possessions contained in A1P1.

(10) Officer Boote's decision was insufficiently reasoned, so that the Appellant "does not know why [she] assessed the evidence in such a way and made the decision so unfavourable and unjust".

42. The Border Force submitted that Officer Boote's decision should be upheld for the reasons she gave. In relation to A1P1, the Border Force said that the Vehicle had not been restored in line with the UK's policy of preventing the evasion of excise duty; that this was a legitimate aim, and thus there was no breach of A1P1.

Discussion and Decision

The Border Force policy

43. The starting point is the Border Force's policy. This is that where a vehicle has been "adapted for the purposes of concealing goods" it will not normally be restored, although in exceptional circumstances it may be restored for a fee.

44. This is an entirely reasonable policy, and the Representative did not seek to argue otherwise. Such adaptations are made deliberately, for the purposes of carrying illicit goods, and forfeiture ensures that the vehicle cannot be so used in the future. The policy also rightly recognises that there will be exceptions.

The adaptations

45. At the time of the review decision, the Appellant had not attempted to explain "how the adaptation materialised", and Officer Boote said that "clarification would have been expected". In the grounds of appeal to the Tribunal, and in subsequent submissions, the Representative said that:

(1) the Tribunal should accept that "the modifications were made even before the Vehicle was picked up"; and

(2) Officer Boote had "completely ignored the fact that the disclosed space may be a normal equipment of this type of cars, installed by the manufacturer".

46. These submissions are inconsistent. By the first, the Representative accepts that the Vehicle had been modified; by the second, the Representative is asking the Tribunal to find that there was no modification, but that the "disclosed space" was instead part of the Vehicle's "normal equipment".

47. I reject both submissions. In relation to the first, I have already found as a fact that no adaptations or modifications were made to the Vehicle by the manufacturer. In relation to the second, there was no supporting evidence, such as information from the manufacturer about the equipment installed in all Volkswagen Crafter vans. It would also be very surprising if these vans were designed so as to include inside the walls of the bulkhead a wooden frame with vertical elastic fabric bands attached, with the space being accessible only by removing a wooden panel which had been screwed into place. In short, the submission is both unsubstantiated and not credible. I find as a fact that the concealment was not part of the normal equipment installed a Volkswagen Crafter van.

The absence of any smuggled goods

48. The Representative emphasised that the concealment was empty, with the result that the Vehicle was not carrying illegal goods when it was stopped. This factor was considered by Officer Boote: she decided that although the Vehicle did not contain illicit goods, the presence of the concealment would have allowed such goods to be carried in the future, had it not been seized. This is clearly a reasonable conclusion.

The roles of Mr Wożniak and Mr Palka

49. Officer Boote placed weight on the Appellant's lack of references for Mr Palka. However, more evidence has been provided since the review decision, and on the basis of that evidence, I found as a fact that the Appellant and MPGP worked closely together in using the Vehicle to carry out a transportation business.

50. The Representative submitted that it was reasonable of Mr Wożniak to decide Mr Palka was "a trustworthy person", and unreasonable of Officer Boote not to take that belief into account, along with Mr Palka's "unblemished record".

51. I have already found as facts that:

(1) the Vehicle was adapted after purchase;

(2) Mr Palka was the only driver;

(3) the transportation business was conducted by Mr Wożniak and Mr Palka; and

(4) they each had one of the two sets of keys.

52. There is no evidence that any third party had access to the Vehicle after it had been acquired by the Appellant. I therefore find as a further fact that only Mr Palka and Mr Wożniak had access to the Vehicle, and that one or both of them knew about the concealment.

53. There are the following possibilities:

(1) *Mr Wożniak installed the adaptation without Mr Palka's knowledge*. This option is inherently unlikely, because Mr Palka was the only driver. He would have seen the "crude" adaptation in his cab, and he was the only person who could have used the concealment to move goods across frontiers.

(2) *Mr Palka installed the adaptation without Mr Wożniak's knowledge*: If this was the case, it is surprising that Mr Wożniak did not blame Mr Palka once he had been made aware of the concealment and the seizure.

(3) *They both knew about the adaptation*: Given that Mr Wożniak and Mr Palka were working closely together, using the Van for a single transportation business, this is the most likely option; it would also explain why Mr Wożniak did not blame Mr Palka once the concealment was discovered by the Border Force.

54. It follows from the above that Mr Palka knew about the concealment, and I so find. That fact more than outweighs what the Representative has called Mr Palka's "clean record", namely, that he has no criminal record and has not been previously identified by the Border Force as having smuggled goods into the UK.

55. In relation to the Appellant, it is true that the second option may be correct, so that Mr Wożniak did not know about the adaptation made by Mr Palka. However, that does not assist unless Mr Wożniak's ignorance was reasonable. In other words, the Appellant would have to show that Mr Wożniak had carried out reasonable checks to ensure that the Vehicle was not being used for smuggling. Although the Representative submitted that the Appellant was "not able to detect" the concealment "despite its efforts", neither Officer Boote nor the Tribunal was provided with any evidence that checks of any sort had been made by Mr Wożniak on behalf of the Appellant. Instead, Mr Wożniak merely said he trusted Mr Palka. I find as a fact that no such checks were made.

56. Moreover, it would not have been difficult for Mr Wożniak to do carry out checks: he had retained a set of keys, and he lived in the same areas as Mr Palka. I therefore agree with Officer Boote that it was not sufficient for Mr Wożniak simply to trust Mr Palka, and to make no checks on the Vehicle.

57. I find that it was more likely than not that the Appellant was aware (through Mr Wożniak) of the adaptation, but even if that was not the case, so that the concealment had been included in the Vehicle without Mr Wożniak's knowledge, that does not assist the Appellant, because it was responsible for making reasonable checks on the Vehicle, and no such checks were made.

Szabala

58. The Representative asked the Tribunal to follow *Szabala.* However, in restoration cases the Tribunal has to consider and balance a range of factors which are specific to that particular appeal. Comparing one Tribunal decision with another is rarely a useful exercise.

59. In any event, I note that *Szabala* included the following factors:

(1) the seized vehicle was to be used for the purposes of the driver's business (moving static caravans) and Mr Szabala had not yet begun to work in that business. In the Appellant's case, the Vehicle was the key part of a shared enterprise run jointly by both Mr Wożniak and Mr Palka;

(2) the seizure in *Szabala* took place within a month after the driver first had access to the vehicle, so that there was no time for Mr Szabala to carry out any sort of periodic check. In contrast, the seizure of the Vehicle took place in July, some nine months after it had been acquired, so there is no similar excuse for the lack of reasonable checks; and

(3) in *Szabala* the owner's account was "coherent, logical and credible". In this case, there is no evidence from the Appellant as to how the Vehicle came to be adapted and the Representative's two explanations were conflicting, unsubstantiated and not credible.

60. In addition, the owner in *Szabala* lived in Poland and the driver in Belgium, so the owner was physically distant from the vehicle. Both Mr Palka and Mr Woźniak live in or near Katowice.

61. For all the above reasons, the conclusions in *Szabala* do not assist the Appellant

Hardship

62. The Representative submitted that the Appellant had suffered the hardship of having to pay the monthly fee for the Vehicle, and of being unable to use the Vehicle to cover those costs, or to make a profit.

63. Officer Boote accepted that the Appellant had suffered hardship because of the seizure but found that this was "a natural consequence of having a vehicle seized", and there was no evidence of "exceptional hardship".

64. I again agree with Officer Boote. Whenever a vehicle which is the subject of a lease agreement is seized, the lessee continues to be responsible for paying the monthly charges. Similarly, where a vehicle is owned outright, seizure means that the owner loses that capital asset. In addition, seized vehicles never continue to form part of the profit-making structure of the business. In other words, hardship of this nature is the inevitable consequence of almost all seizures.

Human Rights law

65. The Representative submitted that the review decision breached Article 6. That submission is difficult to understand, given that the Appellant had the right to appeal Officer Boote's decision to this Tribunal and has done so.

66. The Representative also submitted that the decision breached A1P1. The relevant law is summarised in *Lindsay*, see §33-§34. The Vehicle was seized to prevent the evasion of excise duty, and this is a legitimate aim under A1P1. The issue is thus whether the refusal to restore the Vehicle was disproportionate, taking into account the particular facts of the Appellant's case.

67. Having considered all relevant factors, I agree with the Border Force that it was not disproportionate. The Vehicle had been adapted for smuggling; on the balance of probabilities with Mr Woźniak's knowledge, but in any event without the Appellant having carried out any sort of reasonable checks to prevent it being so adapted. The refusal to restore has adverse financial consequences for the Appellant, but there is no exceptional hardship. It follows that there was no breach of A1P1.

Inevitably the same

68. Officer Boote took into account the factors at §25 and §26: The Representative submits that her decision was insufficiently reasoned and that some factors have not been considered, and/or were not given proper weight.

69. As is clear from my analysis above, I agree that there are other relevant factors. However, much of the related evidence was only provided after the review decision, so could not have been taken into account by Officer Boote.

70. Having considered these further factors as well as those taken into account by Officer Boote, I confirm her decision to refuse restoration. In other words, none of the further factors changes the position: had Officer Boote considered all relevant factors, the outcome would inevitably have been the same.

Decision and appeal rights

71. For the reasons set out above, I refuse the Appellant's appeal.

72. This document contains full findings of fact and reasons for the Decision. If the Appellant is dissatisfied with this Decision, it 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.

73. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2021