[2016] UKUT 0195 (TCC)

Reference number: UTJR/2015/004

EXCISE DUTY – claims for "drawback" – EU Directive 92/12/EEC, arts 7, 22 – EU Directive 2008/118/EC, arts 9, 33 – Excise Duty (Drawback) Regulations 1995, regs 7, 8 – whether refusal of claims as a consequence of Claimant having failed to make goods available for inspection for not less than two business days following notice of intention to claim drawback was unlawful – whether contrary to EU law – principles of proportionality and fiscal neutrality – Scandic Distilleries SA v Direcția Generalã de Administrare a Marilor Contribuabili [2014] STC 1 considered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
IN THE MATTER OF A JUDICIAL REVIEW
BETWEEN

THE QUEEN
(on the application of HAMMONDS OF KNUTSFORD PLC)

Claimant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

TRIBUNAL: MRS JUSTICE WHIPPLE

JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 21 and 22 March 2016

Michael Firth, instructed by Morrisons, solicitors, for the Claimant

James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

INTRODUCTION

1. The Claimant seeks judicial review of the refusal by The Commissioners for HM Revenue and Customs ("the Commissioners") to pay five "drawback" claims (the "Claims"), as follows:

	Claim number	Claim date	Amount
(a)	81120	15 April 2010	£20,554.56
(b)	81124	15 April 2010	£20,554.56
(c)	89843	18 July 2011	£16,935.84
(d)	89855	16 July 2011	£23,175.36
(e)	89857	16 July 2011	£23,175.36
Total			£104,395.68

2. The Claims relate to excise duty on bottled alcoholic drinks. That duty was paid in the United Kingdom. When the Claimant dispatched the goods to customers in other EU Member States, it claimed repayment of that excise duty, on the basis that excise duty had been paid or guaranteed for payment in the other Member States in question. This is, in very summary terms, what "drawback" means.

3. The Commissioners refused the Claims because in each case the Claimant had not made the goods available for inspection by the Commissioners for at least two clear business days (calculated in such a way as to mean 48 hours over two business days, in effect) following notification to the Commissioners of the intended dispatch to another Member State, as domestic law requires as a condition precedent to obtaining drawback (a requirement which we shall refer to as the "inspection facility rule"). In fact, the Claimant's goods had been available for inspection for a period short of 48 hours, in each case being dispatched by the warehouse operator, in error, at the end of the second business day, but before the 48 hour period had elapsed.

4. The Claimant argues that the refusal of the Claims as a consequence of its admitted non-compliance with the inspection facility rule is unlawful, either because the requirement is itself contrary to EU law, or because the sanction which follows from non-compliance (namely refusal of the Claims) is disproportionate and undermines fiscal neutrality; that for any or all of those reasons, the inspection facility rule must be disapplied, with the effect that the Claims must be paid in full (with statutory interest). The Commissioners maintain that the inspection facility rule is a well-established and lawful element in the legislative package by which the EU drawback provisions have been implemented domestically, and that the refusal of the Claims consequent on the breach of that rule is permissible, being compliant with EU law, proportionate and compatible with the principle of fiscal neutrality.

5. It can be seen, even following this short introduction, that the Claimant's case is a large one. If the Claimant is correct, then the inspection facility rule is unlawful and inapplicable, not only to this Claimant in relation to these Claims, but generally. The nature and scope of the particular breach is immaterial, on the Claimant's argument, with the result that a modest breach of a few hours (as here) falls to be treated in the same way as a gross breach by dispatch of goods without any opportunity for inspection at all. Mr Firth, Counsel for the Claimant, did not shrink from this consequence, but embraced it as the logical conclusion of his arguments.

6. The Claimant also puts its case in a narrower way, as an alternative, to the effect that even if the inspection facility rule is not generally unlawful, it cannot lawfully be applied to these particular Claims, because the default in each case was insubstantial when weighed against the draconian penalty of disallowing the claim altogether. In that alternative way, so it is argued, the legislation is unlawful, being disproportionate and contrary to fiscal neutrality in its effect in relation to these Claims, if not generally.

FACTS

7. The Claimant is a wholesaler of alcohol with customers based in the UK and abroad. The Claims fall into two categories. So far as the first two claims are concerned: the Claimant faxed "Notices of Intention" (as required by domestic regulations) in relation to two consignments of beer to the Commissioners on 19 March 2010 (a Friday). The beer was at the time held to the Claimant's order by a third party, Safe Cellars Ltd. The Claimant instructed the third party not to export the beer until 24 March 2010, allowing for the two day inspection facility. In fact, and unknown to the Claimant, the beer left storage at around 17.00 on Tuesday 23 March 2010, which was 7 hours short of the 48 hour period required by the inspection facility rule, which would have expired at midnight that day. The Claimant's claims for drawback were dated 25 March 2010, and were submitted to the Commissioners on 15 April 2010. Those Claims were refused by the Commissioners on 28 April 2010 because the Claimant had not complied with the inspection facility rule. On 19 July 2010 the Claimant appealed that refusal to the First-Tier Tribunal ("FTT") but on 11 August 2011 that appeal was dismissed by Lady Mitting sitting as a judge of the FTT, under FTT reference TC/2010/06015.

8. So far as the third, fourth and fifth claims are concerned: the Claimant faxed Notices of Intention in relation to those three consignments of beer to the Commissioners on 24 June 2011 (a Friday). The beer was at the time held to the Claimant's order by a third party, Seabrook Warehousing Ltd. The Claimant instructed that third party not to export the beer until 29 June 2011, allowing for the two day inspection facility. In fact, and unknown to the Claimant at the time, the beer left storage on 28 June 2011, short of the required 48 hour period. By claims submitted on 16 and 18 July 2011 the Claimant claimed drawback. Those Claims were refused by the Commissioners on 5 August 2011 because of the early departure. The Claimant requested a statutory review, and on 8 February 2012 the reviewing officer upheld the decision to withhold drawback. There was no appeal to the FTT against the review decision.

9. On 30 May 2013, the Court of Justice of the European Union ("CJEU") delivered judgment in Case C-663/11 *Scandic Distilleries SA v Direcția Generalã de Administrare a Marilor Contribuabili* [2014] STC 1. On 2 May 2014 the Claimant's representatives wrote to the Commissioners querying the refusal of drawback in a different case, citing *Scandic*, which had recently come to their attention and asking the Commissioners to reconsider. The Commissioners replied on 27 June 2014, having reconsidered, stating that *Scandic* did not apply to the Claims and upholding the original decision. The Claimant wrote back to the Commissioners on 3 October 2014 requesting repayment of the Claims on the basis that *Scandic* altered the analysis and mandated payment of the Claims. The Commissioners responded on 9 December 2014, addressing the Claimant's various arguments, and concluding that the inspection facility rule remained lawful notwithstanding *Scandic*.

10. The Claimant disagreed. An exchange of judicial review pre-action protocol correspondence followed. On 6 March 2015 a Claim Form for judicial review was issued accompanied by the Claimant's Statement of Grounds and a witness statement from Mr Jonathan Hammond, managing director of the Claimant. The Commissioners resisted the claim for judicial review in their Acknowledgement of Service and Summary Grounds, lodged on 26 March 2015. The matter came before Kenneth Parker J, who by order dated 20 May 2015 adjourned the matter to an oral permission hearing, giving directions for skeletons to be lodged in advance. The oral hearing took place on 11 June 2015 before Popplewell J, who granted permission and gave standard directions for a substantive hearing. We will come back to a number of procedural points which emerge from the sequence of events outlined above at the end of this judgment.

11. On 18 August 2015, the Commissioners filed their Detailed Grounds for Contesting the Claim, supported by witness statements from Ms Amy Burgess, a manager employed by the Commissioners in the Indirect Tax Directorate in the Alcohol, Tobacco, Holding and Movement group, with policy responsibility for drawback; Ms Anne Fitzcharles, an officer of the Commissioners, who exhibited the 2010 correspondence between the Claimant and the Commissioners; and Ms Gillian Wood, excise assurance officer for the Commissioners, who exhibited the 2011-12 correspondence between the Claimant and the Commissioners. In response, the Claimant sought to admit a second witness statement from Mr Hammond and a witness statement from Mr Tristan Thornton, a tax consultant who had previously been involved in a judicial review against the Commissioners brought by Millenium Cash and Carry Ltd challenging the Commissioners' seizure of duty paid stock in 2010, who exhibited certain materials from that piece of litigation.

12. On 21 August 2015 the Commissioners applied to have the claim for judicial review transferred to the Upper Tribunal pursuant to section 31A of the Senior Courts Act 1981. The Claimant resisted transfer. Picken J granted the Commissioners' application on 12 October 2015 and gave permission for the Claimant's additional witness statements to be adduced (the Commissioners not resisting the grant of that permission).

13. The judicial review was listed for two days before us, on 21 and 22 March 2016. We had the benefit of skeleton arguments from each party filed in advance of that hearing. Mr Firth, counsel for the Claimant, also produced a written note for the hearing, and a written reply. We thank both Counsel for their detailed and helpful submissions, written and oral.

EU DIRECTIVES

14. The first two claims were made at a time when Directive 92/12/EEC was in force. That Directive provides, so far as is relevant, as follows:

> **"Article 7**
> 1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.
> 2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, intended for delivery or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.
> 3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.
> 4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18 (1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.
> 5. The person, trader or body referred to in paragraph 3 must comply with the following requirements:
>
> (a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;
>
> (b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
>
> (c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.
>
> 6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22 (3).
>
> **Article 22**
> 1. In appropriate cases, products subject to excise duty which have been released for consumption may, at the request of a trader in the

course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not indented for consumption in that Member State.

However, Member States may refuse request for reimbursement where it does not satisfy the correctness criteria they lay down.

2. In the application of paragraph 1, the following provisions shall apply:

(a) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid. However, the competent authorities may not refuse reimbursement on the sole grounds of non-presentation of the document prepared by the same authorities certifying that the initial payment had been made;

(b) movement of the goods referred to in (a) shall take place under cover of the document specified in Article 18 (1);

(c) the consignor shall submit to the competent authorities of his Member State the returned copy of the document referred to in (b) duly annotated by the consignee which must either be accompanied by a document certifying that the excise duty has been secured in the Member State of consumption or have the following details added:

- the address of the office concerned of the tax authorities in the Member State of destination,

- the date of acceptance of the declaration by this office together with the reference or registration number of that declaration;

(d) products subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them has established that such markings or marks have been destroyed.

3. In the cases referred to in Article 7, the Member State of departure is required to reimburse the excise duty paid only where the excise duty was previously paid in the Member State of destination in accordance with the procedure laid down in Article 7 (5).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.

4. In the cases referred to in Article 8b the Member State of departure must, at the vendor's request, reimburse the excise duty paid where the vendor has followed the procedures laid down in Article 10 (3).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.

Where the vendor is an authorized warehousekeeper, Member States may stipulate that the reimbursement procedure be simplified.

5. The tax authorities of each Member State shall determine the monitoring procedures and methods applying to reimbursement made

in their territory. Member States shall ensure that the reimbursement of excise duty does not exceed the sum actually paid."

15. Council Directive 2008/118/EC repealed and replaced the 1992 Directive with effect from 1 April 2010 and was in force at the time of the third, fourth and fifth Claims. Chapter I of the 2008 Directive laid down general provisions for excise duty on various goods including alcohol and alcoholic beverages. Chapter II is headed "Chargeability, Reimbursement, Exemption". Article 9 is within Chapter II and provides:

> **"Article 9**
> The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.
>
> Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States."

16. Chapter V is headed "Movement and Taxation of Excise Goods After Release for Consumption" and includes the following:

> **"Article 33**
>
> 1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
> …
> 6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State."

17. The language of the two Directives is different. Notably, the 1992 Directive states in terms at Article 22(3) that Member States may refuse a request for drawback where

the request does not satisfy the "correctness criteria" which the Member States have laid down. Some time was spent at the hearing discussing what was meant by "correctness criteria" and, more specifically, what if anything was to be understood from the absence of those words in the 2008 Directive. We will return to the proper construction of these Directives later in this Judgment.

DOMESTIC REGULATIONS

18. The Excise Duty (Drawback) Regulations 1995 (SI 1995/1046) implemented the 1992 Directive into domestic legislation. They came into effect on 1 June 1995. The authorising provision is found in section 2 of the Finance (No 2) Act 1992. They provide for drawback claims to be made on "eligible goods" as defined at regulation 5 as goods on which duty has been paid *and* those goods have been exported, warehoused for export or destroyed. The claims can be made by "eligible claimants" as defined at regulation 6. Part III of the 1995 Regulations is headed "Claims, Conditions and Cancellation of Drawback" and includes the following:

> **"7.— General conditions**
> (1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the Act, every eligible claimant shall—
>
> (a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and
>
> (b) in addition to those conditions, comply with such other conditions as the Commissioners see fit to impose in a notice published by them and not withdrawn by a further notice.
>
> (2) If the Commissioners consider it necessary for the protection of the revenue they may, by a notice in writing delivered to a revenue trader, require him to comply with such additional conditions as they think fit to impose.
> (3) Sections 14 to 16 of the Finance Act 1994 shall have effect in relation to any decision of the Commissioners to impose additional conditions under paragraph (2) above as if that decision were a decision of a description specified in Schedule 5 to that Act.
> …
> (6) No claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid.
>
> **8.— Conditions to be complied with before export**
> …
> (2) Where an eligible claimant intends to claim drawback after export he shall, before export, comply with the following conditions—
>
> (a) he shall deliver to the Commissioners at such address as they shall specify a notice in writing stating that he intends to claim drawback and containing the following particulars—
>
> (i) his name and address,
>
> (ii) the address of the premises at which the goods may be inspected prior to their export,
>
> (iii) the description of the goods, including their nature and quantity,

(iv) the amount of duty paid in respect of the goods, and

(v) the address of the premises to which the goods are being exported;

(b) if the export is a dispatch he shall complete an accompanying document;

(c) if the export is not a dispatch he shall complete a single administrative document; and

(d) the goods and the accompanying document or single administrative document shall be available for inspection by the Commissioners, at any reasonable time, for not less than two clear business days following the day upon which the notice mentioned in sub-paragraph (a) above was received by the Commissioners."

19. The provision at issue in this judicial review is regulation 8(2)(d), which sets out the inspection facility rule. This rule is mandated by the opening words of regulation 8(2) ("*he shall, before export, comply …*"). However, the rule is itself subject to the opening words of regulation 7(1)(a) which confer a broad discretion on the Commissioners to relieve from sanction any failure to comply (by the words "*save as the Commissioners may otherwise allow*").

20. We understand the above domestic provisions to have remained in substantially similar terms since their introduction in 1995, and the inspection facility rule to have been a component of the 1995 Regulations from the outset. The 1995 Regulations were not materially amended when the 2008 Directive replaced the 1992 Directive.

COMMISSIONERS' POLICY

Notice 207

21. The Commissioners have published guidance in the form of Notice 207 "Excise Duty: drawback". The version current at the time of the Claims was published in April 2010 (that version was revised in April 2012, and the current version of the Notice is dated 1 May 2014; the extracts below are from the April 2010 version). Paragraph 3.1 explains the drawback system in the following terms:

> "the drawback system allows for the repayment of Excise duty paid on goods that have not been and will not be consumed in the UK".

22. Notice 207 is concerned with cases where excise duty has been paid in the UK, the goods are exported and duty is paid or secured in the destination state. That can be described as the "duty paid" basis for drawback, which was authorised by Articles 7 and 22(3) of the 1992 Directive and now by Article 33 of the 2008 Directive. That may be contrasted with another form of drawback claim, known as "warehousing for export" (WFE) under which in the UK prior to 1 June 2009 traders could claim reimbursement of duty where they had purchased duty paid goods which they intended to export, and the goods were placed in an excise warehouse and returned to duty suspension. Under WFE, the duty was reimbursed before the goods were exported. WFE was authorised under Articles 22(1) and 22(2) of the 1992 Directive.

23. The distinction between the two types of drawback claim is explained in the case of *R (on the application of Seabrook Ltd and others) v Revenue and Customs Commissioners* [2010] STC 996, a case to which reference was made in argument before us by way of background, in that the Claimant was one of the claimants in that judicial review which challenged the lawfulness of the decision to withdraw WFE with effect from 1 June 2009. The Claims at issue in this case were all made in reliance on the duty paid procedure. The distinction between the two procedures is important background when it comes to the case law, *Scandic* in particular.

24. The Notice sets out the main conditions for drawback, including at paragraph 5.1 the following:

> "We will pay drawback of Excise duty only if we are satisfied that all of the following conditions have been met:
>
> 1. The goods have not been and will not be consumed in the UK.
> 2. The duty on the goods was paid not more than three years before the event giving rise to the claim for drawback.
> 3. The duty claimed has not been remitted, repaid or drawn back prior to the claim.
> 4. The duty has been guaranteed, prior to despatch, in the Member State of destination, to the satisfaction of the fiscal authorities in that Member State and subsequently collected (despatch to EU only).
> 5. The claim is accurate.
> 6. You have observed the relevant conditions set out in this notice."

25. Paragraph 5.2 requires notice of intention to claim drawback to be given, and refers to section 7. Section 7 provides as follows:

> **"Notice of Intention**
>
> **7.1 Important Information**
>
> You must fulfil this condition before we will accept a drawback claim.
>
> **7.2 Notifying us that you intend to submit a claim for drawback**
>
> You must give us written notice of your intention (NOI) to claim drawback before the event that will give rise to the claim (except for accidental destruction).
>
> …
>
> **7.5 How much notice we require**
>
> You must give us at least two business days notice between the date on which the NOI is received at the DC and the day you intend to either
>
> - dispatch goods to another Member State

…

Saturdays, Sundays and bank holidays are **not** business days.

Those two clear days give us an opportunity to inspect the goods.

…

If you remove goods from the address specified or carry out destructions before the period of notice has expired, we will reject your claim."

26. Separately, paragraph 8 is headed "Submitting claims" and requires the claim to be submitted to the Commissioners with evidence of the UK duty payment. Paragraph 8.5 specifies the kind of evidence of UK duty payment which must be provided. Paragraph 8.6 is headed "Other evidence, if you are unable to provide the originals", and permits the Commissioners to accept alternative evidence in certain circumstances, noting that any alternative evidence must be discussed and accepted by the Commissioners in writing in advance of submitting claims.

Internal Guidance to Officers

27. The Commissioners also maintain internal guidance for the use of its officers headed "Internal Drawback Guidance extract – NOI process". Parts of that guidance are published by the Commissioners. However, the Commissioners referred in open court to other parts of that internal guidance which have not been published, including the following extract:

> "The period of inspection allows Assurance Officers to verify that goods described on the NOI document exist and confirm that they will be eligible goods once the drawback event takes place.
>
> Principal risks are:
>
> - Documentation is not correctly completed
> - Goods do not exist
> - Goods do not match the declaration on the NOI
> - Goods presented at premises where a number of similar goods are stored may be substituted ones and not those which supporting documentation relates
> - Substitution of low ABV goods when higher ABV goods are declared
> - Goods are allowed to leave the storage site before the period of inspection has expired; and
> - A claimant may quickly submit a second NOI for the same goods, to use a single set of goods to make multiple claims."

28. The guidance also lists the objectives of the visit to the declared premises, in the following terms:

> - "Confirm that the goods exist
> - Confirm that the goods are as described on the form

- Mark the goods
- Obtain unique marks and detail recorded on the goods
- React to when you suspect that the goods are not duty paid"

29. Under the heading "Breach of the NOI inspection period" the guidance states:

> "The inspection period is an important assurance tool. Where a business does not allow HMRC the full inspection period by exporting, dispatching or destroying goods before the expiry of the inspection period, then the subsequent claim may be rejected.
>
> …
>
> There are two occasions where we may consider a claim when the two … day inspection period has been breached. These are when:
>
> - The NOI period has been breached for the first time
> - It would be unfair or unreasonable to disallow the claim.
>
> If the NOI period has been breached for the first time you should normally allow the claim, but issue the claimant with a written warning giving a clear direction that a further failure to comply with this condition will normally result in that further claim being rejected.
> …
>
> Where there is a further breach, then the facts of this breach should be carefully considered. Normally the claim should be disallowed, however it may be allowed where it would be unfair or unreasonable to disallow; for example, where the event was beyond the control of the person holding the goods."

CLAIMANT'S CHALLENGE

30. The Claimant argues that the denial of its Claims to drawback is unlawful. The Claimant puts its case in three ways, namely (i) that the two stage procedure requiring a Notice of Intention to be submitted before the goods are dispatched is contrary to the Directives; (ii) that the consequence of failing to comply with the two stage claim procedure is contrary to the principle of proportionality; and (iii) that the consequence of failing to comply with the two stage procedure is contrary to the principle of fiscal neutrality. The Claimant recognises that there is significant overlap between those three articulations. The central issue is the lawfulness (judged by EU law principles) of a domestic provision which permits a drawback claim to be rejected for non-compliance with the inspection facility rule.

31. The Claimant's starting point in argument was the evidence which it has produced to support its case that duty has been paid in the UK and in the Member State of destination of the goods. In compliance with a pre-existing agreement with the Commissioners under paragraph 8.6 of Notice 207, the Claimant relied on "alternative evidence" to support its Claims; there is no dispute about the Claimant's entitlement to rely on alternative evidence or that the evidence actually produced appears to be in order. The Claimant admits that it breached the inspection facility rule by a few hours, but argues that the goods were in each case dispatched after ordinary working

hours on the second day and that the goods had in fact been available for inspection for two days during working hours, that the Commissioners had not indicated any intention to inspect these goods while they were available for inspection, and that the premature removal by the warehouse operator in each case was a mistake by a third party beyond the Claimant's immediate control. The Claimant also asserts, more generally, that inspection would not have informed the Commissioners of anything they did not already know, because physical inspection would not, in fact, enable the Commissioners to verify that duty had been paid on the specific goods inspected; at most it would enable the Commissioners to check whether the batch numbers matched the invoices on which duty had been paid at an earlier stage in the commercial chain and, possibly, to verify that the goods physically present at the warehouse were capable of matching the goods which were subject to the drawback claim. But, the Claimant argues, it is not possible to be sure, by inspection or indeed by any other means, that the particular goods in the warehouse are the subject of the drawback claim. The Claimant relies on Mr Thornton's witness statement in relation to this last point.

32. Based on the evidence adduced, the Claimant argues that it has fulfilled the substantive conditions attaching to the Claims, because it has demonstrated that the duty has been paid in the UK and in the Member State of destination. Whether duty has been paid on given goods is an issue of fact, so it is argued, to be determined on balance of probability. In this case, the Commissioners have "not admitted" whether the duty has been paid, and so the Claimant invites this Court to perform the fact-finding function on the evidence before it, and suggests that this Court's conclusion based on that evidence must inevitably be in the Claimant's favour (because the Commissioners have produced no evidence at all to suggest that these are bogus Claims). Once recognised that the duty has been paid in two Member States, the Claimant is entitled to repayment under the Directive – this is the Claimant's fundamental EU right. Whatever other rules are imposed by the taxing authorities in relation to any claim for drawback are, axiomatically, merely procedural rules, and breach of procedural rules cannot be punished by refusal of the claim, because that would be to impose a further condition on the fundamental EU right to repayment, which EU law prohibits. It would be open to the taxing authorities to impose a penalty for breach of the procedural rules, such as a fine, but it is not open to the authorities to refuse the Claims.

33. The Claimant relies on two main lines of CJEU case law to support its arguments. The first of those starts with Case C-96/07 *Ecotrade SpA v Agenzia delle Entrate* [2008] 3 CMLR 1. The other cases in this line of authority, which Mr Firth took us through in some detail, are: Case C-280/10 *Kopalnia Odkrywkowa Polski Trawertyn P Granatowicz, M Wąsiewicz, spólka jawna v Dyrektor Izby Skarbowej w Poznaniu* [2012] STC 1085, Case C-284/11 *EMS-Bulgaria Transport OOD v Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' Plovdiv* [2012] STC 2229, Case C-272/13 *Equoland Soc coop arl v Agenzia delle Dogane-Ufficio delle Dogane di Livorno* [2014] STC 2487, Case C-590/13 *Idexx Laboratories Italia Srl v Agenzia delle Entrate* [2015] STC 735, Case C-183/14 *Radu Florin Salomie v Direcția Generală a Finanțelor Publice Cluj* (Judgment dated 9 July 2015, unreported), and the Advocate-General Bot's Opinion in Case C-518/14 *Senatex GmbH v Finanzamt*

Hannover-Nord (Opinion delivered on 17 February 2016, unreported). We shall refer to these authorities compendiously as the *Ecotrade* cases.

34. The principle to be derived from the *Ecotrade* cases is revealed by consideration of just one of those cases, *Idexx.* In *Idexx,* the taxpayer had failed to comply with Italian legislation on the registration of intra-Community acquisitions which were subject to the reverse charge for VAT, and in consequence the authorities had assessed the taxpayer to tax, which was, in effect, to refuse the taxpayer's claim to deduction of tax on its intra-community acquisitions. The CJEU held that the taxpayer's right to deduct tax payable in relation to intra-community acquisitions could not be denied on the ground that it had not satisfied the formal requirements laid down by national law. On that central point, the Court held that:

> [30] According to the Court's settled case-law, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation (judgment in *Tóth*, C-324/11, EU:C:2012:549, paragraph 23 and the case-law cited).
>
> …
>
> [35] However, the formalities thus laid down by the Member State concerned, which must be complied with by a taxable person in order for the latter to be able to exercise the right to deduct VAT, should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure (judgments in *Bockemühl*, C-90/02, EU:C:2004:206, paragraph 50, and *Fatorie*, EU:C:2014:50, paragraph 34 and the case-law cited).
>
> …
>
> [37] Such measures, however, must not go further than is necessary to attain such objectives and must not undermine the neutrality of VAT (see, to that effect, judgments in *Collée*, C-146/05, EU:C:2007:549, paragraph 26 and the case-law cited, and *Ecotrade*, EU:C:2008:267, paragraph 66 and the case-law cited).
>
> [38] Thirdly, it is apparent from paragraph 63 of the judgment in *Ecotrade* (EU:C:2008:267) and from the Court's subsequent case-law (see, inter alia, judgments in *Uszodaépíto*, C-392/09, EU:C:2010:569, paragraph 39; *Nidera Handelscompagnie*, C-385/09, EU:C:2010:627, paragraph 42; *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458, paragraph 62; and *Fatorie*, EU:C:2014:50, paragraph 35) that, in the context of the reverse charge procedure, the fundamental principle of fiscal neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements.
>
> [39] The position may be different if non-compliance with such formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied (judgment in *EMS-Bulgaria Transport*, EU:C:2012:458, paragraph 71 and the case-law cited).

> [40] Consequently, where the tax authority has the information necessary to establish that the substantive requirements have been satisfied, it cannot, in relation to the right of that taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (see, to that effect, judgment in *EMS-Bulgaria Transport*, EU:C:2012:458, paragraph 62 and the case-law cited).

35. Thus, the central proposition to be derived from paragraph [40] of *Idexx*, and reflected in all the other *Ecotrade* cases, is that where the tax authority has the information necessary to establish that the substantive requirements attaching to a claim which itself is the exercise of an EU right have been satisfied, the tax authority cannot impose additional procedural conditions, non-compliance with which will or might result in denial of that claim. It can only penalise non-compliance with procedural conditions by proportionate sanctions, falling short of outright refusal, for example, a fine.

36. The Court in *Idexx* provided guidance on the difference between substantive requirements on the one hand, and formal (or procedural) requirements on the other:

> [41] In that regard, it must be stated that the substantive requirements for the right to deduct are those which govern the actual substance and scope of that right, as provided for in Article 17 of the Sixth Directive, entitled 'Origin and scope of the right to deduct' (see, to that effect, judgments in *Commission* v *Netherlands*, C-338/98, EU:C:2001:596, paragraph 71; *Dankowski*, C-438/09, EU:C:2010:818, paragraphs 26 and 33; *Commission* v *Hungary*, C-274/10, EU:C:2011:530, paragraph 44; and *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wasiewicz*, C-280/10, EU:C:2012:107, paragraphs 43 and 44).
>
> [42] The formal requirements for that right, by contrast, regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns. Those requirements are set out in Articles 18 and 22 of the Sixth Directive (see, to that effect, judgments in *Commission* v *Netherlands*, EU:C:2001:596, paragraph 71; *Collée*, EU:C:2007:549, paragraphs 25 and 26; *Ecotrade*, EU:C:2008:267, paragraphs 60 to 65; *Nidera Handelscompagnie*, EU:C:2010:627, paragraphs 47 to 51; *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wasiewicz*, EU:C:2012:107, paragraphs 41 and 48; and *Tóth*, EU:C:2012:549, paragraph 33).
>
> [43] So far as concerns taxable intra-Community acquisitions of goods, the substantive requirements stipulate, as follows from Article 17(2)(d) of the Sixth Directive, that those acquisitions must have been effected by a taxable person, that that person must also be liable for the VAT payable on those acquisitions, and that the goods in question must be used for the purposes of his taxable transactions.

37. The Court's conclusion was:

> [45] Accordingly, it follows from all of the foregoing considerations that the right, referred to in Article 17(2)(d) of the Sixth Directive, to deduct the VAT payable in relation to the intra-Community acquisitions at issue in the main proceedings cannot be denied to *Idexx* on the ground that it did not satisfy the formal requirements laid down by national law in implementation of Article 18(1)(d) and Article 22 of the Sixth Directive That right to deduct arises, in accordance with Article 17(1) of that directive, at the time when the deductible tax becomes chargeable.

38. One other *Ecotrade* case is relevant for its facts, and that is *Equoland.* That case concerned goods which were imported from a third country and placed on a warehouse register in Italy without actually being physically present at the warehouse; the goods were then withdrawn from the warehouse register, and tax was accounted for on the goods according to the reverse charge. Italian law required warehoused goods to be physically placed in the tax warehouse. That rule had been breached because the goods had at no stage been physically present in the warehouse. In consequence, the Italian customs authorities charged the importer import VAT together with a 30% penalty for non-compliance. The CJEU referred to *Ecotrade* and other authorities, before concluding that breach of the requirement of physical placement of goods in the warehouse (which Mr Firth argues is analogous with the inspection facility rule at issue in this case) could not lead to denial of the right of deduction of input tax under the reverse charge mechanism.

39. As to its reasoning, the CJEU noted that that there was no loss of tax, because the importer had in fact accounted for any tax due under the reverse charge mechanism ([37]). It concluded that the requirement to pay VAT on importation without consideration being given to the payment already made through the reverse charge mechanism amounted to double taxation ([40]). It held that the charge to tax was unlawful:

> [40] …it must be noted, at the outset, that the requirement that the taxable person must, in addition to an increase of 30%, again pay the VAT on importation, without consideration being given to the payment already made, amounts, in essence, to depriving that taxable person of his right to deduct. To make a single transaction subject to double imposition of VAT, while only allowing that tax to be deducted once, leaves the taxable person liable to pay the remaining VAT.
>
> [41] In that regard, without it being necessary to examine the compatibility of that part of the penalty with the principle of proportionality, it suffices to recall, first, that the Court has repeatedly held that, in view of the preponderant position which the right to deduct has in the common system of VAT, which seeks to ensure complete neutrality of taxation of all economic activities, that neutrality presupposes that a taxable person may deduct the VAT paid or payable in the course of all his economic activities, a penalty consisting of a refusal of the right to deduct is not compatible with the Sixth Directive where no evasion or detriment to the budget of the

> State is ascertained (see, to that effect, judgments in *Sosnowska*, C-25/07, EU:C:2008:395, paragraphs 23 and 24, and *EMS-Bulgaria Transport*, EU:C:2012:458, paragraphs 68 and 70).
>
> [42] Furthermore, it is clear from the case-law of the Court that, contrary to what the Italian Government argued at the hearing, the reverse charge mechanism provided for under the Sixth Directive enables authorities, inter alia, to counter the tax evasion and avoidance observed in certain types of transactions (see judgment in *Véleclair*, C-414/10, EU:C:2012:183, paragraph 34).
>
> [43] In so far as, according to the referring court, there is neither evasion nor attempted evasion in the main proceedings, the part of the penalty consisting of requiring a new payment of VAT already paid, without that second payment giving rise to a right to deduct, cannot be regarded as consistent with the principle of VAT neutrality.

40. The CJEU then considered the 30% penalty and concluded that it was for the national court to assess the proportionality of that measure ([44]-[48]).

41. Mr Firth relies on the *Ecotrade* cases to support his argument that once a claim has been established by fulfilment of the substantive conditions attaching to that claim, it cannot be refused for breach of a mere procedural or formal condition laid down by the tax authorities of the Member State. Further, it is clear from these cases (he argues) that the inspection facility rule falls into the procedural category. That proposition is advanced by way of analogy with cases in the *Ecotrade* line, such as *Equoland*, in relation to which the Claimant argues that there is little difference between a requirement that goods should be physically present at the warehouse as in that case, and a requirement that goods should be available for inspection at the warehouse for a minimum period; and *Polski Trawertyn* where the Court accepted (at [48]) that an invoice has an important documentary function because it may contain verifiable data, but nonetheless that domestic rules about the form and content of invoices produced in support of claims to repayment were merely procedural.

42. The second authority on which the Claimant places particular emphasis is *Scandic*. In that case, the taxpayer marketed alcoholic products in Romania and other Member States. The taxpayer paid duty in Romania on products which it then dispatched to the Czech Republic, where duty was again paid. It claimed reimbursement of the duty from the Romanian tax authorities, but its claim was refused, because the taxpayer had failed to notify the Romanian tax authorities of the proposed dispatch of the goods out of the territory, as the taxpayer was required to do by Romanian law. The Romanian Court referred questions to the CJEU. The CJEU considered the 1992 Directive, which was in place at the time of the events in dispute. The Advocate General (Sharpston) and the Court concluded that the Romanian authorities could not refuse the claim for breach of the notification requirement. Both the Advocate General and the Court drew a distinction between Article 22(2) of the 1992 Directive, which related to duty suspension arrangements where the claim is made prior to export and the goods are then dispatched under guarantee of payment in the destination Member State and which was not in issue in *Scandic* (nor, we interpose, in

this case), and Article 22(3) which related to goods on which duty had been paid or guaranteed in two Member States, which was in issue in *Scandic* (and, we interpose, is at issue in this case). But then the Advocate General and the Court took different routes to their (agreed) conclusions. The Advocate General accepted that a Member State could require pre-notification of dispatch in Article 22(3) cases, but she identified (and answered) the problem in this way:

> "[41] The difficulty in the present case lies, however, not with the procedure for lodging a request as such but with the refusal of a request which, although substantively complete in all respects, did not formally comply with that procedure. Can such a refusal be justified on the ground of a failure to satisfy the 'correctness criteria' laid down by the member state?
>
> [42] I agree with the Commission that in the present case such a result would be disproportionate and inconsistent with the provisions of Directive 92/12 as a whole. Whatever 'correctness criteria' a member state lays down must seek to ensure that the scheme of the directive is respected, in particular with regard to guaranteeing fiscal neutrality, as well as preventing fraud or evasion of duty."

43. She disagreed with the case advanced by Romania that the requirements of its domestic law including pre-notification of dispatch were "correctness criteria" within Article 22(3) and characterised them, instead, as administrative requirements, breach of which could not justify refusing the claim:

> "[44] I cannot agree, however, that all those provisions (which, in conformity with art 22(5) of the directive, lay down the procedure for requesting reimbursement) constitute 'correctness criteria' within the meaning of art 22(3). A distinction must be drawn between failure to comply with procedural rules imposed for reasons of administrative expediency, which may no doubt give rise to a proportionate penalty, and failure to satisfy 'correctness criteria', which can entail refusal of the request for reimbursement. Such refusal, involving as it does an exception to the member state's obligation to reimburse duty pursuant to arts 7(6) and 22(3), can be justified only where there is a plausible risk that duty will not be correctly collected in the final event. No such risk is apparent where a consignor has fulfilled all the requirements of arts 7(5) and 22(3). A requirement involving advance lodging of a provisional request for reimbursement may be justified for administrative reasons but failure to comply with it cannot, on its own, justify a refusal of reimbursement."

44. The Court took a different tack. It recorded that there was no dispute on the facts that the taxpayer had paid excise duty on the goods in Romania ([9], [35]). It noted that Article 22 related to two distinct reimbursement schemes ([25], [26]), with Articles 22(1) and (2) addressing duty suspended goods (we interpose that this equates to WFE arrangements as used to be permitted in the UK, see above and *Seabrook Warehousing*), and Article 22(3) dealing with goods where duty had already been paid in the Member State of departure and destination ([27]). It commented that it was reasonable to provide for stricter requirements for the duty suspended scheme

within Articles 22(1) and (2), given that reimbursement under that scheme takes place before the duty is paid in the Member State of destination ([28]); it noted that one requirement within Article 22(2) was that the request for reimbursement must be lodged before the goods are dispatched ([28]), but Article 22(3) did not contain any provision about when the request for reimbursement must be lodged ([29]), which was a distinction within the Directive which the Romanian legislation did not take into account ([33]). The Court concluded as follows:

> "[35] Where the excise duty has already been paid in the member state of destination, which seems to be the case in the main proceedings, it is art 22(3) of Directive 92/12 which is applicable and which specifies that reimbursement is subject to one condition, namely that the excise duty has been paid in the member state of destination. That means that the trader is not required to lodge the request for reimbursement before the goods concerned have been dispatched.
>
> [36] In such a situation, the proviso according to which a member state may refuse a request for reimbursement where it does not satisfy the correctness criteria that the member state lays down cannot apply in cases where the request for reimbursement has not been lodged before the goods concerned have been dispatched. The concept of 'correctness criteria' may not be interpreted in such a way which would allow for the imposition of a condition laid down by Directive 92/12 solely in relation to a different request for reimbursement scenario and which would therefore contravene the first sub-paragraph of art 22(3) thereof.
>
> [37] By contrast, where the request for reimbursement has been lodged before the excise duty in the member state of destination has been paid, art 22(1) and (2) of Directive 92/12 would apply, meaning that the member state of departure may require that the request for reimbursement be lodged before the goods concerned have been dispatched. In this case, an important condition explicitly laid down in art 22(2)(a) thereof would be at issue, the failure to comply with which could result in the reimbursement being refused.
>
> [38] It is apparent from the scheme of art 22(1) and (2) of Directive 92/12 that a two-stage procedure is provided for therein. After the initial request is introduced, the trader must have the opportunity to lodge the documents referred to in art 22(2)(c) thereof.
>
> [39] In light of the above, the answer to the questions referred is that art 22(1)–(3) of Directive 92/12 must be interpreted as meaning that, when products, which are subject to excise duty that has been paid and which have been released for consumption in one member state, are transported to another member state where those products are subject to excise duty, which has also been paid, a request for reimbursement of the excise duty paid in the member state of departure may not be refused on the sole ground that that request was not made before those goods were dispatched, but must be assessed on the basis of art 22(3) of Directive 92/12. By contrast, if the excise duty has not been paid in

> the member state of destination such a request may be refused on the basis of art 22(1) and (2) of the directive."

45. Mr Firth relies on the Judgment of the Court (and indeed, to an extent on the Opinion of the Advocate General) in *Scandic* to support his argument that a breach of the inspection facility rule, which he argues is similar in content and effect to the Romanian pre-notification requirement, cannot result in the taxpayer's right to repayment under Article 22(3) being refused. He argues that this would be to do precisely what the CJEU has said in *Scandic* cannot be done, and in effect to repeat the error of the Romanian tax authorities.

DISCUSSION

46. We do not set out the Commissioners' case separately, because (as will become apparent) we agree with it and to set it out at length would be repetitive. What follows below is, in essence, the case advanced by Mr Puzey who appeared for the Commissioners, put into our own words.

Objective of the Rule

47. The Claimant argues that the inspection facility rule is unlawful, on various EU law grounds. The correct starting point in the analysis must surely be that rule. We make two preliminary observations about the inspection facility rule. First, we note that the rule itself is part of the package of domestic measures implemented with regard to claims for drawback of excise duty under Article 22(3) of the 1992 Directive (later replaced by Article 33 of the 2008 Directive). It is an obvious point, but the rule is not part of the domestic VAT scheme (and in that fundamental way, therefore, is different from the various domestic rules considered by the CJEU in the *Ecotrade* cases, all of which concerned VAT). Secondly, we note that the measure itself goes beyond requiring mere notification of intention to dispatch, or even requiring that the goods should be placed in a warehouse or other specified place. It is in terms a rule which enables the Commissioners to inspect the goods, should they wish to. In its substance it is materially different from the rules considered by the CJEU in the *Ecotrade* cases, and indeed from the provision under scrutiny in *Scandic*, which was merely a pre-notification or early request provision.

48. The objective of the inspection facility rule is to be inferred in large part from the legislation. But in this case, the Commissioners produced evidence to explain the purpose of the rule, and we consider that evidence to be relevant to our understanding of the inspection facility rule. Ms Burgess stated as follows:

> "[16] The notification of intent (NOI) alerts HMRC of the intention to dispatch duty paid product from the UK. HMRC requires this notification to be received 2 clear days before the product is dispatched. This period allows HMRC officers to inspect the stock, to check that it exists, that UK duty has been paid and it is as described in the subsequent claim. During the visit, officers may also stamp the stock, allowing HMRC to ascertain that it is the same consignment if it later re-enters the UK".

Ms Burgess referred to Notice 207 before continuing:

> "[23] The guidance sets out the sort of checks an officer should make. These include satisfying themselves that the stock records at the premises where the inspection takes place clearly identify the goods to a specific location, and that said location does in fact contain the goods intended for drawback. The more detailed checks require officers to check that the goods presented for inspection have not been substituted; this is noted to be a risk where a warehouse stores goods for more than one claimant or where there are multiple claims from the same claimant. The risk is that the goods may not exist for all the notification of intention forms presented.
>
> [24] The aim is to ensure that duty is only repaid on goods where duty has been paid and to help identify the goods if they re-enter the country. The visit also allows HMRC to check that one product or consignment is not substituted for another once the claim is made."

49. Ms Burgess identified drawback as a risk area for fraud, given that it involves refunds of tax. It also involves repayment to a person who is, very often, different from the person who initially paid the duty. Ms Burgess extracted certain figures from HMRC's publication "Measuring Tax Gaps 2014 edition, Tax gap estimates for 2012-13", which she exhibited. In 2009, the level of drawback-related fraud was estimated to be £25 million per annum, against total drawback claims for 2009-10 of £84.7 million: this is a very high proportion of all claims. The peak of drawback claims was in 2010-11, when claims totalled £110 million, although the value of claims has fallen since then to £68 million in 2014-15. It is against this background that Ms Burgess described the inspection facility rule, and its objective in combatting fraud and avoidance.

50. Mr Firth did not dispute the statistics produced by Ms Burgess, nor did he dispute the Commissioners' entitlement to inspect goods, or the fact that an inspection could on occasion serve to combat fraud by revealing suspicions upon which the Commissioners could then act (at the limit, by simply refusing the claim on grounds that it had not been proved). But he did dispute Ms Burgess' suggestion that the validity of a claim for drawback could, in any circumstances, be confirmed by inspection. To support that challenge, Mr Firth relied on a witness statement filed by Mr John Hogg, compliance manager of Heineken (UK) Ltd in a different judicial review brought by Millenium Cash and Carry Ltd against the Commissioners. In his witness statement, Mr Hogg asserted that it was impossible to prove the link between physical products and particular invoices which proved the duty was paid. Mr Firth suggested that assertion had been accepted by the Commissioners in that judicial review, and drew our attention to an extract from a transcript of the hearing of that case in front of His Honour Judge Seymour QC sitting as a deputy judge of the High Court on 6 December 2010.

51. We do not accept Mr Firth's challenges to Ms Burgess' evidence. First, Ms Burgess' evidence was not tested under cross examination and so the Claimant is in no position to dispute it. Secondly, we do not consider that comments made by Counsel for the Commissioners instructed in the Millenium Cash and Carry judicial review are capable of binding the Commissioners in this case which involves different facts,

parties and issues. Thirdly, Ms Burgess' evidence is adduced on behalf of the Commissioners, the taxing authority entrusted with powers to collect and manage tax by Parliament, and is aimed at explaining the policy objective of the inspection facility rule; that evidence is authoritative and cogent, and it assists us in understanding why the rule exists. Fourthly, we consider from our own objective viewpoint that the rationale for having an opportunity to inspect is self-evidently to check that the goods tally with the description on the invoices or other evidence produced in support of the claim; in this connection we note that inspection is specifically envisaged at destination, under Article 7(5)(c) of the 1992 Directive, no doubt because the authors of that Directive recognised the value of laying eyes on goods which are the subject of a claim for repayment of excise duty. Thus, we see no difficulty in accepting Ms Burgess' evidence which simply reflects ordinary common sense, and amply explains why a Member State would wish to have an opportunity to inspect goods on which drawback has been claimed before those goods leave the territory of the Member State.

52. We conclude that the objective of the inspection facility rule is to enable the Commissioners to inspect the goods in question before dispatch, in order to prevent tax fraud by false claims. It is an anti-avoidance measure.

53. We turn then to consider how the rule should be characterised by reference to the Directives.

The legal context for the rule

54. The first two Claims were made when the 1992 Directive was in place. Article 22(3) expressly entitles Member States to refuse a request where the request does not satisfy the "*correctness criteria*" which have been laid down by the Member State in question. We consider, as was common ground, that correctness criteria are to be understood as meaning something different from the "*monitoring procedures and methods applying to reimbursement*" which are referred to in Article 22(5).

55. We know from *Scandic* that the correctness criteria referred to in Article 22(3) must relate to the condition(s) for reimbursement, and that the concept of "*correctness criteria*" may not be interpreted in a way which allows a new or different condition to be added, if and to the extent that condition would fall outside the ambit of the directive ([35], [36] of the Judgment). Thus far, we agree with Mr Firth's argument that there are different types of measures or qualifying requirements which can be imposed by the Member State, some of which attach to the substance of the claim (in the context of Article 22(3) these can be seen to be "*correctness criteria*") and some of which are merely procedural (which in the context of Article 22(5) can be seen as "*monitoring procedures*"); and that a claim cannot be refused simply because the taxable person is in breach of one of the latter category of procedural requirements. This analysis squares with the *Ecotrade* cases which distinguish between substantive requirements on the one hand (non-compliance with which can result in refusal of the claim) and formal requirements on the other (non-compliance with which cannot result in refusal of the claim, but can be penalised in some other proportionate manner). Further, this analysis would appear to be at one with the Advocate General's opinion in *Scandic,* where at paragraph 44 she distinguishes between

correctness criteria which can entail a refusal of reimbursement, and involve a "*plausible risk that the duty will not be correctly collected*" on the one hand, and procedural rules imposed for reasons of administrative expediency which may only give rise to a proportionate penalty (not refusal) on the other.

56. The 2008 Directive does not mention "*correctness criteria*", instead referring to the "*procedure laid down by each Member State*" (Article 9). But we accept the Commissioners' submission that the latter term encompasses the full range of national measures establishing the system for taxable persons to make claims. Some of those measures will relate to the substance of the claim, others will be merely procedural. This is simply to restate the proposition to be drawn from the *Ecotrade* cases. We conclude that the architecture of the 2008 Directive is similar to that of the 1992 Directive. It permits Member States to devise rules for the payment of drawback. The Member State has a free hand in devising those rules, subject to compliance with overarching principles of EU law (amongst which, relevant for present purposes, are the principles of proportionality and fiscal neutrality on which the Claimant relies).

57. We therefore reject the Claimant's argument that the absence of any reference to "*correctness criteria*" in the 2008 Directive signals a material change of approach from its 1992 predecessor. In advancing that argument, the Claimant relied on Case C-495/12 *Commissioners for HM Revenue and Customs v Bridport and West Dorset Golf Club Ltd* [2014] STC 663 and Case C-310/11 *Grattan plc v Revenue and Customs Commissioners* [2013] STC 502. But these two cases both involved different directives, relating to a different tax, and different "omitted" words. They cannot support a general proposition that the omission of words which are found in other instruments touching on the same subject matter necessarily signals a material difference between the one and the other: it may or it may not do. In this context, we note that the 2008 Directive confers on Member States the power to prescribe national rules about how claims are to be made. This is a recognition that the mechanics of making a claim lie within the national competence of the Member States. *Ecotrade* and other cases tell us that those national rules may play different roles, with some going to the substance of the claim and others simply promoting administrative convenience. Article 9 of the 1992 Directive reflects that standard approach, adopted in many EU tax directives. Thus, we do not detect any material difference between the 1992 and 2008 Directives.

The substantive conditions for a "duty paid" claim

58. It is necessary to identify the substantive conditions for making a claim for drawback on a "duty paid" basis. A claim of this type has two substantive elements or conditions, namely (i) the payment of duty in the Member State of departure and (ii) the payment of duty in the Member State of destination. These two conditions are manifest from the Directives, and we note that both the Advocate General and the Court in *Scandic* held these two elements to be the defining features of a claim under Article 22(3), see [37] of the AG's Opinion and [27] of the Judgment. They are reflected in Regulation 5 read with Regulation 8 of the 1995 Regulations, in the definition of eligible goods, being those which are duty paid in the UK and are then exported, warehoused for export or destroyed; in the first two instances duty will become payable again at destination. The domestic rules require the duty actually to

be paid in the Member State of destination, or in some cases to be guaranteed in the Member State of destination (see paragraph 5.1.4 of Notice 207 above).

Nature and Character of the Rule

59. We turn then to the inspection facility rule itself, set in the context of the scheme of the Directives as implemented into domestic legislation by the 1995 Regulations. We have already concluded that it is an anti-avoidance measure (see above), the object of which is to ensure that duty has been paid in the United Kingdom, as the Member State of departure. This is a requirement, therefore, which is relevant to establishing the first element or condition of a duty paid claim. It is not the only requirement attaching to the first condition: the claimant is also required to file the necessary paperwork (or alternative evidence if that has been agreed). There may be other measures also which go to the first condition, although we believe that these are the two most important. But it is clear that the inspection facility rule is not merely procedural in nature, or included within the domestic package of measures purely for administrative convenience. It is a rule which goes to the very heart of any claim for drawback, because it enables the taxing authorities of the Member State to establish that the particular claim for drawback is valid.

60. We conclude that the inspection facility rule is a substantive requirement, which attaches to the first condition for making a claim under Article 22(3) (or its successor under the 2008 Directive). It is a "correctness criterion" which can lead to refusal of the claim if it is breached, within the language of Article 22(3), and the judgment of the Court in *Scandic*. It is a measure which permits the Member State to establish that the substantive requirements have been satisfied, adopting the language of the *Ecotrade* cases. It is not merely procedural, formal, or implemented to achieve administrative convenience.

ANSWER TO THE CLAIMANT'S CASE

61. The Claimant's case is predicated on the inspection facility rule being a mere monitoring procedure or formal requirement, or a measure imposed for reasons of administrative convenience. That predicate is incorrect. Once the true character of the inspection facility requirement is revealed, the central plank of the Claimant's case disappears, and this application for judicial review must fail. Nonetheless, we set out below our answers to specific arguments advanced by Mr Firth on behalf of the Claimant.

62. Much of the Claimant's argument was built on the *Ecotrade* cases. But those cases concerned a different tax (value added tax), deriving from a different directive (the Sixth Directive or the Principal VAT Directive), in circumstances where there was no risk of tax loss (as stated in each of the cases). By contrast, this case concerns excise duty, deriving from a different directive, where the particular rule is concerned with tax avoidance and there is, absent the rule, a risk of tax loss. On their facts, the *Ecotrade* cases involved measures which were qualitatively different from the measure at issue here (even the measure examined in *Equoland* was materially different because it was not intended to permit inspection of the goods prior to dispatch; it was simply a requirement that the goods should be physically present at the warehouse). There is no rule to be imported from the *Ecotrade* cases to the effect

that a measure such as the inspection facility rule *must* be classified as a procedural rule which *cannot* lead to the claim being refused for non-compliance. That is to miss the important point that each case will depend on the nature of the measure in question, its objective and the legislative context in which it operates. Once those aspects are considered in relation to the inspection facility rule, its character as a substantive requirement, relevant to a condition for making a claim, is revealed.

63. The Claimant argued that there was no separate category of "means of proof" evidence or documents (there were only substantive or procedural measures), and in this context resisted the Commissioners' reliance on Case C-85/95 *Reisdorf v Finanzamt Köln-West* [1997] 3 CMLR 536 and the Opinion of Advocate General Jacobs in Case C-90/02 *Finanzamt Gummersbach v Bockemühl* [2004] CMLR 5. The Claimant argued that *Reisdorf* had been overtaken (and effectively overruled) by the *Ecotrade* cases, and that the Court did not follow the Advocate General in *Bockemühl* anyway. Both *Reisdorf* and *Bockemühl* concerned the use of invoices to document claims for repayment of VAT, and on their facts are far distant from the facts of this case, where the issue is not merely documentary proof but the facility to inspect in connection with a claim for repayment of excise duty. Neither case has any real relevance to this case. But in any event, we do not consider either case to be fundamentally at odds with the approach adopted in the *Ecotrade* cases. The Court in *Reisdorf* concluded that the Member State had power to require an original invoice to be produced in support of a claim, and the Advocate General in *Bockemühl* emphasised the character of the invoice as a means of proof of the claim itself. We understand the Court and the Advocate General to be concluding, on the facts before them, that the production of an invoice which complied with national rules could be, or was, a substantive condition for repayment. This fits with the later *Ecotrade* cases. On the facts, the Court in *Bockemühl* disagreed with the Advocate General, noting that

> "[51] …Where the tax administration has the information necessary to establish that the taxable person is, as the recipient of the supply is, as the recipient of the supply in question, liable to VAT, it cannot, in relation to the right of that taxable person to deduct that VAT, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes."

Thus the Court relegated the national rule to the status of a procedural or administrative measure. It did so on the basis that the tax administration already had the information necessary to establish the claim. Thus the national measure was not substantive, but merely procedural. The Court's reference to the administration having the "information necessary" in that case begs the very question to be answered in this case. For reasons set out above, we conclude that in this case the Commissioners do not have all the information which is necessary to establish that the Claims are valid, because of the Claimant's non-compliance with the inspection facility rule. It is nothing to the point that the Commissioners do not in practice avail themselves of the opportunity to inspect in all cases. It would not be feasible for them to do so. The acceptance of evidence of duty payment under the alternative evidence arrangements is predicated on the Commissioners being afforded an opportunity to

inspect; the two go hand in hand. Failure to provide that opportunity deprives the Commissioners of an important element in satisfying themselves that duty has been paid in the UK.

64. The Claimant argued that a measure can only be justified as an anti-avoidance measure where the evasion or detriment to the Member State's budget is shown actually to exist, on the particular facts of the particular case. This argument was based on the CJEU's use of the word "*ascertained*" at [41] of *Equoland*, citing *EMS Bulgaria* [70] and other cases. We reject this argument which is based on a misunderstanding of the word "ascertained" as it appears in those cases. The Directives confer on Member States the power to lay down the methods and procedures by which taxable persons within their territory are to claim drawback. As we have already said, the Member States have a free hand in devising those methods and procedures, subject to compliance with the overarching principles of EU Law (including the principle of proportionality and fiscal equality, cited by the Claimant). The prevention of possible tax evasion and avoidance is also an established principle of EU law, reflected in the *Ecotrade* cases and in many, many other tax cases in domestic and European Court case law (see, for examples within the cases we have examined above, *Equoland* [28] and *EMS Bulgaria* [69]). Consistently with that principle, the Member States may prescribe rules to combat a perceived or anticipated risk of avoidance or evasion (assuming the perception or anticipation of risk is coherent and rational). Such perceived or anticipated risk of avoidance is sufficient justification for an anti-avoidance rule, and is what the Court meant when it used the word "ascertained". The Claimant's argument to the contrary is absurd, and would leave Member States in the forlorn position of not being able to prevent evasion and abuse through a robust system which incorporated generic anti-avoidance measures; they would be able to invoke anti-avoidance rules only as and when there were grounds for suspicion arising out of a particular claim. As we have discussed above, there is extensive evidence that the United Kingdom perceives there to be a risk of tax loss in relation to drawback generally. Whether such a risk attaches specifically and individually to the Claimant's claims is beside the point. The United Kingdom's rules are designed to enable the correct amount of tax to be collected from (and repaid, as necessary, to) the whole body of taxpayers, and the rules correctly incorporate generic anti-avoidance measures.

65. Although the Claimant placed considerable reliance on *Scandic*, and although that case provides an important illumination of Article 22(3) and the conditions attaching to it, in the end that case concerned a different problem altogether. In that case, it appears to have been accepted that excise duty had been paid in the Member State of departure (Advocate General at [17], Court at [9]) and thus that the first of the two conditions that we have identified underpinning Article 22(3) was satisfied. The discussion in *Scandic* related only to the second condition, namely the payment of duty in the Member State of destination: that was the "one condition" the Court considered (Court, [35]), that condition being the feature which distinguished this case from the suspended duty cases within Article 22(1) and (2). The Court concluded that the measure in issue (pre-notification to the taxing authorities of the Member State of departure) could have nothing substantively to do with the second condition, which concerned payment of duty in a different Member State. There was,

we infer, simply no connection between the measure and the second condition. For that reason, the trader could not be required to lodge the request for reimbursement before the goods were dispatched (Court, [35]), nor could the trader lose its claim on the sole ground that it had failed to make that request prior to dispatch (Court [39]). We do not find in *Scandic* any suggestion that the pre-notification requirement was relevant to establishing the first condition, nor any suggestion that if the requirement had been relevant to the first condition, the Court would necessarily have decided the case the same way. *Scandic* raises a different issue and is not decisive of the position on the facts of this case.

66. The Claimant further relies on the EU principles of proportionality and fiscal neutrality. But those principles add little, if anything, to the Claimant's case. So far as proportionality is concerned, once established that the domestic measure is substantive, as opposed to procedural, it follows that non-compliance can be sanctioned – proportionately - by refusal of the claim. Article 22(3) expressly permits Member States to refuse a request for reimbursement where that request "*does not satisfy the correctness criteria*". That express provision in the Directive must be taken to reflect a position which is proportionate as a matter of EU law. This is entirely logical: there can be no disproportion where the substantive conditions set down for the establishment of any claim have simply not been met: the claim has not been established, the conditions attaching to it have not been made out. The same approach is implicit in the scheme of the 2008 Directive, even though that Directive is couched in different language and lacks the express permission to refuse a claim for non-compliance with correctness criteria. That is not to say that proportionality has no role, because even a substantive measure must be proportionate in its effect; but in this case, for good reason, the Claimant does not challenge the inspection facility rule as intrinsically disproportionate. A requirement that the goods be retained for inspection for a period of two working days is a modest interference with the rights of ownership, and for reasons set out above, the right to inspect is an appropriate means by which to achieve the object of preventing fraud, evasion and abuse. We conclude that the inspection facility rule lies well within the United Kingdom's margin of appreciation under the Directives, when proportionality is tested.

67. Our conclusions on fiscal neutrality are similar: it is implicit within Article 22(3) that refusal for non-compliance with correctness criteria will be fiscally neutral, because the conditions for making the claim have not been made out. The same analysis applies so far as the 2008 Directive is concerned. There is no breach of fiscal neutrality where a claim is refused for failure to meet basic conditions designed to establish the claim substantively. The claim has quite simply not been made out.

68. The Claimant advances various arguments on the facts, but these are of no assistance to the resolution of this case. It is not relevant that inspection was not in fact undertaken or even intended by the Commissioners. What is important is that the Commissioners had the power to make inspection, at any time in the two day window, whether on notice or unannounced. Whether they used that power in any given case is an operational matter for them which does not touch on the validity of the power itself. It is not an answer for the Claimant to point to the paperwork submitted, which (it argues) demonstrates that the conditions have been met. The

Commissioners require not only that the paperwork is submitted in good order, but also that the goods should be available for inspection: these are their "correctness criteria". Where the goods are not available for inspection, the Commissioners are entitled to say that they are not satisfied of the validity of the Claims – and thus to plead "no admission" in this litigation – and in consequence to refuse to meet them.

69. Further, it is not for this Tribunal to make a finding of fact, one way or another, on whether the duty has in fact been paid in the UK and in the Member State of destination. That is a function which Parliament has mandated to the Commissioners. This Tribunal's role is to supervise the exercise of those powers. For all the reasons given above, we conclude that the inspection facility rule is EU compliant, and not contrary to proportionality or fiscal neutrality. Further, we conclude that the Commissioners are entitled, as a matter of EU law, to refuse the Claims for breach of the inspection facility rule. There is no role for the Upper Tribunal as a fact finder in a challenge by way of judicial review to that refusal. Mr Firth at one point said that the Commissioners' decision to refuse the Claims was based on an error of material fact, because *in fact* the Claims had been established by the paper evidence produced. But, as should by this point be clear, we do not agree with that proposition. Rather, it is the Claimant itself which has failed to establish its Claims according to the legitimate criteria prescribed by Parliament in the 1995 Regulations. There is no error of material fact. This Tribunal cannot cure the Claimant's default, when the 1995 Regulations demand more than just documentary evidence to support a claim.

70. Finally, and lest it be argued that the effect of the inspection facility rule has been harshly or unreasonably applied to the particular facts of this particular case, we remind ourselves that the Commissioners do not invariably penalise non-compliance by refusal of the claim. Their policy is to show some flexibility, particularly where the breach is an isolated incident by an otherwise compliant taxpayer: see above. The problem for this taxpayer is that the breach was not an isolated incident; there had been previous, recent violations of the inspection facility rule in relation to other claims. Although Mr Firth did not put his challenge this way, there is no basis to suggest that the Commissioners have unreasonably failed to exercise their administrative discretion to waive the breach. If any reasonableness challenge had been advanced in relation to the third, fourth and fifth Claims, we would anticipate the FTT coming to the same view in relation to those Claims as Lady Mitting came to in relation to the first and second Claims, and for similar reasons, and dismissing the appeal. In this case the Commissioners have not acted unreasonably (as Mr Firth concedes). In another case, the Commissioners' own policy of flexibility provides a safeguard against the refusal of claims for reasons which fall at the most trivial end of the spectrum, and is subject to review on appeal to the FTT under s 16 of the Finance Act 1994.

71. For the reasons set out above, we dismiss this claim for judicial review. We conclude that the inspection facility rule is lawful, and was lawfully applied to the Claims. This deals with the Claimant's case in both its wider and narrower iterations.

72. We reach this conclusion with confidence, having regard to the established EU law principles that can be derived from the existing case law of the CJEU. We see no need for a reference to the CJEU.

PROCEDURAL ISSUES

73. Popplewell J granted permission for judicial review in this case. We have been shown an informal note of a short judgment he gave when granting permission, and we have seen the skeleton arguments prepared for that permission hearing. Mr Firth submitted that the FTT had no jurisdiction to hear this challenge, based on the wording of section 13A(2)(e) Finance Act 1994 which defines a "relevant decision" over which the Tribunal would have jurisdiction following a decision on review by the Commissioners as:

> "any decision by HMRC as to whether or not any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled".

We accept that this provision refers in terms to the domestic legislation. Mr Firth may be right that the effect of this provision is to limit the FTT's jurisdiction to domestic law challenges only. We have not heard argument on the point and should not be taken as expressing any conclusion on it, but we wish to record our instinctive response that the result is a surprising one, because it means that the FTT has a very limited jurisdiction in relation to excise duty appeals, whereas in VAT and direct tax matters the FTT's jurisdiction is much wider, including adjudicating EU law challenges to domestic legislation. The jurisdiction issue may be worth revisiting if the issue recurs in another case.

74. We further note that the first and second Claims had in fact been the subject of an unsuccessful appeal to the FTT (Lady Mitting). We have dismissed the application for judicial review in relation to those two Claims. But had we decided that there was merit in the judicial review, we would have been troubled about the effect of Lady Mitting's judgment in relation to those claims. We would have wished to investigate whether those Claims, in particular, could be reopened by way of judicial review, when they had been the subject of a concluded appeal to the FTT and were to all intents and purposes "dead claims".

75. The Claimant's case in relation to all the Claims was that the Commissioners had engaged in a reconsideration of those Claims in 2014 and that the judicial review had been issued without any delay following the reconsideration. We have not heard argument on the issue of delay, which was resolved in the Claimant's favour at the permission hearing. Whilst accepting the principle that a reconsideration can amount to a fresh decision triggering a fresh right of appeal or judicial review (as relevant), we would wish to record our own view that it should only be in an exceptional case that a decision by the Commissioners, which is otherwise long out of time, can be reopened in this way.

CONCLUSION

76. We dismiss this application for judicial review.

MRS JUSTICE WHIPPLE
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 20 April 2016