

Out of practice

It may be an established practice, but HMRC's lengthy detention of goods is not always lawful and should be challenged, says **Marc Glover**

OCCASIONALLY A CASE is reported that reminds lawyers of the need not to take an entrenched practice for granted but instead review its genesis to ascertain whether or not it is lawful.

In *R on the application of Millennium Cash & Carry Ltd v HMRC* [2010] EWHC 1308 (Admin), HMRC had detained £1.4m of alcoholic goods following inspection of cash and carry facilities. The detention of such goods is a daily occurrence across the UK in warehouses, and is used by HMRC to provide a period to investigate the supply chain of detained goods and whether VAT and excise duties have, or should have, been paid in relation to the same. Often the matter concludes by HMRC advising that the detention is lifted.

There are obvious strains placed on a business by a detention. Goods are usually left in situ by HMRC (they are not physically taken away) with the prohibition that they cannot be traded. The business is left having to use its (inevitably limited) storage space to house the detained goods for which it may already have paid. Further, the business still has to service its market and will invariably have to obtain a replacement consignment of the detained stock at short notice, and therefore increased cost, to keep its supply reputation with customers or to meet its contractual obligations. Consequently, detentions have an immediate impact on a business' Achilles heel: its cash flow.

The expectation is that the length of detention will be kept short – to a few days. HMRC's published guideline is that a detention would normally be no more than five working days, and thereafter extensions would be provided by an operational manager. However, there is unease that HMRC can use the detention of goods – particularly at busy times of year, such as Christmas – to put out of business an operation which an officer might have concerns is involved in VAT or excise fraud, albeit without having sufficient evidence to take formal action.

The concern about overlong periods of detention was expressed by the Court of Appeal in the case of *Gora & Ors v Commissioners of Customs & Excise* [2003] EWCA Civ 525, in which the court talked about a period of detention in excess of four months as being unsatisfactory.

Suspicious minds

In *Millennium* the liquor had been detained for a period of 78 days. The claimant applied for an interim order for the delivery up of its goods. The commissioners argued that they were empowered by statute to detain goods, in particular by section 139 of the Customs and Excise Management Act 1979, which provides "anything liable to forfeiture under the Customs and Excise Act may be seized or detained by any officer". It was accepted that "liable to forfeiture" would include alcoholic goods on which duties had not been paid.

HMRC's stance was that under section 139 it did not have to show that the stock was liable to forfeiture, but rather (1) while they investigated whether or not goods were liable to forfeiture, (2) they could detain the same for such reasonable period of time as was required to complete the investigation, and as such the application for the return of the detained goods stood to be dismissed.

Indeed, in *Demand & Supply Cash and Carry Ltd v HMRC* [2009] EWHC 3321, the court noted that an "adequate reason" for detention was to investigate if excise duties had been paid. Although the court in *Demand & Supply* went on to comment that it was arguable that HMRC should have "some cause for suspecting... a real possibility" of non-payment of duties (and therefore liability to forfeiture) before a detention, it did not make a finding on that point.

Limited guidance

In *Millennium* the court was troubled by the dearth of guidance on the trigger required before HMRC could detain goods. Can an officer detain at will simply to investigate, or should there be a suspicion and if so to what level? As *Millennium* involved an interim application, that issue was left to be determined in a later case.

Regarding the second point, the court determined that while section 139 clearly implied a short period for detention before the commissioners must elect to release or forfeit the goods, it was "at the very least arguable that the statute does not grant to the commissioners the power for which they contend, namely the power to detain for a reasonable period to determine" and "if I am right in my conclusion that the power to detain... can

only lawfully be exercised for a short period, that period has by now elapsed".

Before the decision in *Millennium*, parties seeking to challenge prolonged detentions had not seized upon the argument concerning the lack of statutory authority for lengthy detentions, but rather had challenged them by way of judicial review of the reasonableness of the commissioners' decision to authorise continued detentions of greater duration than five days.

Most recently that approach was followed in the case of *R on the application of Eastenders Cash & Carry v HMRC* [2010] EWHC 135 (Admin), in which alcoholic liquor had been detained for over 90 days. In *Eastenders* the claimant relied on the published guideline that a detention would normally be no more than five working days, and the court, having considered the concerns of the Court of Appeal as expressed in *Gora*, had sympathy for the claimant.

Although at an interlocutory hearing the claimants in *Eastenders* (as in *Millennium*) obtained an order for the release of the detained goods, it was on terms that it paid a sum of money into court representing the potential duties attributable to the liquor. Further, the burden of demonstrating a serious triable issue concerning the 'reasonableness' of HMRC's decisions to extend the period of detention of the goods was on the claimant throughout and the finding in its favour was specific to the facts of that case.

The decision in *Millennium* is of greater significance to the claimant in a similar scenario because the burden of persuading the court that the period of detention was 'lawful' fell on HMRC. In failing to convince the court that the duration of the detention was permitted by statute (and therefore that the interim application for the return of the goods should be dismissed) there was no question of the claimant having to pay a sum into court before its goods were released to it, and the conclusion regarding the period of detention permitted by section 139 is not fact specific.

This reminds all lawyers that simply because a practice has become established and the route to challenging it tried and tested, does not mean that a keen review of the lawfulness of that practice will not bear fruit.

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