EXCISE DUTY – Restoration of seized goods and vehicle – Goods alleged to have been hidden in car – Review out of time – No reasons given for original decision not to restore – Whether decision "reasonable" – Excise Duties (Personal Reliefs) Order 1992 arts 3, 3A, 5 – CEMA 1979 ss 49(1), 151(b) – FA 1994 ss 14(2), 15(1), (2), 16(4) – Appeal allowed

LONDON TRIBUNAL CENTRE

AVTAR SINGH JHALLI Appellants

KATHLEEN MARGUERITE JOHNS

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: ANGUS NICOL (Chairman)

SHEILA WONG CHONG FRICS PRAFUL D DAVDA FCA

Sitting in public in London on 17 May 2002

The Appellants in person

Nicola Shaw, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. This appeal is against a decision of the Commissioners not to restore excise goods seized under section 49(1)(a) or (f) of the Customs and Excise Management Act 1979 ("CEMA") from both Appellants, and not to restore to the Second Appellant a motor vehicle seized under section 141(1) of CEMA. This is a case in which a review of the decision not to restore was duly made, but the Commissioners did not complete their review within the 45 days allowed for so doing. As a result, the decision not to restore is, under section 15(2) of the Finance Act 1994, deemed to have been upheld on review.

The facts

2. The facts are not essentially in dispute, except as to the matter of whether there was any intent on the part of the Appellants to conceal goods from the Customs officers.

3. The two Appellants were stopped at Coquelles, in France, on 23 May 2001 at about 7.30 p.m. in a car belonging to the Second Appellant. During initial questioning, the Appellants said that they had been to France and had visited Eastenders and a duty paid shop. The Second Appellant said that she had bought

800 cigarettes and a few cases of beer. The Fist Appellant said that he had bought 1,600 Superkings, 1,600 Lambert & Butler, and some beer and wine. The Second Appellant said that the vehicle was hers, and that she had not been abroad in it since before the preceding Christmas; she had been abroad as a foot passenger by ferry to buy excise goods about two weeks previously. Neither had been stopped by Customs before.

4. The car was unloaded, and in addition to what had been declared, a further 4,000 Benson and Hedges and 800 Superkings were found, all of Belgian origin, under and between cases of beer on the back seat of the car. The Second Appellant was asked why she had said that she had bought only 800 cigarettes and had not declared the others, and said that she had only meant to buy 800, and had forgotten about the others. They were issued with a Customs Notice 1. There was no other interview with either Appellant. The total of the excise goods found in the car were 8,800 cigarettes, 100 cigars, 29 cases of beer, and 4 cases of wine. The goods and vehicle were then seized.

5. Mr Todd Elliott, the officer of Customs who had intercepted the Appellants, said that he had seized the goods because he was not satisfied with the way in which they were packed in the vehicle; they were packed, he said, so as to deceive him as to the amount of goods in the vehicle. There was also a discrepancy as to the amount of goods declared. Also, there was a large amount of cigarettes, and it did not appear credible to him that the Second Appellant could have forgotten a quantity of cigarettes which she had only just bought for £480.

6. Mr Elliott said that he had asked questions to both Appellants from the driver's side of the car, and they had answered individually. He did not remember going to the passenger's side at all. As he asked questions, he said, he was looking into the car, and did not see the beer. He said that it was not stacked in a suspicious way. He said that if beer and cigarettes were packed as they had been it was normally with an intent to deceive, so as to block the view of the cigarettes. It is usual to pack lighter things on top of heavy ones, as it would be unstable to put the beer on top. He said that he had not asked why the cigarettes were concealed. The majority of the cigarettes were, he said, in full view on top of the beer. He did not do a quick tally of the goods then, he just wanted to get the car in. He did not at that stage notice that the cigarettes were from Belgium. Mr Elliott said that he could not remember what receipts were given to him. The documents were all kept together, and he did not think that he had lost any. He agreed that he had not read the "commerciality statement" to the Appellants. He said that he thought they were cigarette smugglers, and not bona fide travellers.

7. Cross-examined by the First Appellant, Mr Elliott said that he agreed with the First Appellant's description of how the beer and cigarettes were stacked on the back seat. He said that all that he could see at that time was beer, with some cigarettes on top. That, he said, was why he sent the car into the garage, to see if there were any more. He had not thought that there was any issue as to the different brands of cigarettes, nor had he asked for whom the cigarettes were. If he had noted anything wrongly, they had an opportunity to correct it; he was sure that he had told them that, since he always did. In answer to the Second Appellant, Mr Elliott said that there were sometimes tax stamps on individual packets of tobacco goods, about the size of a postage stamp. There was also normally a seal at the end of a packet. The stamp would be easily visible. He had not noticed it himself, and was unaware that the goods were from Belgium. In any case, he had seized the goods because they had been placed in the car in a manner intended to deceive, and it was therefore not relevant where they came from.

8. The request for restoration was dealt with by Karen Booth on 20 June 2001. She made a witness statement on 2 February 2002. Her letter refusing restoration was dated 21 June 2001, and contains no reasons for her decision. She merely stated that she had considered all the factors in the case, and that there were no exceptional circumstances which would justify departure from the Commissioners' policy. At that point of time, it was therefore not possible for the Appellants or for anyone else to say whether the decision was reasonable or not. In her statement made seven and a half months later, she said that the Appellants had declared 4,000 cigarettes between them, and that more than twice that quantity had been found. She went on to say that 2,400 cigarettes had been found underneath and between cases of beer on the back seat of the car, and considered that it was neither reasonable nor justifiable to pack crushable items such as cigarettes under heavy cases of beer. She said that she considered that the Appellants had packed the goods "in a manner appearing to be intended to deceive the officer". She also said that she considered the underdeclaration to be a deliberate attempt to mislead the Customs officer. For those reasons, Miss Booth considered that the goods and vehicle had been properly seized.

9. Miss Booth said also that the Second Appellant had, when intercepted, said that the Appellants had only been to France. However, the cigarettes proved to be of Belgian origin, and could not therefore have been transported by the Appellants under legitimate cross-border shopping arrangements, and were, therefore, not eligible for relief under the Excise Duties (Personal Reliefs) Order 1992. Her statement concluded,

> "Under the circumstances detailed in this statement it was not appropriate to offer either of the travellers an interview prior to the seizure of the goods and vehicle."

It is to be noted that that statement also gives no reasons for refusing restoration of the goods or vehicle, though it does state that in the circumstances seizure was, in her consideration, properly made.

10. In evidence, Miss Booth said that she had before her when she wrote the refusal letter, the seizure file including a copy of the officer's notebook, the seizure form, and the list of goods. She also had information before her that the goods were of Belgian origin. She had not herself seen the goods. She said that there was a huge workload of decision letters, and it would be impossible to compile full particulars. Therefore only limited details were given. Miss Booth said that the "commerciality statement" was usually read to travellers before interview about the goods and their intended use. She gave her view that legitimate travellers do not pack crushable goods under heavy cases of beer. She also said that there was nothing which the Appellants could have said to the officer that would have persuaded him that the goods were for their own use and not for commercial use. They were not bona fide cross-border shoppers.

11. The review letter, though not issued within the 45 days limited for the purpose, was written by Mr Jeremy Tooke, on 21 December 2001. He also gave evidence that all three brands of cigarettes were of Belgian origin, information which he obtained from departmental records. In the letter, Mr Tooke outlined the facts as set out above, and set out the relevant legislation. He also summarised the Commissioners' restoration policy as to goods and vehicles. Under the heading "Consideration", he began by saying,

> "It falls to me to determine whether or not the contested decision is one which a reasonable body of commissioners could not have reached."

He then went into the reasons why he considered that the goods and vehicle had been properly seized. He repeated that he did not find it reasonable that crushable items such as cigarettes should be packed under cases of beer, for any reason other than to keep them out of sight from the outside of the vehicle. He referred to the underdeclaration of the amount of cigarettes, and considered that that was a deliberate attempt to mislead Customs. He referred to evidence before him that the Second Appellant's vehicle had travelled out and back by ferry on 10 March 2001, whereas the Second Appellant had said that she had not been abroad in the vehicle since Christmas 2000. He mentioned that the cigarettes were of Belgian origin, and could not, therefore have been transported to France by the Appellants, who said that they had only been to France. He said that he was, therefore, satisfied that the goods and vehicle had been properly seized. He referred to a letter in which the Second Appellant had said that the notices in duty free shops which said that one could buy as much as one liked, and pointed out that the notices were displayed by people with a commercial interest in the sale of tobacco. He said that Mr Elliott had recorded in his notes that "cigarettes were hidden under the cases of beer". He also observed that the First Appellant had not corrected the mistake that the Second Appellant had made as to the number of cigarettes imported. Having expressed satisfaction that the goods and car were properly seized, Mr Tooke concluded by saying that he was satisfied that there were no exceptional circumstances that would warrant restoration of either the goods or the vehicle, and that he was satisfied that the Commissioners' policy treated the Appellants no more harshly or leniently than anyone else.

12. The Second Appellant gave evidence, saying that they had not had time to go to Belgium. They were stopped at 7.30 p.m., and had given the receipts for the cigarettes and for the beer, bought in the duty paid shop, to the officer. They had not seen them since. They had had till receipts and credit card receipts from the Duty Paid shop. The Second Appellant said that Mr Elliott had not written his notes during the questioning, but had gone away for about an hour and written them. There were omissions and mistakes in them. She had said that she bought the car in December, not March 2000. She said that when he had asked her when she had last travelled abroad and bought excise goods, he had not recorded the question correctly: she had answered on the basis of the last time she had been through the tunnel. Before being stopped by Mr Elliott, the Second Appellant said, they had been stopped by the French Customs, who had searched the car and used a metal detector. There had been no attempt to conceal anything. All the goods in the car could be seen through the front windscreen. She said that she quite often went to France with a friend, aged 81, because it was a nice day trip since she lives only 45 minutes drive from the coast. She had bought the extra cigarettes because there was a special offer of a free box of wine if one bought 4,000 cigarettes, which she considered was worth while. The previous trip had been with two other friends. She could not remember what she had bought. She had been to France with a friend for Christmas by car. She had told Mr Elliott that she had bought 800 cigarettes; that was not true, nor was it a lie. She said that she was tired and shocked, and had already been stopped by French Customs, and she simply forgot about the others. She had no need to lie, she said, as everything was in full view, and nothing was hidden. The cigarettes were perfectly visible, and were packed so that they would not have been crushed.

13. The First Appellant said that he had told Mr Elliott what he had bought, and had heard the conversation with Mrs John. The officer had asked why he had two

brands of cigarettes, and he said that the Superkings were for himself and the Benson & Hedges were for his wife and son. That had not been included in the notes. The First Appellant said that he had packed the car. There were 29 cases of beer, and the boot was full. He put three cases of beer on each side of the back seat, so that there was a gap between them, and three boxes of cigarettes in that gap. Another case of beer was put on top, resting on the other cases of beer. There was room for more cigarettes. Everything was clearly visible. He said that he had asked Mr Elliott to look from the passenger window, from which you could see the cigarettes clearly. Mr Elliott did so, and simply said "To me it looks hidden". All the cigarettes in the boot were on the top. He gave the receipt to the officer. This, he said, was his first and last visit to France. He said that he could read but not write English, so the Second Appellant wrote that the notes were true, and he signed that. The beer and cigarettes were all for himself and his family, who would not be paying him for it.

14. There was correspondence between the Appellants, most of it in joint letters. These letters add little to the evidence which they gave. In the last letter, dated 29 June 2001, signed by both Appellants, though apparently written by the Second Appellant, they said that smoking 40 a day as they each did, the cigarettes purchased would last about three months, as would the allowance of 90 litres of wine if they had bought that amount. The letter said that it was not a reflection of "British justice" that they should be found instantly guilty without the chance to defend themselves, and that she should lose more than £3,000 worth of property and the First Appellant £400 worth of goods because they could not prove that the goods were for their own personal use.

The law

15. Relief is afforded by article 3 of the Excise Duties (Personal Reliefs) Order 1992 from payment of excise duty on excise goods imported by a Community traveller in respect of goods which he has obtained for his own use in the course of cross-border shopping and which he has transported. Article 2 defines "cross-border shopping" as

> "...the obtaining of excise goods duty and tax paid in the Economic Community provided that payment has not been, and will not be, reimbursed, refunded or otherwise dispensed with."

Article 3A provides for the conditions on which relief is given in the case of goods brought through the Channel Tunnel, which are termed "shuttle train goods":

> "(1) In relation to shuttle train goods, this article shall have effect for the purpose of determining whether relief has been treated as having been afforded under article 3 above.
>
> (2) No relief shall be treated as having been afforded if the goods are held for a commercial purpose.
>
> (3) Where the shuttle train goods exceed any of the quantities shown in the Schedule to this Order the Commissioners may require the person holding the goods to satisfy them that the goods are not held for a commercial purpose.
>
> (4) In determining whether or not any person holds shuttle train goods for a commercial purpose regard shall be taken of the factors listed in sub-paragraphs (a) to (j) of article 5(2) below.

(5) If the person holding the goods is required so to do but fails to satisfy the Commissioners that he does not hold them for a commercial purpose, it shall be presumed that the goods are held for a commercial purpose.

(6) . . ."

Article 5, so far as it applies in this appeal, provides as follows:

"(1) The reliefs afforded under this order are subject to the condition that the excise goods in question are not held or used for a commercial purpose whether by the Community traveller who imported them or by some other person who has possession or control of them; and if that condition is not complied with in relation to any excise goods, those goods shall ... be liable to forfeiture.

(2) In determining whether or not the condition imposed under paragraph (1) above has been complied with, regard shall be taken of-

(a) his reasons for having possession or control of those goods;

(b) whether or not he is a revenue trader;

(c) his conduct in relation to those goods and, for the purposes of this sub-paragraph, conduct includes his intentions at any time in relation to those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information whatsoever relating to those goods;

(g) the nature of those goods including the nature and condition of a package or container;

(h) the quantity of those goods;

(i) whether he has personally financed the purchases of those goods

(j) any other circumstances which appear to be relevant."

The Schedule to that Order sets out the quantities of goods specified for the purposes of paragraph 3A(3), and includes 800 cigarettes, 100 cigars, and 110 litres of beer.

16. Section 49 of the Customs and Excise Management Act 1979 ("CEMA") provides that,

(1) Where—

> > > (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—
>
> (i) unshipped in any port,
>
> . . .
>
> those goods shall, subject to subsection (2) below, be liable to forfeiture."

Subsection (2) is not relevant in the present case.

Section 151(b) of the Customs and Excise Management Act 1979 ("CEMA") provides that 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.

17. The Finance Act 1994 provides for a system of review of the Commissioners decisions, and of appeal from those decisions. Section 14(2) provides that any person in relation to whom, or on whose application, a decision to which that section applies may by notice in writing require the Commissioners to review that decision. The decisions concerned include those specified in Schedule 5 to the Act, which includes appeals against decisions to forfeit goods and vehicles. Section 15 provides for the review procedure:

> "(1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either—
>
> (a) confirm the decision; or
>
> > > (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.
>
> (2) Where—
>
> > > (a) it is the duty of the Commissioners in pursuance of a requirement of any person under section 14 above to review any decision; and
> >
> > (b) they do not within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,
>
> they shall be assumed for the purposes of this Chapter to have confirmed the decision."

Section 16 provides for appeals to the Tribunal, and as to matters defined as ancillary matters in Schedule 5 to the Act, which includes appeals such as the present, 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—
>
> > (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
> >
> > (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."

The contentions

18. Miss Shaw, for the Commissioners, began by submitting that the officer who made the decision not to restore the goods and vehicle was entitled to reach the conclusion that the goods were imported for a commercial purpose without requiring the Appellants to satisfy him to the contrary. She contended that article 3A(3) is not necessary, and that the officer made a decision on the basis of article 5(2)(a) to (j). Miss Shaw submitted that he reached his decision reasonably. Although the review was out of time, Miss Shaw contended, the Tribunal ought to consider it, since it was a reasonable review and was persuasive. It also bolstered Miss Booth's decision and its reasonableness. The conclusion that the Appellants were commercial smugglers was justified by the evidence. Although there were no reasons given in the decision letter, Miss Booth's evidence contained the reasons, and she was an honest and compelling witness. The Commissioners relied particularly upon the concealment of the cigarettes, the Second Appellant's failure to disclose all that she had bought only a few minutes earlier. The explanation as to the packing of the goods in the car was not acceptable, and the goods packed like that could have been dangerous. The cigarettes, being Belgian in origin, could not have been acquired in the course of cross-border shopping, but must have been illegally purchased in France, as the absence of a receipt suggested. There was no evidence that the receipts were destroyed, and Mr Elliott would have put them all together. The review also drew attention to the fact that the Second Appellant was a frequent traveller, who failed to disclose her trip in March 2001. If the purchase was not for commercial purposes, why should a traveller buy three months supply of goods every month. Finally, there was no record that Mr Elliott had failed to record the First Appellant's mention of his wife and son: his notes were signed by both Appellants as a true record.

19. The Appellants relied upon the truth of their evidence. They added that had they been told at the time that the goods had Belgian tax stamps on them, they could easily have walked back to the shop and established that they had bought the cigarettes there.

Conclusions

20. In accordance with section 16(4) of the Finance Act 1994, our function is to determine whether or not the decision not to restore the excise goods and vehicle to the Appellants was a decision at which no reasonable body of Commissioners could have arrived. The expression "reasonable" is used in the sense in which it was used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. That is, that to be a reasonable decision the decision maker must have considered all relevant matters and must not have taken into consideration anything that was not relevant.

21. This is not a case in which we have to decide whether a review decision was reasonable or not. The review was several months too late, and it is therefore assumed that the original decision not to restore was upheld. Unfortunately, that decision was unaccompanied by any reasons. Miss Shaw submitted that Miss Booth, the author of that decision, had provided her reasons in her witness statement, made some seven months later, and two months after the date of the review letter. If we were to confine this decision to saying that we had heard and considered all the evidence and relevant factors in the case and had concluded that the decision not to restore was reasonable, or was not reasonable, as the case may be, we cannot avoid feeling that neither party would consider the decision a satisfactory one. But in any event, Miss Booth's statement did not give any reasons for refusing to restore the goods and vehicle. They gave reasons why she considered that seizure had been appropriate, and why it was also appropriate that there should have been no interviews after the initial questions. That is a very different matter from giving reasons for her decision. The question of restoration does not arise until after seizure, and is a different matter. Seizure may have been entirely appropriate, and yet restoration of goods or vehicle might be a reasonable course to take. So to say that there were good reasons for seizure does not touch upon the next question, whether the goods and vehicle should be restored. It is still the case that no reasons for refusing to restore have been given.

22. It is clear from the first sentence of the section of the review letter headed "Consideration" that the review officer has misunderstood his function. It is not his function to determine whether or not a reasonable body of Commissioners could have come to the decision not to restore. The review officer's function is quite different from that. It is to review the decision: to consider all the facts and relevant matters and to come to his own decision upon them. He is entitled under section 15(1) to confirm, withdraw, or vary that decision. If what he has done is no more than to consider whether a reasonable body of Commissioners could or could not have come to that decision, he has not fulfilled his proper function. In the present case, it is apparent from the review letter that that is what happened. Like Miss Booth, he gave reasons based upon evidential matters why the seizure was appropriate, and then concluded by saying that there were no exceptional circumstances that would warrant restoration, and that the Commissioners' policy treated these appellants neither better nor worse than any others in a similar position. In effect, that is saying that since the seizure was appropriate, there will be no restoration.

23. We turn now to the evidence. The Tribunal is entitled to look at the evidence where there is an effective review or an original decision assumed under section 15 to have been upheld, in order to ensure, especially if it is contested, that the review or original decision has been based upon correct evidence. If it has not, even though the decision making officer was unaware of the fact, the decision cannot be a reasonable one. The Commissioners are the body responsible for

making the decision, and the Commissioners act through their officers, intercepting officers, the officer making the original decision, and the review officer. So that if one limb of the Commissioners passes on incorrect information to another, for whatever reason, it is nonetheless the Commissioners who are misinforming themselves.

24. We heard the Appellants give evidence, and on the whole we considered them to be telling the truth. Having said that, we did not find that the Second Appellant's explanation for failing to declare a further 4,800 cigarettes which she had bought only a few minutes or so earlier was very convincing. We are not satisfied, however, that the First Appellant can be said to have been aware of that underdeclaration. However, when it comes to the packing of the goods in the car, we considered that what the First Appellant said was the truth. In the first place, he explained clearly how the goods had been packed, and not only that but Mr Elliott agreed that that was how they had been packed. That disposes of the suggestions that nobody would put crushable goods like cigarettes under heavy cases of beer. In any case, whatever the purpose of the importation, no-one with sense would so pack cigarettes as to do them extensive damage. We have difficulty in understanding how, if they were thus packed, the cigarettes would be anything other than clearly visible. Contrary to what Mr Tooke said in his review letter, Mr Elliott did not record in his notes that the cigarettes were "hidden" under the cases of beer.

25. There follows the matter of the origin of the cigarettes. Miss Shaw adverted to the lack of a receipt. But it was the Appellants' evidence that they had given receipts to Mr Elliott; Mr Elliott said that he could not remember what receipts had been handed to him, and he did not know where they were. He also said that he had not noticed that the cigarettes were of Belgian origin. Nor was any Belgian tax stamp, nor any of the cigarette packaging produced in evidence to shew this. The only evidence was a bare statement by Mr Tooke, relating to departmental records which were not produced either. However, even if the origin of the cigarettes was Belgium, there was no evidence to shew that they had not had such duty as was exigible paid upon them in France. Article 2 of the 1992 Order refers to the obtaining of excise goods duty and tax paid in the Economic Community, rather than the country in which the goods were purchased.

26. In this case the Appellants were not required to satisfy the Commissioners that the goods which they were importing were not held for a commercial purpose. That being so, the statutory presumption that they were so held does not arise. Therefore the officer concerned, Mr Elliott, had to fall back upon article 5(2)(a) to (j) of the 1992 Order (see paragraph 15 above). The answers to questions arising out of that paragraph were largely lost because of the want of any interview. Doing the best that we can on the evidence before us, we would consider the sub-paragraphs as follows:

> (a) the Appellants were never asked, but said in later correspondence that the goods were for their own use.

(b) neither was asked, but it appears that neither was a revenue trader.

> (c) the conduct would include the Second Appellant's underdeclaration, the First Appellant's failure to correct that, and the alleged concealment of the cigarettes. Neither Appellant was asked about his, her, or their intentions, save that the First Appellant said that he had said that some of the cigarettes were for his wife and son.

(d) the location of the goods was in the car in Coquelles.

(e) the mode of transport was private car.

(f) there apparently were receipts, handed to Mr Elliott, which have never been seen again.

(g) there seems to have been nothing remarkable about this.

(h) the quantity of cigarettes was considerably in excess of the quantities set out in the Schedule to the 1992 Order.

(i) it appeared that the Appellants had personally financed the purchases.

(j) possibly the previous journey made by the Second Appellant, and the comment that people do not smoke more than one brand of cigarette, and the Belgian origin.

Of those matters, it appears to us that all except (c), (h), and (j) were neutral or in the Appellants' favour. We have already dealt with (c), and with the matter of the Belgian origin. It is also the case that, probably in part because there had been no interview, the Commissioners did not at any stage consider what the Appellants' several intentions were with respect to the goods, since they were never asked.

27. Miss Shaw contended that the Second Appellant was a regular traveller, and went to buy excise goods monthly. That was not in the evidence. All that there was in the evidence was that the Second Appellant had been as a foot passenger a fortnight earlier, and by car the previous December. There was also evidence that she had travelled by ferry, with two other friends (not the First Appellant) on 10 March 2001. There was no evidence that she had brought back any or any significant quantity of excise goods on that occasion. That evidence did not suggest to us a regular and frequent traveller for the purpose of purchasing excise goods. It appears that the Commissioners hold the view that members of the public who travel to France and Belgium are presumed, apparently, all to behave in exactly the same way, without any individuality. If it were really the case that smokers invariably only smoke one brand of cigarette, then the fact that these Appellants had three different brands is also capable of shewing that, as the First Appellant said, the other two brands were for his wife and son. It does not necessarily follow that different brands are for the satisfaction of customers in the way of trade.

28. Of the relevant matters which the Commissioners should have taken into consideration with respect to the restoration of goods and vehicle, as opposed to the appropriateness of seizure, it seems to us that all that was actually considered was whether there were any exceptional circumstances and whether the Commissioners; policy was being properly adhered to. The circumstances of the importing of the goods, and, more important, the Appellants' intentions with regard to the goods, appear to us to have been ignored. The additional fact that, as we have found on the evidence, the decision was based upon some incorrect evidence, in our judgment renders the decision not to restore unreasonable.

29. In accordance with section 16(4) of the Finance Act 1994, therefore, we declare the decision against which this appeal has been brought to have been unreasonable, and we direct that a further review should be carried out, taking

into account all the points which we have set out above. To that extent, this appeal is allowed.

30. The Appellants made an application at the hearing for costs in case they should succeed in this appeal. We take the view that the costs ought, in the normal way, to follow the event. However, if either party wishes to be heard on the matter of costs, or in default of agreement as to costs, we direct that each party shall have liberty to apply to the Tribunal as to costs. Any such application should be made not later than 42 days after the date of release of this appeal.

ANGUS NICOL

CHAIRMAN

RELEASED:

LON/01/8174-JJHAL.NIC