[2014] UKUT 0226 (TCC)
Appeal number FTC/31/2013

Excise Duty – order of magistrates' court condemning goods as forfeited – further goods deemed to be duly condemned as forfeited – application by owner of goods for restoration of goods – decision not to restore goods – review decision upholding original decision not to restore goods – review decision set aside by First-tier Tribunal – directions as to further review – whether directions appropriate – extent to which further review should investigate for any purpose whether duty paid on goods which were condemned as forfeited

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(TAX CHAMBER)

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellants

- AND -

EUROPEAN BRAND TRADING LIMITED **Respondent**

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 20 and 21 May 2014

Mr Jonathan Swift QC and Mr James Puzey (instructed by **General Counsel and Solicitor for HM Revenue and Customs**) for the **Appellants**
Mr James Pickup QC (instructed by **Hill Dickinson, solicitors**) for the **Respondent**

DECISION

RELEASE DATE: May 2014

Tribunal Judge: Mr Justice Morgan:

Introduction

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") against part of an order made by the First-tier Tribunal ("the FTT") (Judge Demack and Mr Robertson) on 9 October 2012. On 12 December 2012, the FTT released its decision giving its reasons for making that order. On 20 February 2013, Judge Demack granted permission to HMRC to appeal against part of the order of 9 October 2012.

2. This appeal requires the Upper Tribunal to consider the effect of paragraphs 5 and 6 of schedule 3 to the Customs and Excise Management Act 1979 ("the 1979 Act"), following a seizure of goods under the 1979 Act. The appeal also involves consideration of the provisions of the 1979 Act which deal with the power of HMRC to restore to their owner goods which have been seized or forfeited under the 1979 Act and the provisions of the Finance Act 1994 ("the 1994 Act") dealing with the review of a decision not to restore such goods. Finally, the appeal involves a consideration of the powers of the First-tier Tribunal ("the FTT") on an appeal against a decision on such a review.

3. Many of the questions raised on this appeal are directly answered by the decision of the Court of Appeal in Revenue and Customs Commissioners v Jones [2012] Ch 414. Judgment in that case was given on 18 July 2011. Most of the relevant events in the present case occurred before that date and the parties acted without the assistance of the court's ruling in Jones. It may be that if the parties had appreciated that the legal position was as it was later declared to be in Jones, matters might have been handled differently. However, it is accepted on this appeal that the Upper Tribunal must apply the law as declared in Jones to the circumstances of this case.

4. Mr Swift QC and Mr Puzey appeared on behalf of HMRC and Mr Pickup QC appeared on behalf of the Respondent, European Brand Trading Limited ("EBT").

The statutory provisions

5. The statutory provisions which are relevant in this case are in the 1979 Act and the 1994 Act. Section 49(1)(a)(iv) of the 1979 Act provides, so far as material, that where any imported goods, being goods chargeable on their importation with customs or excise duty, are removed from their place of importation without payment of that duty, then such goods are liable to forfeiture. The goods in question in the present case were chargeable, on their importation, with customs or excise duty within section 49(1).

6. By section 139(1) of the 1979 Act, any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or

constable. Section 139(6) of the 1979 Act gives effect to schedule 3 to the 1979 Act.

7. Section 154(2) of the 1979 Act provides that in any proceedings relating to customs and excise, brought by or against HMRC, the burden of proving that any duty has been paid or secured in respect of any goods is on the other party to the proceedings.

8. Under paragraph 1 of schedule 3 to the 1979 Act, HMRC are required to give notice of a seizure of any thing as liable to forfeiture and of the grounds of such seizure to any person who to their knowledge was the owner of the goods at the time of the seizure. Under paragraph 3 of schedule 3 to the 1979 Act, any person claiming that any thing seized as liable to forfeiture is not so liable must give notice of his claim in writing to HMRC within one month of the date of the notice of seizure.

9. Paragraph 5 of schedule 3 to the 1979 Act provides:

> "5. 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 thing in question shall be deemed to have been duly condemned as forfeited."

10. Paragraph 6 of schedule 3 to the 1979 Act provides:

> "6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

11. By paragraph 8 of schedule 3 to the 1979 Act, proceedings for condemnation are civil proceedings and, in England and Wales, may be instituted in the High Court or in a magistrates' court. There is a right of appeal from a magistrates' court to the Crown Court and a right to require the statement of a case for the opinion of the High Court: see paragraph 11 of schedule 3 to the 1979 Act.

12. Section 152(b) of the 1979 Act provides:

> "The Commissioners may, as they see fit … restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts … ".

13. Where HMRC have been asked to, but have declined to, exercise their power under section 152(b) of the 1979 Act to restore goods which have been seized or forfeited, a person in relation to whom such a decision has been made may, by notice in writing, require HMRC to review that decision: see section 14(1) and (2) of the Finance Act 1994 ("the 1994 Act"). A person is entitled to give

a notice under section 14 requiring a decision to be reviewed for a second or subsequent time if, but only if, the grounds on which he requires the further review are that HMRC did not, on any previous review, have the opportunity to consider certain facts or matters and he does not on the further review require HMRC to consider any facts or matters which were considered on a previous review, except in so far as they are relevant to any issue to which the facts or matters, not previously considered, relate: section 14(5) of the 1994 Act.

14. By section 15 of the 1994 Act, where HMRC are required in accordance with section 14 to review a decision, it is their duty to do so and they may, on that review, either confirm the decision or withdraw or vary the decision and take appropriate further steps. If HMRC do not, within a period of 45 days (or such other period as is agreed), give notice of their determination on the review, then they are assumed to have confirmed the decision.

15. Under section 16 of the 1994 Act, an appeal against a decision on a review under section 15 may be made to an appeal tribunal. In this case, the appeal tribunal was the FTT: see section 7 of the 1994 Act. A decision as to whether or not any thing forfeited or seized under the customs and excise Acts is to be restored to any person is "a decision as to an ancillary matter": see section 16(8) of, and schedule 5 paragraph 2(r) to, the 1994 Act.

16. Section 16(4) of the 1994 Act provides:

> "(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—
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> (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;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
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> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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."

17. It was agreed at the hearing before me that the reference in section 16(4) of the 1994 Act to a decision which a person "could not reasonably have arrived at" is to a decision which is open to challenge on the usual judicial review grounds.

18. By section 16(6) of the 1994 Act, on an appeal under section 16, it is for the appellant to show that the grounds on which any such appeal is brought have been established; this is subject to certain exceptions which are not material in the present case.

The decision in Revenue and Customs Commissioners v Jones

19. It can be seen from the above statutory provisions that where goods are seized by HMRC pursuant to sections 49 and 139 of the 1979 Act, the owner of the goods may wish to consider taking either, or both, of two courses of action. The first course is to give notice under paragraph 3 of schedule 3 to the 1979 Act claiming that the goods which have been seized are not liable to forfeiture. If the owner does not take that course, within the relevant period for doing so, then at the end of that period, by virtue of paragraph 5 of schedule 3 to the 1979 Act, the goods in question are deemed to have been duly condemned as forfeited. If the owner does take the course of claiming that the goods which have been seized are not liable to forfeiture, then HMRC must take proceedings for the condemnation of the goods. In those proceedings, the burden is on the owner to prove that duty has been paid in relation to the goods.

20. The second course of action which might be taken by the owner of the goods is to request that HMRC exercise their discretionary power under section 152 of the 1979 Act to restore to the owner the goods which have been seized. Indeed, if the goods are not only seized but are forfeited (perhaps because the owner does not take the first course of action to claim that the goods are not liable to forfeiture) then, again, the owner can request that HMRC exercise their power to restore the goods to the owner. If HMRC decide not to restore the goods to the owner, then the owner may require HMRC to review that decision. If the decision on review is that the goods are not to be restored, then the owner may appeal the review decision to the FTT which will consider whether a reasonable person could have arrived at that review decision. If the FTT decide that question in favour of the owner, it may direct that the review decision is to cease to have effect and may require HMRC to conduct a further review.

21. It can be seen from the above that, in this context, different kinds of dispute between the owner of goods and HMRC may end up in the magistrates' court (or the High Court) under schedule 3 to the 1979 Act or in the FTT pursuant to section 16 of the 1994 Act. In the past, difficulties have arisen as to the precise role of the two judicial bodies and these were addressed by the Court of Appeal, in obiter remarks, on two occasions, namely: Gora v Customs and Excise Commissioners [2004] QB 93 and Gascoyne v Customs and Excise Commissioners [2005] Ch 215. Doubts remained as to how the two statutory schemes operated and those doubts were then resolved by the decision of the Court of Appeal in Revenue and Customs Commissioners v Jones [2012] Ch 414.

22. In Jones, the owner of the goods had initially claimed under paragraph 3 of schedule 3 to the 1979 Act that the goods were not liable to forfeiture but later withdrew that claim. The case therefore concerned the default provisions in

paragraph 5 of schedule 3, rather than the provisions of paragraph 6 of schedule, where there are proceedings in a court. The issue raised in that case was whether the owner was relieved from excise duty as distinct from the issue being whether excise duty had been duly paid. The principal judgment in Jones was given by Mummery LJ, with whom Moore-Bick and Jackson LJJ agreed. In paragraph [71] of his judgment, Mummery LJ stated his conclusions, as follows:

> "71 I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
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> (1) The owners' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.
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> (2) The owners had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
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> (3) The owners in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
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> (4) The stipulated statutory effect of the owners' withdrawal of their notice of claim under paragraph 3 of schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
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> (5) The deeming process limited the scope of the issues that the owners were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the owners argued in the tribunal, being imported legally for personal use.

> That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the owners. In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use.
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> (6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with article 1 of the First Protocol to the Convention and with article 6 , because the owners were entitled under the 1979 Act to challenge in court, in accordance with Convention-compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the owners. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.
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> (7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in Gora's case [2004] QB 93 and as approved by the Court of Appeal in Gascoyne's case [2005] Ch 215. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion. "

23. Although the issue which was sought to be raised in Jones was whether the owner was relieved from excise duty as distinct from the issue being whether excise duty had been duly paid, the same principles apply where the owner of goods wishes to contend that the goods are not liable to be forfeited because duty has been paid. This can be seen not only from the reasoning in Jones itself but also from its approval of the decision in Gora. In Gora, on the question whether the owner could raise, in an appeal to the FTT against a review decision of HMRC confirming a decision not to restore, the argument that the duty on the goods had been paid, Longmore LJ said at [62]:

> "I agree with Pill LJ's conclusion that, once seizure has occurred, the issue whether duty has, in fact, been paid is not a matter which is within the jurisdiction of the tribunal. The provisions of Schedule 3 enact that if notice of claim, that goods seized are not liable to forfeiture, is not given to the commissioners, the thing in question 'shall be deemed to have been duly condemned as forfeited'. This provision cannot be sidestepped by saying (as the tribunal does) that a deemed fact is not a real fact. A deemed condemnation occurs because the

> forfeiture can no longer be challenged. If the forfeiture cannot be challenged, the goods-owner cannot claim in a tribunal that duty has, in fact, been paid because he is thereby challenging the forfeiture. That is what the deeming provision prevents him from doing."

The facts

24. In June 2009, a large quantity of wine and beer belonging to EBT was in a warehouse in Letchworth. On 17 June 2009, HMRC detained those goods. HMRC gave a notice to EBT that the goods were detained for the following stated reason: "Proof of Duty Payment". On 13 July 2009, HMRC gave a further notice to EBT listing the items detained "pending proof of excise duty payment being confirmed". The listed items excepted some of the goods initially detained and the excepted goods were released to EBT. On 22 July 2009, HMRC removed the detained goods from the warehouse in Letchworth. On 19 August 2009, solicitors for EBT wrote to HMRC asking for answers to a number of questions and protesting at HMRC's conduct. On 20 August 2009, HMRC replied to the solicitors stating that a notice of seizure would be served that day.

25. On 20 August 2009, HMRC sent to EBT a notice of seizure of most of the goods detained. The notice was said to be given pursuant to section 139(6) of, and paragraph 1 of schedule 3 to, the 1979 Act. The notice stated that the goods were liable to forfeiture under section 49(1) of the 1979 Act. The notice did not accurately set out the provisions of section 49(1)(a)(iv) but no point has been taken on that. The notice stated that if EBT did not give notice of claim pursuant to schedule 3 to the 1979 Act, then the goods would be duly condemned as forfeited. The notice went on to say that it was the policy of HMRC not to restore goods which were liable to forfeiture under section 49 of the 1979 Act. It then stated that if EBT did not agree with the decision not to restore the goods, it could ask for a review of the decision.

26. The notice of seizure of 20 August 2009 excluded certain of the goods originally detained. Those goods were the subject of a separate notice on 20 August 2009 stating that they remained detained pending proof of payment of excise duty.

27. On 2 September 2009, the solicitors for EBT wrote to HMRC stating that there were discrepancies between the goods listed in the two notices of 20 August 2009 and the goods belonging to EBT which were originally in the warehouse in Letchworth. That particular matter is not directly relevant to the present appeal.

28. On 17 September 2009, the solicitors for EBT wrote again to HMRC. The letter is open to interpretation but it appears to have been treated both as a notice of claim under paragraph 3 of schedule 3 to the 1979 Act and a request for restoration of the goods and/or a review of the earlier decision not to restore the goods. The letter referred to certain matters which were relied upon by EBT as showing that duty had been paid on at least some of the goods which had been seized.

29. On 1 October 2009, the solicitors for EBT wrote a lengthy letter to HMRC. It stated that EBT had already challenged the legality of the seizure and it now requested a review of the decision not to restore the goods. It stated that a request for a review could be considered by HMRC while a challenge to the legality of the seizure was being pursued. The letter set out in detail EBT's case that duty had been paid on all or some of the goods which had been seized. The letter stated that EBT had difficulties in some respects in establishing that duty had been paid on all of the goods. The letter contained significant criticisms of the way in which HMRC had conducted matters and in particular had failed to communicate with EBT.

30. On 7 October 2009, HMRC wrote to the solicitors for EBT accepting that the letter of 17 September 2009 was a claim under schedule 3 to the 1979 Act. HMRC stated that the case would be prepared for condemnation proceedings in the magistrates' court within six months. HMRC also accepted, in response to the letter of 1 October 2009, that it would review the decision not to restore the goods contained in the letter of 20 August 2009. On three occasions, in October and November 2009 and in January 2010, HMRC asked for extensions of time within which to complete the review of the decision not to restore the goods. The letters explained that time was being taken to establish the supply chains for the goods which had been seized. This suggested that HMRC was investigating whether duty had been paid on some or all of those goods.

31. On 16 February 2010, HMRC served on EBT notice of seizure of the goods which had been detained on 20 August 2009 but which were not the subject of the notice of seizure served on that date. The notice of 16 February 2010 did not refer to any question as to the restoration of the goods which were the subject of that notice.

32. On 25 February 2010, a review officer of HMRC wrote to the solicitors for EBT with HMRC's decision in relation to the review of the decision not to restore the goods which were the subject of the notice of seizure of 20 August 2009. The review officer upheld the decision not to restore those goods. She stated that from the documents available to her, she was not satisfied that excise duty had been paid on those goods.

33. On 2 March 2010, EBT appealed to the FTT against the review decision of 25 February 2010. The main ground of appeal was that duty had been paid on the goods. The grounds of appeal also stated that if HMRC established that duty had not been paid on some of the goods then EBT had acted in good faith and that HMRC should use their discretion to restore the goods to EBT as an innocent party.

34. On 4 March 2010, agents for EBT requested restoration of the goods seized on 16 February 2010.

35. On 16 March 2010, HMRC issued a summons in the Manchester City Magistrates' Court for condemnation as forfeited the goods seized on 20 August 2009. The summons recited the history of the matter and stated that the goods were liable to forfeiture under section 49(1)(a) of the 1979 Act and/or

regulation 16 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 on the ground that the goods were chargeable to excise duty and no excise duty had been paid on the goods. The summons further stated that the burden of proving that duty had been paid or secured on the goods was on EBT.

36. On 29 March 2010, HMRC served this summons on EBT. On the same day, HMRC wrote to the agents for EBT stating that the request for restoration of the goods seized on 16 February 2010 was rejected.

37. On 22 April 2010, the solicitors for EBT wrote to HMRC stating that EBT was not pursuing its claim under schedule 3 to the 1979 Act that the goods seized on 20 August 2009 were not liable to forfeiture. The solicitors completed a form to be sent to the magistrates' court stating that EBT no longer wished to contest the summons and agreed to HMRC asking the court to give them an order enabling them to keep the goods seized.

38. On 13 May 2010, the magistrates' court made an order, reciting the contents of the summons and giving judgment that the contents of the summons were true and ordered that the goods be condemned as forfeited. The order stated that the reasons for forfeiture were that EBT had not supplied evidence of duty payment and no longer contested the condemnation.

39. On 22 June 2010, the agents for EBT asked for a review of the decision made on 29 March 2010 not to restore the goods seized on 16 February 2010. This was treated as a valid request for a review and a review officer of HMRC wrote to the agents for EBT on 22 July 2010 confirming the decision not to restore those goods. The letter stated that as there had not been a challenge to the forfeiture of the goods seized on 16 February 2010, those goods were deemed to have been duly condemned as forfeited under paragraph 5 of schedule 3 to the 1979 Act. The letter then referred to the policy of HMRC in relation to applications for restoration of goods where duty had not been paid and concluded that the review officer was not satisfied that duty had been paid with the result that the goods should not be restored to EBT.

40. On 30 July 2010, EBT appealed to the FTT against the review decision of 22 July 2010. The grounds of appeal were the same as those advanced in the appeal against the review decision of 25 February 2010.

41. The decision of the Court of Appeal in Jones was given on 18 July 2011. Following that decision, EBT filed an amended notice of appeal which was treated as a notice of appeal in both appeals. The new grounds of appeal stated that the review decisions were incorrect and/or unreasonable. The grounds accepted that the decision in Jones had narrowed the basis of the appeal so that the question now related to the reasonableness of the review decisions not to restore the goods.

42. On 4 January 2012, following an exchange of statements of case in the appeals, HMRC wrote to the solicitors for EBT seeking confirmation that EBT was not suggesting that the FTT was entitled to consider whether duty was in fact paid. On 5 January 2012, the solicitors for EBT confirmed that EBT did

not invite the FTT to re-open the issue of whether duty was in fact paid; instead, it was stated that the reliance by HMRC on the existence of missing traders in EBT's supply chain was unreasonable as a ground for refusing restoration.

43. The appeals were heard by the FTT on 8 and 9 October 2012 and, by consent, the appeals were allowed. On 9 October 2012, the FTT made an order disposing of the appeals and in that order it gave directions as to the conduct of a further review of the two decisions not to restore the seized goods. Those directions were not by consent and HMRC wished to appeal against them. HMRC required the FTT to give reasons for its decision which were duly given in a decision released on 12 December 2012. The FTT later granted HMRC to appeal against part of the order of 9 October 2012.

The FTT order

44. The FTT allowed the appeals by consent. It also ordered HMRC to pay EBT's costs of the appeals. This was not by consent but there is no appeal to the Upper Tribunal against this order for costs. It was further ordered, by consent, that the two review decisions should cease to have effect from 9 October 2012 and HMRC were required to conduct further reviews of the original decisions not to restore the seized goods.

45. The FTT gave directions as to the conduct of the further reviews. The further reviews were to be carried out by a new review officer, who was independent of the earlier involvement of HMRC and who should give reasons for his or her decisions. The directions referred to a Mr Chaplin who had made the original decisions (on 20 August 2009 and 29 March 2010) not to restore the goods. The FTT gave the following directions, in particular, as to the conduct of the further reviews:

> "iii that the further reviews are to examine all relevant material and in particular that material available to and considered by Mr Chaplin at the time of his decisions not to restore on 20 August 2009 and 29 March 2010, including that material relevant to the duty paid status of the goods. This examination should include what response if any was made by officers of HMRC to [EBT's solicitors'] letter of 1 October 2009, the assertion that the Fosters EMEA labels confirmed that the Wolf Blass wines were duty paid, what meetings were held with manufacturers, breweries, agents and suppliers and what enquiries were made of bonded warehouses.
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> iv that the material obtained and considered by Mr Chaplin in reaching his decisions not to restore be disclosed to [EBT] within 42 days of today's date.
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> v that the further reviews should also consider what mitigating and aggravating factors were taken into consideration by Mr Chaplin in each case in reaching his decisions not to restore the seized goods to [EBT]."

The FTT decision

46. In its decision, the FTT described the somewhat unusual course taken at the hearing before it. Counsel for EBT opened the appeals and then counsel for HMRC called Mr Chaplin to give evidence. Counsel for EBT began his cross-examination of Mr Chaplin but before he completed it, the FTT rose and asked counsel to speak to the FTT in chambers. The FTT suggested to counsel for HMRC that he should "take further instructions" from HMRC. The hearing was adjourned for the day and the next morning, counsel for HMRC stated that HMRC consented to the appeals being allowed.

47. In its decision, the FTT described the evidence given by Mr Chaplin. It was critical of the way the seizures had been conducted and of Mr Chaplin's evidence. It referred to documents which Mr Chaplin or HMRC may have had but which had not been produced to EBT for the purpose of the appeals. The FTT said that such documents might be relevant to matters within the jurisdiction of the FTT and so those documents should be produced to EBT. The FTT referred to the letter dated 1 October 2009 from EBT's solicitors and held that Mr Chaplin had not seen this letter. It held that this letter should be the subject of a detailed response in the further review which it directed. The FTT stated that HMRC's failure to disclose "a substantial file of papers", presumably relating to the goods, was "a most serious matter" which warranted "the most serious censure".

48. The FTT then identified a number of further factors which influenced it in determining its directions for the further review. These principally related to procedural aspects of the decision making within HMRC. The FTT was critical of the fact that the review officer was not being called to give evidence. Instead, HMRC proposed to call another officer who had reviewed the decision of the review officer. This was said to be "usurping the tribunal's function". This witness was also criticised for focussing on the fact that EBT had not effectively challenged the forfeiture of the goods. It was said that: "[t]hat failure is not relevant to the issue before the tribunal in these appeals; the issue is the Commissioners' discretionary power to restore goods for which s. 152(b) of CEMA provides. What the tribunal had to decide was whether [the review officer's] review decisions were unreasonable."

49. The FTT then added at [30]:

> "Yet further, [counsel] contended that [HMRC were] wrong both in practice and in law in stating that it was for EBT to provide [the review officer] with evidence that duty had in fact been paid. We agreed that it was for the Commissioners to establish that duty had not been paid on the seized goods, or at least to show that there was no evidence that duty had been paid. We should expect the new review directed correctly to reflect the law."

50. The FTT then referred to attempts which had been made by EBT to inquire into the supply chains to it and whether duty had been paid. The FTT stated that EBT had been unable to get full information on that subject but had

obtained informed from Fosters EMEA which confirmed that 5/8 of the Wolf Blass wine was duty paid and it should be assumed that all of that wine was duty paid. The FTT stated that the further review should deal with this point.

The appeal to the Upper Tribunal

51. HMRC's appeal to the Upper Tribunal raises the question as to the scope of the further review which is to be carried out and whether the directions of the FTT are appropriate.

52. HMRC submits that the effect of the magistrates' court's order in relation to the goods seized on 20 August 2009 and the effect of paragraph 5 of schedule 3 in relation to the goods seized on 16 February 2010 is that, for the purposes of the review, the position which has been established between HMRC and EBT in a binding way is that duty was not paid on any of the seized goods. It follows, it is submitted, that the review need not, and indeed must not, involve an investigation as to whether that position is factually correct. The review can investigate other matters which might be relevant such as whether EBT exercised due diligence in relation to checking, at the time it acquired the goods, whether duty had been paid and whether EBT acted in good faith. It was accepted that these matters would be material considerations but whether they should be given any weight, and if so what weight, was a matter for the new review officer.

53. It followed from the foregoing, it is submitted, that it is not relevant for the review officer to inquire as to whether HMRC had itself investigated, adequately or at all, the duty status of the goods. Nor is it relevant to inquire as to what would have emerged if HMRC had carried out such investigations. Those matters are not relevant because the review will be conducted on the basis that duty was not paid on any of those goods.

54. On this basis, it is not appropriate for HMRC to be required to disclose documents which it may have which might throw light on the suggested question as to whether duty was paid on some of the goods or on the suggested question as to the adequacy of HMRC's investigations into the duty status of the goods. Those suggested questions simply do not arise.

The position of EBT

55. On this appeal, the central submission of Mr Pickup QC, on behalf of EBT, was as follows:

> "The directions of the FTT do not invite nor do they require the Senior Officer of HMRC tasked with the further reviews to reach a decision as to the duty status of the seized goods. That would, as Mummery LJ said in *Jones* be contrary to the "*deemed effect of the owners' failure to contest condemnation of the goods by the Court."* However whilst the Senior Officer tasked with conducting the review is not required, by these directions, to reach a finding as to the duty paid status of the seized goods, in determining whether or not the original

> decision not to restore the goods to the Respondent should be upheld and thereafter the reasonableness or otherwise of the review decisions undertaken by [the original review officer] it is permissible indeed it is required that he/she considers that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time."

56. Mr Pickup took me in detail through the factual history of this matter. He pointed out that the first review decision was made on 25 February 2010 which was before the order of the magistrates' court of 13 May 2010. He also suggested that the decisions made by EBT as to how to conduct its challenges to the seizure and/or the forfeiture of the goods and as to how to seek restoration of the goods were not assisted by the lack of clarity in the law before the decision in Jones. However, he did not at the end of the day suggest that these matters could affect the nature and scope of the further review which is to take place pursuant to the consent order of the FTT.

Analysis

57. The effect of the order of the magistrates' court on 13 May 2010 is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 20 August 2009. The effect of paragraph 5 of schedule 3 to the 1979 Act is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 16 February 2010.

58. HMRC had decided (on 20 August 2009 and 29 March 2010) not to exercise its discretionary power under section 152(b) of the 1979 Act to restore any of the goods to EBT. The result of the appeals to the FTT is that the earlier review decisions of HMRC no longer have effect. HMRC is now required to review the decisions of 20 August 2009 and 29 March 2010 in accordance with sections 14 and 15 of the 1994 Act.

59. In the absence of any direction from the FTT, the precise form of the new review of the earlier non-restoration decisions would be, in the first instance, for the new review officer. In the absence of any such direction, the review officer would need to take account of all material considerations. The material considerations would include all relevant matters up to, and as at, the date of the further review decision.

60. At the present time, and therefore as at the date of the further review decision, the established position is that duty was not paid on any of the seized goods. The review officer should therefore consider what HMRC should do in this case in the light of that, and all other, material considerations. The review officer is certainly not required to make a decision based on a finding that duty was paid on some or all of the seized goods. The same applies to any suspicion which the review officer may form as to the possibility that duty had been paid on some or all of the seized goods. If the review officer was to make a decision based on a finding that duty had been paid, or might have been paid, on some or all of the seized goods, that finding would be contrary to the established position that duty has not been paid on any of the seized goods.

61. Since the review officer should make a decision on the basis that duty was not paid on any of the seized goods, it is not relevant to the decision to inquire whether there is evidence to suggest that duty was paid on some or all of the goods. It is therefore not necessary or appropriate to disclose to EBT documents which might help EBT to argue that duty was paid on some or all of the goods. Such documents will be irrelevant to the further review. It is similarly irrelevant to inquire whether HMRC, at an earlier point in time, did sufficient to investigate whether duty had been paid or to inquire what would have emerged if HMRC had made inquiries, or further inquiries. What now matters is the position which has been established that duty was not paid on any of the seized goods.

62. The review officer is entitled to make a decision as to what HMRC should now do, in relation to the request for restoration, in the light of all material considerations as at the date of that decision. The review officer is not restricted to considering whether there are judicial review grounds for the review officer to "quash" the original non-restoration decisions. If the review process was restricted to being akin to a judicial review of the original decisions, then the issue would be whether Mr Chaplin had material before him on which, acting reasonably, he could have reached his decision. In the present case, the further review which has been ordered by the FTT follows its decisions that the earlier reviews of the original decisions resulted in review decisions which could not reasonably have been arrived at and the FTT has directed that the further review is to consider "all relevant material".

63. For the above reasons, I am unable to accept the submission made by counsel for EBT on the appeal to the Upper Tribunal, which I have set out above, to the effect that the review officer is required to consider "that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time". As at the time of the further review decision, the duty paid status of the seized goods is established to be that duty was not paid. It is irrelevant to inquire as to what might have been argued to have been the apparent position at an earlier time.

64. I have set out fairly fully the history of this matter. The decision not to restore the goods seized on 20 August 2009 was taken (prematurely because there had not been, by that date, any request for restoration) on 20 August 2009; this was before the order of the magistrates' court on 13 May 2010. The decision not to restore the goods seized on 16 February 2010 was taken on 29 March 2010; by 29 March 2010, the effect of paragraph 5 of schedule 3 to the 1979 was that those goods were deemed to have been duly condemned as forfeit and so it was deemed that duty had not been paid on them. This history would not have justified the FTT in directing that the further review should be based on how matters stood as at 20 August 2009 (in relation to the goods seized on that date) rather than on how matters will stand at the time of the further review. Indeed, the FTT was not asked to, and did not purport to, restrict the scope of the further review to how matters stood on 20 August 2009. On the appeal to the Upper Tribunal, EBT did not ask me to give such a direction.

65. The FTT made an order for disclosure of documents by HMRC to EBT. There was no argument before the Upper Tribunal as to the existence of a power in

the FTT to order disclosure for the purpose of a further review, as distinct from a power to order disclosure for the purpose of an appeal to the FTT. In its reasoning, the FTT appeared to focus on the desirability of having certain documents for the purposes of an appeal to the FTT and did not consider whether it had, and if so whether it should exercise, a power to order disclosure for the purpose of a review by HMRC. As the matter was not argued before me, I will not rule on whether the FTT had such a power. In the present case, where the matter was not argued at the hearing before the Upper Tribunal and does not seem to have been separately addressed by the FTT, the order made by the FTT should not be considered to be a precedent in relation to such a question.

66. I can now address the particular directions given by the FTT which have been challenged on the appeal to the Upper Tribunal.

67. In place of the direction in sub-paragraph iii, quoted in paragraph 45 above, it should be directed: "that the further reviews are to examine all relevant material". The remainder of sub-paragraph iii should be deleted. For the reasons give above, it is inappropriate to require the review to address arguments and evidence of the kind referred to by the FTT as to whether duty had in fact been paid, or might have been paid, on some or all of the goods. Further, as the further review is to examine all relevant material, it is inappropriate and might be misleading to single out material which was available to Mr Chaplin; it would be misleading if the intention behind that direction was to require attention to be given to material which suggested that duty had been paid or might have been paid. Further, for the sake of clarity, the Upper Tribunal will add the direction that the review is to be conducted on the basis that duty had not been paid on any of the seized goods.

68. Sub-paragraph iv of the FTT's directions was an order for disclosure by HMRC. HMRC did not challenge the power of the FTT to make an order for disclosure but confined their submissions to saying that it was not appropriate to order disclosure of documents which might be said to relate to the suggested issue as to whether duty had been paid. It is clear from the FTT's reasoned decision that it considered that the documents which were of the greatest relevance were documents which would show, or suggest, that duty had been paid on some of the goods or which would reveal the investigations which HMRC had carried out or had failed to carry out. In view of my conclusions, those are not proper grounds for ordering disclosure. If those grounds cannot be relied upon, it is not clear what other documents HMRC have which would be relevant to the review decision. As I indicated at the end of the hearing, I will allow the parties to apply in writing to the Upper Tribunal for an order for disclosure and in the meantime I will set aside the order for disclosure made by the FTT. For the avoidance of doubt, any submissions made to the Upper Tribunal for an order for disclosure may address the question whether the Upper Tribunal has power to make such an order and as to the circumstances in which it would be appropriate for the Upper Tribunal to make such an order.

69. For the avoidance of doubt, I ought to refer to sub-paragraph v of the FTT's directions. There is no challenge to this direction. However, it should be made

clear that, as already directed, the further review is to examine all relevant material. All material which relates to mitigating and aggravating factors will be potentially relevant. That material is not to be confined to the material before Mr Chaplin. HMRC accepted that material which relates to whether EBT took all proper steps to verify that duty had been paid, and as to whether EBT acted in good faith, is potentially relevant material. If that is EBT's case then, of course, it is open to EBT to rely on material which shows that it took such steps. In that event, the focus will be on what EBT did and what it thought. However, whatever EBT did and thought at the time, the review will be conducted on the basis that duty was not paid on any of the goods seized. If EBT do establish mitigating factors of this kind, it will be for the review officer to decide whether to give any weight to those factors, and if so, what weight.

The result

70. The result is that the appeal is allowed.

71. The Upper Tribunal will make revised directions, in accordance with this decision, as to the conduct of the further review.

72. If EBT wishes the Upper Tribunal to order HMRC to give disclosure for the purposes of the further review, it should apply to the Upper Tribunal in writing (supported by its submissions) with 21 days from the date of release of this decision. If EBT does so apply, then HMRC is to reply in writing to the Upper Tribunal and to EBT within 21 days thereafter.

Costs

73. Finally, I direct that any applications as to the costs are to be made in writing, to be served on the other party and on the Upper Tribunal within 21 days of the date of release of this decision.

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MR JUSTICE MORGAN

RELEASE DATE: 23 MAY 2014