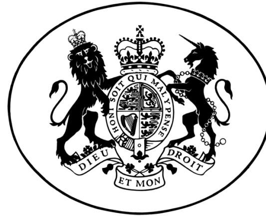
[2018] UKUT 0058 (TCC)



Appeal number: UT/2016/0197

EXCISE DUTY- excise duty suspension arrangements - electronic movement control system - jurisdiction

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BUTLERS SHIP STORES LIMITED **Appellants**

- and -

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

TRIBUNAL: THE HONOURABLE LADY WOLFFE
(Sitting as a Judge of the Upper Tribunal)

Sitting in public at The Tribunal Centre, George House, Edinburgh on 24-25 October and 3 November 2017

Mr Tristan Thornton of TT Tax, London for the Appellant

Mr Ross Anderson, advocate, instructed by the Office of the Advocate General for the Respondents

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DETERMINATION AND REASONS

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (Tax Chamber) ("the Decision" and "the FTT", respectively) refusing the appellants' appeal against a statutory excise duty assessment dated 19 October 2014 ("the Assessment") made by the respondents, and confirmed on review on 19 January 2015 ("the Review"), in the sum of £1,766,766.85. (This figure forms part of a sum of £2,277,935.34, comprising import duty of £101,999, excise duty of £1,766,766.85 and import VAT of £409,169.49. The import duty and the VAT are not in dispute in these proceedings and have been paid.)

2. The appellants operate from premises at Blaikies Quay, Aberdeen ("the premises") which are an "authorised customs warehouse" and an "authorised excise warehouse" (these terms are defined below).

3. In or between about 2012 and 2014 the appellants dispatched (putting it neutrally) a large quantity of excise goods, namely cigarettes ("the Goods") to two customers (who also operate authorised excise warehouses) in Scotland ("the recipient excise warehouses"). It is now accepted that this constituted an irregular importation such as to render the appellants liable to customs duty on the Goods, being the form of impost due when goods are first imported into the territory of a Member State within the EU. The appellants accept this and have paid the import duty and VAT.

4. However, the respondents contend that the dispatch of the Goods from the premises also triggered an excise duty point, rendering the appellants liable for excise duty. The appellants dispute this.

5. Mr Tristan Thornton, of TT Tax, London, appeared on behalf of appellants and Mr Ross Anderson, advocate, instructed by the Office of the Advocate General, appeared on behalf of the respondents (HMRC) before me. The same representatives had also appeared before Tribunal Judge J. Gordon Reid QC FCIArb. Before the FTT Mr Thornton led no evidence; Mr Anderson led the evidence of Laura Cowie, an HMRC official, whom the Judge Reid QC described as having considerable experience in customs duties.

Grounds of appeal

6. The appellants were granted permission to appeal on three grounds of appeal (as reformulated by Judge Richardson) as follows:

    1) The FTT erred in law in concluding:

        (i) that customs suspensive arrangements ended before the Goods left the appellants' warehouse (ie the premises);

        (ii) that an excise duty point was triggered at the point at which the Goods left customs suspensive arrangements, and

        (iii) in particular (and without limiting point (ii) above) by failing to conclude that the Goods were subject to an excise duty suspension arrangement while being transported to the recipient excise warehouses.

I shall refer to grounds 1(ii) and (ii) as "the excise duty issue".

2) The FTT erred in law in failing to give the appellants permission to rely on evidence in the form of two lever arch files of electronic movement control system ("EMCS") records and/or erred in law in failing to consider that evidence ("the EMCS issue");

3) The FTT erred in law
   (i) in concluding that it had jurisdiction only to make determinations of the kind set out in section 16(5) of Finance Act 1994 ("the FA 1994") and that it could not, in addition, make determinations of the kind set out in section 16(4) of the FA 1994, and
   (ii) in failing to apply the correct legal principles to the facts that it had found, with the result that it made no determinations of the kind set out in section 16(4) of the FA 1994.

I refer to this ground as "the jurisdiction issue".

Scope of the appeal

7. It is necessary to say something about the scope of this appeal.

8. The appellants sought permission to appeal the FTT decision. In his decision on the application for permission to appeal, dated 27 September 2016 (the "PTA Decision"), Judge Jonathan Richards declined to review the FTT judge's decision as he was not satisfied that it contained an error of law. In considering the application for permission to appeal, Judge Richards felt compelled to observe that a general assertion that the FTT's conclusion was against the weight of the evidence and therefore wrong was not a permissible ground of appeal. This is because there is in general no appeal against findings in fact by the FTT, unless no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal: Edwards v Bairstow [1956] AC 14. There was no relevant Edwards v Bairstow review in the appellants' proposed grounds of appeal. Accordingly, Judge Richards found it necessary to formulate three short grounds on which permission to appeal would be granted. I have noted those above. However, the appellants were not satisfied with the PTA Decision and renewed their application for permission to appeal on their original grounds to the UT. That application was refused by a decision of UT Judge Bishopp dated 25 October 2016.

9. Accordingly, the only grounds on which the appellant have permission to appeal to the UT are the grounds reformulated by Judge Richards in the PTA Decision, and recorded at paragraph 6 above. Notwithstanding this, the appellants' skeleton strayed beyond the permitted grounds of appeal. Further, one of the preliminary issues Mr Thornton raised on the first day of this appeal concerned the proper scope of this appeal and how the reformulated grounds were to be interpreted. The first half-day was taken up with arguments on that matter and with the appellants' late motion for the allowance of additional documents (totalling some 600 pages). The additional documents sought to be admitted, but which application I refused, were said to relate to the second ground of appeal. I record my decision on these matters at the end of this decision. It was also a feature of Mr Thornton's submissions to assert matters of fact that were not proved or which were inconsistent with the (unchallenged) findings in fact by the FTT in the Decision. These matters are outwith

the scope of the permitted grounds of appeal. Accordingly, it will be necessary to disentangle these assertions when considering the parties' submissions.

Legal framework

The customs and the excise regimes in outline

10. This appeal concerns a certain point of interaction between the separate, but related, regimes of customs duty and excise duty. In a very general sense, customs duties are payable on the release of imported goods into circulation into the Community, that is, into the territory of a member state of the EU. The rules are largely a matter of EU law. In a general sense, excise duty is payable on the "release for consumption" of particular goods within a member state. While there is an EU Directive governing excise, excise duties are largely a matter of domestic law: see paragraph 12 of the Decision.

11. Putting matters simply for the moment, each regime enables goods to be held in "suspension" arrangements, provided the prescribed requirements are complied with. For so long as the Goods are duly held in these suspension arrangements, the obligation to pay customs duty (while held in a customs suspension arrangement ("CSA")) or excise duties (while held in a duty suspension arrangement ("DSA")) is suspended. Again, speaking generally (and simplifying), the applicable duty becomes payable upon the Goods leaving the respective CSA or the DSA. A DSA can cover production, processing, holding or the movement of goods subject to excise. This case is concerned only with the question of whether the movement of the Goods (the dispatch referred to above) from the appellants' premises to the recipient excise warehouses constituted a "movement" under a DSA. There are further, quite detailed, provision for goods physically to be moved from one authorised excise warehouse to another, without loss of the DSA to which those goods are subject but, again, so long as the specified requirements are complied with.

12. The customs and excise regimes are mutually exclusive, in the sense that at any particular time goods can only be held subject to one or other of these regimes, but not both simultaneously. (While this was disputed by the appellants before the FTT, and this constituted one of their permitted grounds of appeal, the appellants now accept this.)

13. It is possible for a person to be registered as the keeper of a customs warehouse or an excise warehouse, or both (the latter is otherwise known in the EU legislation as a "tax warehouse"): see Article 4(11) of the EDD and regulation 3 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Holding 2010 Regulations"). It is also possible for these authorisations to operate in respect of the same physical premises. That was the case in respect of the appellants' premises. The premises were separately authorised as a customs warehouse and as an excise warehouse.

14. Even in the case of an irregular importation, as occurred in respect of the Goods, it is nonetheless necessary to comply with the requirements to constitute a valid DSA in respect of the Goods. Generally, excise goods may only be held under a DSA in a tax warehouse. Further, goods otherwise subject to excise may only be moved under a DSA if the prescribed requirements are complied with. These requirements include creating the correct electronic entries in relation to the goods. In practical terms (albeit to simplify), this required that the Goods be entered into the appellants' excise warehouse records or that they be legibly or uniquely marked in terms of regulations 11 and 12 of the Excise Warehousing (etc.) Regulations 1988 ("EWER"), as well as complying with the requirement that a

movement of goods under a DSA "must" take place under cover of an administrative electronic document" as required by regulation 57 of EWER.

15. In this case, the first ground of appeal raises the question of whether the dispatch by the appellants of the Goods from their premises (and their discharge from the CSA to which they had been subject) triggered an excise duty point (as HM contend) or whether those Goods nonetheless entered into a DSA (or a functional equivalent) such that excise duty was not immediately payable (as the appellants contend).

16. It is necessary to set out the provisions and definitions governing the two regimes. I use the same defined terms and abbreviations as used in the Decision of the FTT under challenge.

EU legal instruments governing the customs regime

17. The relevant EU customs rules are contained in a number:

1) The Community Customs Code (Council Regulation 2913/92/EEC) (the "CCC"); and

2) The Implementing Regulation (Commission Regulation 2454/93/EEC) (the "Implementing Regulation");

EU and UK instruments governing the excise regime

18. The relevant rules in relation to excise duty are contained in an EU directive, namely,

1) the framework for the interaction between EU Customs law and national excise law contained in the Excise Duty Directive 2008/118/EC (the "EDD");

and in the following domestic provisions:

2) The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (ie "the 2010 Holding Regulations", as I have defined them);

3) The Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR Regulations"). These are made under the Customs and Excise Management Act 1979, s 93.; and

4) The Excise Warehousing (etc) Regulations 1988 (ie "EWER", as I have defined them).

19. Mr Thornton made passing reference to Excise Notice 196. (This was produced on the second day, but I was not taken to its terms.) Excise Notice 197 was produced (but not referred to). This was referred to in the Decision but not in detail. Since it does not add to the domestic and EU provisions, I make no further reference to it.

Definitions

20. It is important to understand the applicable definitions. These are derived from a number of sources, principally from the EDD and the Holding 2010 Regulations. I begin with the definitions from Article 4 of the EDD, which include the following:

"*authorised warehousekeeper*" is "a person authorised by the competent authorities *inter alia* to hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse".

"*Customs suspensive procedure or arrangement*" means "any one of the special procedures provided for under the CCC relating to customs supervision to which non-Community goods are subjected upon the entry into the Community customs territory."

"*duty suspension arrangement*" means "a tax arrangement applied to *inter alia* the holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended." This is also reflected in regulation 3 of the the Holding 2010 Regulations.

"*importation of excise goods*" means the entry into the territory of excise goods unless the goods upon their entry are placed under a customs suspensive procedure or arrangement (ie a CSA) as well as their release from a customs suspensive arrangement.

"*tax warehouse*" means a place where excise goods *inter alia* are held received or dispatched under a duty suspension arrangement by an authorised warehousekeeper subject to certain conditions laid down by the competent authorities. This definition is reflected in regulation 3 of the Holding 2010 Regulations. In terms of those regulations, an excise warehouse is otherwise known as a tax warehouse.

These definitions are transposed into the domestic legislation.

21. It is also important to understand what movement involves a change in the status of goods and how those movements are defined. This involves consideration of the definitions of "importation" and "release for consumption". In terms of regulation 6(2) of the Holding 2010 Regulations (which mirrors the definition in the EDD), *"importation"* means the entry into the United Kingdom of excise goods unless the goods upon their entry are placed under a Customs suspensive procedure or arrangement, or the release in the UK of excise goods from a CSA. In this case, it is now accepted that the Goods were imported, albeit by an irregular importation. Article 7(2) of the EDD defines "*release for consumption*" as meaning *inter alia*:

> "(d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation under a duty suspension arrangement."

22. Regulation 6(1) of the Holding 2010 Regulations transposes the definition of "release for consumption" from Article 7 of the EDD, and it states:

> "(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
> (a) leave a duty suspension arrangement;
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
> (c) are produced outside a duty suspension arrangement; or

(d) are charged with duty at importation [including irregular importation] **unless they are placed, immediately upon importation** [[including irregular importation]], under a duty suspension arrangement."

The words in single square brackets are found in Article 7 of the EDD but are omitted from regulation 6. The words in double square brackets do not appear in Article 7(1)(d) of the EDD. Mr Thornton contends that the words "including irregular importation" in brackets require to be read into regulation 6 where indicated by the single and double square brackets. The respondents found on the passage highlighted in bold.

The requirements for and importance of record-keeping

23. There are detailed requirements for keeping current, correct and complete records concerning *inter alia* goods subject to excise and in order to bring goods under a DSA. Compliance with this is essential to the avoidance of risks of evasion of the appropriate duties. The burden of compliance is regarded as a concomitant of the privileges of being an authorised warehousekeeper and operating an authorised tax warehouse.

24. Article 16 of the EDD provides that the operation of a tax warehouse is subject to authorisation by the competent authorities in the member state who may require an authorised warehousekeeper to comply with specified conditions for the purposes of preventing any possible evasion or abuse. Accordingly, these provisions are matters of domestic law. An authorised warehousekeeper is required to keep, for each tax warehouse, accounts of stock and movements of excise goods.

25. Article 21 of the EDD provides that a movement of excise goods under a DSA must be done under cover of the computerised systems of electronic administrative documents submitted to, and approve by, the member state authorities. In the UK, there is provision for use of an electronic form of record-keeping and reporting (eg the Customs Input Entries ("CIEs") described at paragraph 44 of the decision). The importance of record-keeping for the operation of excise warehouses is recognised in regulations 11, 12 and 21 of EWER and regulation 14 of WOWGR. I need not set out the details of these, as it is accepted that the appellants failed to comply with the record-keeping requirements: see the Decision at paragraph 95. Upon the irregular importation of the Goods, the appellants failed to enter the Goods into their *excise* warehouse records or legibly or uniquely to mark the Goods.

26. For completeness, it should be noted that the privileges accorded to the warehousekeeper under regulation 11 of WOWGR do not apply where (a) he is in breach of any condition of approval that applies to his excise warehouse; or (b) any condition or restriction imposed by or under the warehousing regulations: see regulation 14 of WOWGR. I did not understand the respondents to argue that regulation 11 necessarily disabled the appellants from being capable of establishing a DSA in respect of the Goods for so long as they were in breach.

27. The detailed provisions which the appellants subscribed to, and with which they were required to comply, are set out in the Decision (at paragraphs 42ff), and are not here repeated.

Summary of Propositions

28. Judge Reid QC set out the statutory and regulatory framework at paragraphs 11 to 61 of the Decision, and he provided the full texts in the appendix thereto. Reference is made to that

extended exposition and the appendix. However, given the evolution in the appellants' understanding of their case, it may assist to note the following basic propositions are now not disputed and which are relevant to the live issues in this appeal:

1) Goods cannot simultaneously be subject to a DSA and a CSA.

2) Upon importation (which includes release from a suspensive arrangement and an irregular importation), goods will be subject to excise duty, unless they are immediately put into a DSA (Article 7 of the EDD; regulation 6(1)(d) of the Holding 2010 Regulations);

3) Excise duty becomes chargeable at the time of "release for consumption", which includes departure, whether regular or irregular, from a customs suspension arrangement (Article 7 of the EDD; regulation 6(1)(a) of the Holding 2010 Regulations). This is also referred to as an excise duty point;

4) A DSA is established *inter alia* by creating the appropriate entries on the records of the excise warehouse in which they are held;

5) Goods brought to an excise warehouse for warehousing are deemed to be warehoused when they are put into the excise warehouse: regulation 10 of EWER;

6) There can be different forms of DSAs. Chapter III of the EDD governs DSAs applicable to the production, producing and holding of dutiable goods are governed). Chapter IV of the EDD governs "movements" under a DSA.

7) The provisions governing movements in Chapter IV of the EDD govern and permit the movement of excise goods "under duty suspension arrangements" within the territory of the Community (Article 17(1)) in prescribed circumstances. These include movements "<u>from</u> a tax warehouse" (Art 17(1)(a)) (emphasis added, as there were submissions about the impact of the preposition) to another tax warehouse (Article 17(1)(a)(i)), or by a registered consignee (Article 7(1)(b)). Accordingly, it is possible for goods under a DSA to move from the authorised excise warehouse where they are held to another authorised excise warehouse without discharge of that DSA, so long as certain conditions are met.

The risks to the revenues of the member states in respect of movements of dutiable goods are obvious. This case is concerned with movements of the Goods and whether or not these were done under a DSA.

Summary of the issue under on ground of appeal 1(ii) and (iii) (the excise duty issue)

29. The circumstances of this appeal concerns the interrelationship between the customs and excise regimes. The appellants now accept that these regimes are mutually exclusive (proposition (1) in the preceding paragraph), in the sense that at any particular point in time goods can only be held subject to one or other of these regimes, but not both simultaneously. Ground of Appeal 1(i) is therefore conceded.

30. The live issue between the parties under ground of appeal 1 is what is required in the context of an irregular customs importation in order effectively to bring the same goods under a DSA. More particularly, the issue is whether, notwithstanding

(i) the irregular importation of the Goods (and which resulted in the now undisputed customs charge), and
(ii) the failure to complete the formal steps to bring them immediately under a DSA (including the creation of correct electronic entries),

the Goods are nonetheless to be treated as having been subject to a (deemed) DSA.

Some of the arguments presented in relation to the excise duty issue crossed over to the other grounds of appeal. Ground of appeal 2 asserts that the FTT erred in not allowing or not considering the additional EMCS records tendered on the first morning of the hearing before the FTT, and which were said to be relevant as evidencing the movement and/or final destination of the Goods. (Embedded within this argument is one of the assertions of facts objected to by the respondents as impermissible or inconsistent with the FTT's findings in fact; eg the appellants' suggestion that the Goods ultimately left the UK (an assertion HMRC do not accept). This was also one of the grounds advanced before the FTT: see para 62(3) of the Decision). The EMCS records were relied on to evidence this, and they were also said to be relevant to ground of appeal 3, and the respondents' failure to exercise best judgement (ie by not considering the final destination of the Goods), giving rise to the jurisdiction issue, and the ancillary contention that this may have amounted to double taxation.

Outline chronology

31. It is relatively straightforward to identify the steps that resulted in the irregular importation of the Goods. The legal context is more complex. The essential legal features are summarised above but the assiduous reader is referred to the fuller treatment by Judge Reid QC in the Decision and the full text of the relevant domestic and EU instruments in his appendix, and which I do not here repeat.

32. In terms of the steps that took place in relation to the Goods, the appellants accept the following:

1) The appellants breached the Customs authorisation procedure under which they agreed to operate;

2) The appellants moved the Goods from their customs warehouse (where they had been held under a CSA) to third party recipient excise warehouses;

3) The effect of the removal of the Goods from the appellants' warehouse (but without following the formal procedures to bring them under a DSA) constituted an irregular importation; and

4) The appellants thereby became liable for customs duty and import VAT (which they accept and which has been paid).

33. Following their irregular importation of the Goods, the appellants did not follow the prescribed procedures to bring them under a DSA.

34. What divides parties is whether, at the point when the Goods were discharged from the CSA, upon leaving the premises, the Goods were released into free circulation for consumption within the meaning of regulation 6(1) of the Holding 2010 Regulations, thereby triggering an excise duty point and a liability to pay excise duty on the Goods (as HMRC contend) or whether, by some means, they were brought under a DSA or they should be treated as having been under a DSA (eg because the movements mirrored those in a properly constituted DSA), such that there was no excise duty point was triggered.

35. Among other things, the appellants argue that the Goods were transferred to third party authorised excise warehouses and ultimately re-exported. While they didn't put it quite this way, this was relied on in effect, as operating as a *de facto* DSA. HMRC do not accept that the factual premise of this argument. They point out that there was no proof offered by the appellants of this matter, as noted by Judge Reid QC in the decision. (See eg at paras 85 and 88 of the Decision.)

36. Put in narrow terms, consistently with the technical requirements applicable to DSA, the excise duty issue might be framed as asking: whether it is possible to bring the Goods under a DSA other than by the prescribed means, or whether what the appellants did do was functionally equivalent to, and therefore to be treated as, a DSA.

<u>The appellants' arguments in relation to ground 1(ii) and (iii) (the excise duty point)</u>

37. It must be noted that the appellants' skeleton argument was somewhat diffuse and that in oral submissions Mr Thornton's position on certain arguments was fluid, or evolved to some extent, over the course the appeal. It suffices to condense these arguments and to record the final positions he adopted (as I understood them). (I also include the further submissions made in Mr Thornton's reply, on the third day of the hearing.) Mr Thornton drew no distinction in his submissions as between grounds of appeal 1(ii) and (iii).

38. The rules governing the two regimes are technical, detailed and specific. In general terms, the thrust of the appellants' argument was to argue that the Goods were subject to movements that, in fact, were DSA-compliant, and so should be treated as if, or functionally equivalent to, a properly constituted DSA. At times this argument appeared to be presented on the hypothesis that one could bring the Goods under a DSA other than by the prescribed means (ie that there was a DSA), and at other times on a different hypothesis (inconsistent with the first) that the Goods had been moved in a manner which was not a DSA but was functionally equivalent to that under a DSA.

39. The submissions Mr Thornton advanced on behalf of the appellants in support of that argument may be summarised as follows.

40. He began by asserting that excise duty had a dual purpose: to raise revenue but also to discourage consumption of certain types of goods. The CJEU had observed that the excise charge should be applied as close as possible to the point of consumption. Toward the end of his submissions he returned to this point to argue that the purpose informed the interpretation of the provisions. He referred to an observation from the case of <u>Easter Hatton</u> to the effect that purpose was important, albeit this was in the different context of landfill tax. The control of consumption, and the desire of taxing as close to the point of consumption had to be borne in mind.

The impossibility argument

41. Mr Thornton's first argument was that it would always have been impossible for the appellants to enter the Goods into their excise records as excise dutiable goods, because at all times that the Goods had been held in the premises, they had been held under a CSA. It is only possible, he said, to bring the Goods under a DSA where there was no breach of customs procedures when leaving the premises, but that was not the situation here. Here, it was now accepted that there was an irregular importation.

42. It must be possible to place goods under a DSA, even goods that were irregularly imported. If it is impossible to enter a DSA by doing so from within an authorised tax warehouse, as the relevant domestic provisions require, there must be, he said, some other way to initiate a DSA. This is expressly provided for in article 7(2)(d) of the EDD, but the words "including irregular importation" were omitted from the transposing legislation (see regulation 6 of the Holding 2010 Regulations above, at para 22). However, given the irregular importation, it was not possible, he said, to enter into a DSA from within an authorised tax warehouse. The domestic legislation, which did not contain the phrase "including an irregular import", had to be construed consistently with the EDD, ie as containing these words. If an authorised warehousekeeper could only move goods into a DSA by placing the goods under a holding DSA this would, he said, rule out the possibility of being able to do so after an irregular importation. (I refer to this as "the impossibility argument".)

The preposition argument

43. Mr Thornton next noted that Article 17(1)(a) of the EDD defined a "movement" under a DSA as initiating "from" an authorised tax warehouse. He nonetheless argued that there can be movement under a DSA *from* an authorised tax warehouse even if the Goods were not first entered *in* that authorised tax warehouse. This was because, he argued, one can move something "to" another place, without going into or being sent from within another place (I refer to this as "the preposition argument"). In terms of Article 20 of the EDD and the reference to the goods being sent "from" an authorised tax warehouse, this indicates that the goods were inside the authorised tax warehouse and have physically left that warehouse. But this did not mean that the goods had to be within the authorised tax warehouse under a suspense arrangement under Article 20(1) of the EDD. He referred to regulation 11(4A) of EWER. This was, he said, the kind of "co-storage" recognised in the respondents' Excise Note 196 (I was not taken to any passage.) Goods could be in a tax warehouse without being in it and held under a DSA. Accordingly, it is possible to enter into a DSA without the Goods being physically inside an excise warehouse. He also referred to the provisions in which a registered consignor could send excise goods under a DSA without doing so from an authorised tax warehouse (Article 17(1)(b) of EDD) and which otherwise constituted a derogation (from Article 17(1), see in Article 17(2)) as examples where a DSA did not have to be initiated from within a warehouse.

44. While there was reference in his skeleton argument to a "temporary mobile warehouse" outside the physical premises and which followed the goods in transit, he abandoned this line in his oral submissions.

45. Mr Thornton argued that a DSA is nothing other than the absence of the goods being released for consumption. So, the mere act of an authorised warehousekeeper holding goods continued to delay their release for consumption. At one point, he appeared to argue that mere presence of the Goods in an authorised tax warehouse was sufficient to bring them

under a DSA. The purpose of the regime was to delay the incidence of excise duty, so that it was triggered as close as possible to the act of consumption. For so long as the authorised warehousekeeper retained possession or control, no excise duty point cold be triggered, because the goods would not be available, in a practical sense, for consumption.

The control argument and/or a deemed DSA

46. Another way that the excise duty issue was advanced, was to argue (in effect) that it is possible to have an implied or functional DSA. The creation of the prescribed records was not required. So long as the authorised warehousekeeper kept control of the Goods, whether himself or through another, then that would suffice to achieve the purpose of a DSA. Alternatively, so long as sufficient control over the Goods was maintained and they cannot be consumed, they are not available for consumption, and so are subject to a DSA (or should be treated as so subject) ("the control argument"). This was said to be consistent with the policy that excise duty should be levied at the closest point to the consumption of the goods. Therefore, when the Goods physically left the appellants' warehouse (which triggered the irregular import) they did not trigger an excise duty point. This is because, it was argued, the Goods remained under the appellants' "control" until the point when they arrived at the recipient excise warehouse, which was an authorised excise warehouse. This mirrored the kind of permissible movement under a DSA.

47. Accordingly, no excise duty point arose where goods remained in the control of the warehousekeeper(s), sender and recipients. Whether an excise duty point ever arose required consideration of what ultimately happened to the Goods (eg if exported from the EU). This, it was said, the respondents had singularly failed to investigate (this engages one of the other grounds of appeal). As the Goods had been exported from the EU, no excise duty point ever arose and the respondents were claiming duties that were not due from the respondents (or which involved double taxation, if duties were exigible at a later point in the transmission of the Goods).

48. In support of the control argument, Mr Thornton referred to Polihim-SS' EOOD v Nachalnik na Mitnitsa Svishtov [2016] EUECJ C-355/14 ("Polihim"). In that case, under a three-party arrangement, the tax payer company (P) sold exempt goods to a non-exempt intermediary (PO), who sold them on to an exempt end user (T). P delivered the goods directly to T. The tax authorities argued that the first sale (from P to PO) triggered an excise duty point. That matter was referred to the Court of Justice of the European Union ("The CJEU"). On these facts, the CJEU doubted whether the goods had been released for consumption to PO "without that purchaser ever having actual control of those goods" (at para 43). After referring to paragraphs 38 (the first and second questions referred) and 43 (the court's expression of doubt as to whether the sale by P to the intermediary constituted a "release for consumption"), Mr Thornton founded upon the observations (underlined) in paragraphs 51 and 54. The respondents relied on the passages (highlighted in bold) in paragraphs 54 and 55. It is helpful to set these passages out in the wider context of the discussion by the CJEU:

> "The time at which the excise duty becomes chargeable
>
> 45 According to the settled case law of the Court, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (judgment of 26 March 2015 in Litaksa, C-556/13, EU:C:2015:202, paragraph 23 and the case law cited).

46 Firstly, as regards the actual terms of Article 7(1) of Directive 2008/118, it must be noted that that provision defines the time at which excise duty becomes chargeable as the time of release for consumption of the excise goods.

47 Furthermore, it is clear from Article 7(2)(a) of that directive that, for the purposes thereof, 'release for consumption' is to be understood, in particular, as 'the departure of excise goods, including irregular departure, from a duty suspension arrangement'.

48 Clearly, the part of the sentence 'the departure of excise goods ... from a duty suspension arrangement' in Article 7(2)(a) of Directive 2008/118 refers, having regard to the usual meaning of the word 'departure' in normal usage, to the physical departure of those goods from the tax warehouse and not
their sale.

49 Secondly, it must be noted that such a reading of Article 7(1) and (2)(a) of Directive 2008/118 corresponds to the objectives pursued by that directive.

50 Since excise duty is, as is recalled in recital 9 to Directive 2008/118, a tax on the consumption, that directive lays down, as provided in Article 1(1) thereof, general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of excise goods, which include, inter alia, energy products and electricity covered by Directive 2003/96.

51 Thus, since excise duty is a tax levied on consumption and not on sale, the time at which it becomes chargeable must be very closely linked with the consumer.

52 Accordingly, so long as the goods in question remain in the tax warehouse of an authorized warehousekeeper, there can be no consumption, even if those goods have been sold by that authorized warehousekeeper.

53 Thirdly, it must be noted, as regards the context of Directive 2008/118, that Article 7(2)(a) thereof refers, in particular to the possibility of an irregular departure of excise goods from a duty suspension arrangement.
Since the expression 'irregular departure' cannot be understood other than as meaning the physical removal of goods from such an arrangement, the use of that expression in that provision confirms the reading that the release for consumption, within the meaning thereof, takes place at the time of the physical removal of excise goods from a duty suspension arrangement.

54 In addition, it follows from Article 4, point 1, of Directive 2008/118, read in conjunction with Article 15(2) thereof, that excise goods under a duty suspension arrangement are to be held by an authorised warehousekeeper in a tax warehouse. It follows that excise duties are not chargeable so long as the goods concerned are held by the authorised warehousekeeper **in its tax warehouse**, since they cannot be regarded, in that situation, as having been removed from a duty suspension arrangement within the meaning of Article 7(2)(a) of Directive 2008/118.

55 It follows from the foregoing considerations that Article 7(2) of Directive 2008/118 must be interpreted as meaning that the sale of excise goods held by an authorised warehousekeeper in a tax warehouse does not bring about their release for

consumption until the time at which those goods are physically removed from that tax warehouse."

From this passage Mr Thornton argued that, so long as the custodier was in a position to prevent consumption, there was no release for consumption. From this Mr Thornton argued that the CJEU recognised the importance of physical control of the goods. This, he said, was the import of para 52. He went further, to argue that this demonstrated that physical control was enough. He accepted that the argument he advanced constituted an extension of the *ratio* of, or circumstances in, Polihim. By analogy with the warehousekeeper in that case, he argued that so long as the Goods were within the control of the appellants or their agents (even after the Goods were removed the appellants' warehouse), and not capable of being consumed, this sufficed. This prevented consumption of the Goods, which DSA was designed to prevent. Therefore, this meant that there would be no duty excise point until later in the chain of transmission of the Goods and this, he submitted, accorded with the observation in paragraph 51 of Polihim.

49. In support of the same argument, he referred to Vakarų Baltijos laivų statykla' UAB C-151/16. In that case, a vessel had been commissioned and built. Fuel was loaded and the vessel sailed without cargo to the first port where it was to undertake its first commercial cargo. Not all of the paperwork and licensing arrangements were in place at the material time. On that basis, the member state tax authorities refused to refund the excise duty. That case came before the CJEU and one of the cases cited was Polihim. The CJEU stated:

> "42 In that regard, it must be observed that, both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed in accordance with their actual use (judgment of 2 June 2016, ROZ-OEWIT, C-418/14, EU:C:2016:400, point 33).
>
> 43 In so far as Directive 2003/96 does not lay down any particular control mechanism for the use of fuel for navigation nor measures to combat tax evasion connected with the sale of fuel, it is for Member States to provide such mechanisms and such measures in their national legislation, in conformity with EU law, and to lay down the conditions for the exemptions set out in Article 14(1) of that directive (see, by analogy, judgments of 2 June 2016, ROZ-OEWIT, C-418/14, EU:C:2016:400, paragraph 23, and of 2 June 2016, Polihim-SS, C-355/14, EU:C:2016:403, paragraph 57).
>
> 44 That said, the Court has held that the unconditional nature of an obligation to grant an exemption cannot be affected at all by the degree of latitude afforded to Member States by introductory wording such as that contained in Article 14(1), according to which exemptions are granted by those States 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse' (judgment of 17 July 2008, Flughafen Köln/Bonn, C-226/07, EU:C:2008:429, paragraph 31).
>
> 45 Furthermore, the Court has also held that when exercising their power to lay down the conditions for the exemption from excise duty provided for in Article 14(1) of Directive 2003/96, the Member States must comply with the general principles of law which form part of the legal order of the European Union,

> including, inter alia, the principle of proportionality (judgment of 2 June 2016, Polihim-SS, C-355/14, EU:C:2016:403, paragraph 59).
>
> 46 Thus, the refusal by the national authorities to exempt energy products from excise duty on the sole ground that certain conditions that must be complied with under national law in order to obtain that exemption are not fulfilled, without it being checked, on the basis of the evidence provided, whether the substantive requirements necessary for those energy products to be used for purposes giving entitlement to exemption are met, goes beyond what is necessary to ensure the correct and straightforward application of those exemptions and to prevent any evasion, avoidance or abuse (see, by analogy, judgment of 2 June 2016, Polihim-SS, C-355/14, EU:C:2016:403, paragraph 62).
>
> 47 National legislation, such as that at issue in the main proceedings, which makes the application of the exemption laid down by Article 14(1)(c) of Directive 2003/96 conditional on the fuel supplier concerned possessing a licence authorising it to supply fuel to ships and carrying out certain formalities, runs counter to the general scheme and purpose of that directive as it makes the right to that exemption dependent on formal conditions unrelated to the actual use of the energy products concerned."

50. Mr Thornton argued that this case straddled the excise duty issue and ground of appeal 3. For the purposes of the former, he argued that facts supported the control argument. The movement without the licence was the equivalent of the Goods not being in the premises, but, as in *Polihim,* physical control sufficed. In respect of ground of appeal 3, he said that this case emphasised the need for the state authorities to investigate matters.

51. Finally, he addressed HMRC's contention that it was a privilege for an authorised warehousekeeper to be able to consign goods (under regulation 11 of WOWGR) but that privilege was lost if proper excise records were not kept.

52. Mr Thornton went so far as to contend that the Goods entered a DSA instantly upon leaving the premises (which resulted in the discharge of the CSA). In any regular DSA the paperwork is done before the goods leave the authorised tax warehouse. He asserted that electronic documents had been created in respect of the Goods before they left the appellants' premises. A DSA will exist for so long as there is control over the Goods and they are not available for consumption. Mr Thornton argued that the appellants could not be in breach of the WOWGR because the Goods could not be entered into the appellants' excise records while they were held under a CSA in the premises. This lead back to the impossibility argument.

53. In his reply, Mr Thornton took issue with the respondents' proposition that goods cannot be in a tax warehouse unless they are under a DSA. He said that the respondents conflated a DSA with a tax warehouse. Under reference to the plan attached to the appellants' approval, which showed the outlines of the appellants' premises, Mr Thornton argued that the Goods had been in the premises. The approval extended to all parts of the premises. There was nothing to say that the Goods could not be in an excise warehouse even while they were under a CSA. They were simultaneously in a customs warehouse and an excise warehouse; it was just that they weren't held under a DSA.

54. Finally, he submitted that the respondents were wrong to argue that matters should not be easier for an irregular importation of goods than a regular one. Excise Duty was a tax, not a penalty. One should not be encouraged to find excise duty points to address wrongdoing under a completely separate regime. If it is possible to interpret the domestic provisions such that the Goods could be under a DSA by way of a movement, they should be.

Submissions on behalf of the Respondents in reply to ground 1(ii) and (iii) (the excise duty issue)

The purpose of the rules

55. Mr Anderson began by looking at the purpose of the rules for the customs and excise regimes. Warehoused goods pose a risk: they are goods which are in Community territory on which customs duty may not yet have been paid or on which excise duty has not yet been paid. With the privileges that are conferred upon an authorized warehousekeeper, comes onerous responsibilities: regulation 11 of WOWGR.

56. In the context of customs duty, the entitlement to the benefit of a CSA is linked to compliance with certain obligations which allow the authorities to verify the state of the stock at any time in accordance with Article 529 of the Implementing Regulation: Case C-28/11 Eurogate Distribution GmbH v Hauptzollamt Hamburg-Stadt, 6 September 2012, para 27. The Implementing Regulation makes provision for situations where there has been a merely "technical" breaches or "failures which have no significant impact on customs procedures": Implementing Regulation, Art 859. But these rules are "exhaustive".

57. Mr Anderson also referred to the matters I have referred to in paragraphs 23 to 25 above, in relation to the importance of compliance with prescribed requirements, the obligations of record-keeping and the privileges accorded to the warehousekeeper. Because of the importance of record-keeping for the purpose of being able to ascertain whether excise duty has, in fact, been paid on particular goods which have been held in excise warehouse by those authorised to deal in excise-duty suspended goods, he submitted that the UT should be slow to accept a construction placed on the rules which would undermine that basic rationale.

The excise duty issue

58. At the point that the Goods had left the premises an excise duty point had been triggered. Prior to that point they were under a CSA. Their dispatch from the premises constituted an irregular importation; that was now conceded. However, in terms of all of the applicable provisions, if they were not immediately placed under a DSA, then a duty point was triggered and excise duty due became in respect of the Goods.

59. In relation to the excise duty issue, Mr Anderson argued that the appellants' argument contradicted the express terms of the regulations 10 and 16(3) of EWER, Article 7 of the EDD, and Regulations 3(3) and 6 of the Holding 2010 Regulations. He developed this submissions under reference to these provisions. Starting with the EDD, Mr Anderson looked at recital 17; recital 18 concerned registered consignors. The appellants were not registered consignors, so recital 18 was irrelevant, as were the other provisions applicable to consignors that Mr Thornton relied on (eg Article 17(1)(b) of the EDD). The definition of an authorised warehousekeeper in Article 4(1) of the EDD was defined *inter alia* as a person authorised "to dispatch excise goods under a duty suspension arrangement in a tax

warehouse” (emphasis added). This was reinforced by the definition of an authorised tax warehouse, in Article 4(11), which was a place *inter alia* where excise goods were “dispatched under” a DSA. This was the place from which excisable goods were dispatched, ie from inside an authorised tax warehouse. The words “unless the goods are placed” in Article 7(2)(d) were to be noted (emphasis added). Article 7 of the EDD defined the circumstances when goods were “released for consumption”.

60. Mr Anderson also noted the terms of Article 8(1)(d), which provided for the liability to pay excise duty that had become chargeable, by the person who declares the goods upon importation or, in the case of an irregular importation, “any other person involved in the importation”. He also noted the requirements imposed by Article 16 on authorised warehousekeepers. This included (in Article 16(2)(c)) an obligation to keep accounts of stock and movements. Article 17 governs “movement” under DSAs. The prepositions in Article 17(1), “from” and “to”, were to be noted. Movements under a DSA were permitted in prescribed circumstances. One of these (under Article 17(1)(a)) was “from a tax warehouse to” another tax warehouse (Article 17(1)((a)(i)). (The definition of a tax warehouse had to be borne in mind.)

61. This was a short answer to the appellants’ excise duty point. This was also consistent with Polihim.

Reply to the preposition argument and the impossibility argument

62. The requirement that any movement under a DSA initiated by an authorised warehousekeeper had to be from within its tax warehouse was retained in the EWER. Mr Anderson noted the requirements (in regulation 8) for recordkeeping and the terms of regulation 10 (set out above, at para 28(5), above). Goods brought to a tax warehouse for warehousing had to be physically placed within the warehouse: they are “deemed to be warehoused when they are put in the excise warehouse” (emphasis added). Goods could not be warehoused before they were physically moved into the warehouse. This undermined the appellants’ argument.

63. Mr Anderson also noted regulations from the EWER. In terms of regulation 11(7), and the liability to forfeiture of goods where there as a failure to comply with the entry and recordkeeping in respect of excise goods held in an excise warehouse. He also noted regulation 12 of the EWER, dealing with securing excise goods in the tax warehouse, and the obligations of an authorised warehousekeeper legibly and uniquely to mark the Goods so that they could be identified at any time in the stock records. This was important, not least to enable verification. Regulation 15 specified the requirements to be followed (including, eg notice of intention to move) when excise goods were to be removed from a tax warehouse.

64. All of these provisions meant that, in the case of a regular importation, all of these procedures had to be complied with. This would have included the discharge from the customs warehouse regime; entry of the Goods into the appellants’ excise warehouse (and possibly entailing movement into that part of the warehouse segregated for excise goods); the provision of the required notification to HMRC and creation of the appropriate entries in the appellants’ excise records. The recordkeeping obligations would be triggered and could not be avoided: see para 95 of the Decision. Regulation 16 governed removals from the excise warehouse and prescribed that entries were made for this purpose. Regulation 16(3) prohibited removal from excise warehouses unless there had been compliance with regulation 16 (ie the appropriate entries had been made). Record-keeping obligations arose

at the entry of excise goods into excise warehouses and at the point of their removal. It was against this background that the definitions needed to be considered.

65. The appellants now accepted that a CSA and DSA were mutually exclusive and that, for so long as goods were held under a CSA, which they were for the whole time the Goods were physically present in the premises, they could not be under a DSA. The appellants also now accepted that there had been an irregular importation of the Goods (and a discharge of the CSA) when the Goods left the premises. Having left the premises (and been discharged from the CSA), an excise duty point was triggered unless the goods were immediately placed under a DSA: this was what Article 7(2)(d) of EDD unarguably required. The impossibility argument could be shortly answered: in order for the appellants to have effectually and immediately brought the Goods under a DSA, at the very least, they had to bring the Goods back within the premises (ie *qua* excise warehouse). They did not do so. The excise duty was triggered by that failure. The prepositions noted in the various provisions were vital. An authorised warehousekeeper could only initiate a DSA from within its authorised excise warehouse. (The separate provisions concerning consignors were irrelevant.) All of this accorded with paragraph 95 of the Decision, which was correct in law.

66. The domestic transposing provisions all complied with the EDD. Reference was also made to regulation 10 of the EWER, governing the commencement of warehousing of excised goods in an excise warehouse (under regulation 10) and the further requirement that, save as the respondents directed, no goods could be removed from an excise warehouse unless they have also been entered in accordance with regulation 16.

67. By definition, there can be no DSA in place while the Goods were subject to a CSA. The appellants, as an authorised excise warehousekeeper, never entered the Goods into excise control. They could have done so, had the goods been discharged from the CSA and entered into the excise warehouse: see FTT Decision, paragraph 95. Until the Goods were under excise control – that is to say, properly entered into an excise DSA in the appellants' own excise warehouse – there could be no valid excise DSA initiated by the appellants as an authorised excise warehousekeeper in respect of a transfer of excise goods to any other excise warehouse.

68. Furthermore, there was no basis in the EDD for any goods held under a DSA to be initiated by the authorised keeper of an authorised excise warehouse from anywhere other than his authorised excise warehouse: see e.g. recital (17) of the EDD. Indeed, Article 8(1)(d) of the EDD expressly states that anyone involved in an irregular importation shall be liable to pay the excise duty that thereby becomes payable. It should not be the case that greater flexibility is extended to those who have imported irregularly than to those who have complied with the requirements for a regular importation. The appellants' assertion (in paragraph 10 of their skeleton), that the FTT's decision that goods cannot go into excise DSA without first having been properly warehoused as being made "absent any supporting authority", is manifestly unfounded: see the definition of "authorised warehousekeeper" and "tax warehouse" in Article 4 of the EDD, the terms of Article 7(1) and regulations 5, 6 and 12 of the Holding 2010 Regulations, and the references to the FTT Decision at paragraphs 95, 104, 107, 112 and 115. It is striking, Mr Anderson said, that the appellants make no reference to any of the statutory definitions in their Skeleton argument.

69. The appellants' argument, based on the provisions applicable to registered consignors or the derogation in Article 17(2) of the EDD, was also misconceived. EDD Art 17 distinguishes

between registered consignors and authorised warehousekeepers. Registered consignors were permitted to initiate a DSA movement other than from a tax warehouse because they did not operate tax warehouses. (If they did, they wold be authorised as warehousekeepers!) In this case, the appellants were an authorised keeper of a tax warehouse. The appellants were thus obliged to comply with obligations incumbent upon them. The appellants are not a registered consignor, so Art 17(1)(b) does not apply to them. EDD Art 17(2) confers on Member States the power to lay down conditions. No such provisions of UK excise law are identified by the appellants.

The control argument

70. The reference to the "mobile temporary tax warehouse", had no basis in law. Article 20(1) of the EDD stipulated that a movement of excise goods under a DSA began when the excise goods "leave the tax warehouse of dispatch". Article 20, read consistently with recital (17) and with the definitions of "authorised warehousekeeper" and "tax warehouse" in Article 4(1) of the EDD, requires excise goods to have been entered *in* to a tax warehouse before they can be dispatched from a tax warehouse.

71. Furthermore, responsibility for a movement was not the same as control, even if control were relevant. This is why an excise duty point arose. The case of Polihim provides no support for the appellants' argument. Rather, paragraph 55 of that case reflects Article 20 of EDD. On the facts of that case, the goods had not been removed from the warehouse of P after the sale to PO. For that reason, no excise duty point arose. The CJEU focused on the physical location of the goods, and the fact that they had not been removed from the authorised premises where they were held under duty suspense. In relation to Vakaru and the reference to proportionality, as the respondents rely directly on the provisions of the EDD, means that no question of the proportionality of domestic implementing regulation arises.

The absence of a basis of fact for the appellants' ground of appeal 1(ii) and (iii)

72. The FTT found as a matter of fact that such records as there were showed "stock cards noted as customs warehoused goods with discharges showing direct transfer to [the recipient excise warehouses]": see the Decision at para 87. The appellants' director had been unable to say whether these warehouses were authorised for customs goods or for excise goods: the Decision paragraph 55. In fact, these warehouses were authorised only for excise goods: the Decision, paragraph 59. The factual findings of a movement from a customs warehouse to an excise warehouse thus meant that the suggestion that goods could have moved under excise duty suspense is inconsistent with the facts – even on the appellants' curious analysis, that an authorised excise warehousekeeper, who imports goods irregularly, does not have to comply with formalities with which he would ordinarily have to comply. There is no error of law in the FTT's Decision.

73. The appellants' entire argument, that it is possible to have an excise DSA initiated by one authorised tax warehousekeeper without the goods ever having been entered into the stock records of his authorised excise warehouse, was inconsistent with the express wording of EWER, the EDD and the Holding 2010 Regulations. It is an argument that undermined the fundamental importance within the excise control regime of record-keeping. In the present case, the excise duty point arose on the irregular importation of the Goods and this also constituted a "release for consumption", within the meaning of Articles 7(2)(d) and Art 8(1)(d) the EDD and regulation 6(1)(d) and 12(2) of the Holding 2010 Regulations.

74. Even if the FTT's Decision is correctly characterised as "black and white" (appellants' skeleton, para 21), that is an approach required by higher authority. As Lord Walker of Gestingthorpe in Greenalls [2005] 1 WLR 1754 (HL) para 38, observed, the status of a warehousekeeper is one which carries heavy responsibilities and, no doubt, commensurate financial advantages. Since the warehousekeeper will often find itself strictly liable in circumstances where an DSA has been properly initiated, though there has been no fault on his part (as the UT has held in TDG (UK) Ltd v HMRC [2015] UKUT 167 (TCC), [2015] STC 1954), so too must the warehousekeeper be fixed with liability when that authorised warehousekeeper has itself been responsible for an irregular importation and for failing to follow the procedures required of it. In TDG an excise DSA was properly initiated from a tax warehouse, but the goods did not reach their destination. The appellants have offered no coherent explanation to avoid the liability fixed upon them by the terms of the EDD and Holding 2010 Regulations. This ground of appeal, accordingly, should be refused.

Discussion of the excise duty issue

Preliminary observations

75. A notable feature of this appeal is that the appellants made no reference to the Decision and they simply proceeded as if it did not exist. For my own part I find the Decision to be careful, thorough and cogently reasoned. A further notable feature of the appellants' approach was to proceed largely without reference to the relevant legal provisions and wholly without reference to the applicable definitions. To the extent that there was a reference to the "purpose" of excise, it was detached from the provisions to be construed.

Findings of fact that are unchallenged

76. As noted above, at the stage of granting permission, Judge Richards felt compelled to observe that there was no relevant challenge to any findings in fact of the FTT and he reformulated the appellants' grounds of appeal accordingly. As also noted above, at times Mr Thornton premised some of the arguments on a statement of fact that was either unproved or inconsistent with the FTT's findings in fact; or, in the presentation of some arguments, he appeared to ignore findings that were inconsistent with those arguments. It is necessary, therefore, briefly to note the relevant findings. These include:

1) There is no evidence to prove that the Goods were subsequently exported to qualifying ships outwith the EU; the appellants led no evidence about the subsequent destination of the Goods: paragraphs 85 and 88 of the Decision;

2) At no stage did the appellants ever enter the Goods into their excise warehouse records in terms of regulations 10, 11 and 12 of EWER: paragraph 95 of the Decision;

3) The appellants failed to discharge the Goods from customs warehousing control. The consequences were *inter alia* an irregular importation and a liability to customs debt (now paid): paragraphs 96 and 107 of the Decision;

4) The Goods were physically removed from the premises (*qua* an authorised customs warehouse), where they had been held under CSA, and which resulted in the irregular importation, but without thereafter complying with the formal

requirements to bring the Goods under a DSA. Had they done so, there would be no excise duty issue and no assessment; and

5) It is implicit in the foregoing, that after removal of the Goods from the premises, they were never physically returned to the premises *qua* an authorised excise warehouse. Accordingly, the Goods were never held in a tax warehouse (ie they were never held within the premises *qua* excise warehouse) prior to any movement.

The excise duty issue in the Decision

77. Judge Reid QC dealt with the excise duty issue at paragraphs 94 to 122. I find that reasoning wholly persuasive, particularly his analysis at paragraphs 98 to 118, and nothing that Mr Thornton has said convinces me that there is any error in law or other basis to challenge Judge Reid QC's determination of the excise duty issue (comprising ground of appeal 1(ii) and (iii)).

The preposition argument

78. It is a prerequisite of the prescribed procedure that goods must be put under excise control, that is, properly entered in an excise warehouse and duly brought under a DSA. Absent that, there can be no valid movement DSA initiated by the appellants.

79. The appellants now accept that the customs and excise regimes are mutually exclusive. Having accepted the correctness of this proposition, they are faced with the difficulty that the Goods could not be held simultaneously under both a CSA and a DSA. In other words, the Goods could be held in the premises under only one or other of these sorts of arrangements, but not both. In practical terms, and notwithstanding that the premises had a dual authorisation as both an excise warehouse and a customs warehouse, while the Goods were held under a CSA they were held in the premises under the customs authorisation applicable to the premises. The physical departure of the Goods from the premises, where they had been held in a CSA, triggered the discharge of the CSA and constituted the irregular importation. It was necessarily the case that, while the Goods were held under a CSA in the premises, they could not be held under a DSA. It follows that the Goods were never held in the premises in the latter's capacity as an authorised *excise* warehouse. However, in terms of the legislation, a DSA must be constituted from within an authorised tax warehouse (ie an excise warehouse). The preposition argument was advanced to try to elide that difficulty.

80. I accept the respondents' submission that the preposition argument is without merit. There is force in Mr Anderson's observation that it was singularly curious that Mr Thornton never looked at any of the relevant definitions. These provisions cannot simply be ignored, as Mr Thornton sought to do.

81. The appellants' preposition argument flatly contradicts the express and unambiguous words of Articles 20, 17(1) and recital (17) of the EDD and also the definition of a "tax warehouse" in Article 4(11). Starting with the latter, this is defined as a place where "excise goods are…dispatched under duty suspension arrangements by an authorised warehouse keeper…". At the point of dispatch of the Goods from the premises (and which triggered the discharge of the CSA and the irregular importation), none of the features of this definition had been met. At that time, the Goods were not excise goods; the appellants were

not acting in their capacity *qua* excise warehousekeepers; and the Goods had not been held in the premises *qua* an authorised *excise* warehouse. Any records created in respect of the Goods would not be for excise purposes.

82. Furthermore, these provisions are to the effect that excise goods must be entered in a tax warehouse before they can be despatched from an authorised tax warehouse (*per* Article 17(1)(a)). (The German language version of the EDD uses the preposition "*aus*", meaning "out of".) A movement begins "when the excise goods leave the tax warehouse of dispatch": Article 20(1) (emphasis added). There are two features to note: that the goods must "leave", which is suggestive of leaving from within, and they must leave from a "tax warehouse". As a matter of fact and law, the Goods were never in the premises in their capacity as a "tax warehouse". Even if the preposition argument were accepted, that would not avail the appellants for the simple reason that the Goods were never in a tax warehouse. Regulation 10 of the Holding 2010 Regulations provides that excise goods are deemed to be warehoused when they are "put in" the excise warehouse. At no point were the Goods "put in" the premises *qua* an excise warehouse. Accordingly, at no point were the Goods held under a DSA while physically in the premises.

83. It was in this context that Mr Thornton invoked Article 17(1)(b) and (2) as examples of movements under a DSA initiated from outwith a tax warehouse. In my view, the appellants' reliance on registered consignors as an example where a DSA may be initiated outwith an authorised tax warehouse is misconceived, for the reasons explained by Judge Reid QC at paragraph 122 of the Decision (and advanced by Mr Anderson). Apart from repeating the argument, Mr Thornton offered no submission as to why the distinction between consignors and warehousekeepers which the legislation creates, and which Judge Reid QC respected, should simply be disregarded. The separate provisions applicable to the very different circumstances of consignors (as well as those falling under Article 17(2) of the EDD) were simply of no application to the appellants *qua* authorised warehousekeepers of an excise warehouse.

The impossibility argument

84. I turn to consider the appellants' impossibility argument. So far as I understood it, this was premised on the failure (it was said) of regulation 6(1)(d) fully to transpose the terms of Article 7(1)(d) of the EDD. (This is the provision that defines what constitutes a "release for consumption" and contains the proviso that goods will not be so treated if "immediately upon importation" they were placed under a DSA.)

85. In particular, it was suggested that the words "including irregular importation" had twice been omitted and therefore fell to be read into regulation 6, after each reference to "importation". These are the words in square and double square brackets, in paragraph 22, above. On this approach, the exclusion from the definition of the release of goods for consumption that are "immediately upon importation" placed under a DSA is extended to goods that have been irregularly imported: if the words are added, the proviso reads: "…unless the goods are placed, immediately upon importation including irregular importation, under a duty suspension arrangement".

86. The first difficulty for Mr Thornton is that he has misread Article 7(1)(d) of the EDD. While the words "including irregular importation" appear, they only do so once, after the first reference to "importation": see paragraph 21, above. Significantly, these words do not appear after the second reference to "importation" (ie the words underlined in the preceding

paragraph, and enclosed in double brackets in para 22, above, do not appear in the Directive.) There is no basis, therefore, to argue (1) that the Directive contemplates the possibility of placing irregularly imported goods under duty suspense such as to preclude their being "released for consumption"; and (2) that any feature of the domestic legislation that makes this "impossible" must be construed otherwise and in furtherance of a Directive-compliant interpretation. This is the short answer to this argument.

87. In any event, even considering this argument on its terms, I am not persuaded that there is any impossibility arising from the domestic legislation, as Mr Thornton argues. The fact that there has been an irregular importation does not preclude the possibility of placing the goods under a valid DSA. The point is that the prescribed requirements to do so must be observed. In this case, the appellants failed to do so following the irregular importation. (Mr Thornton suggested that the error arose because the appellants believed that the Goods remained under a CSA when they left the premises.) The respondents argue that it would have been possible to bring the Goods under a DSA, had the appellants realised the error sooner, and moved the goods back into their premises; and if they had then made the appropriate entries and otherwise complied with the requirements. While that might raise a separate temporal argument about the meaning of "immediately", I accept that submission. There is no impossibility arising from the domestic legislation, as Mr Thornton asserts. The effect of returning the Goods to the premises would have been to comply with regulation 10 of EWER, because they would then be warehoused in the premises *qua* an excise warehouse. For the whole time that the Goods had been held in the premises, they were in the premises *qua* a customs warehouse and under a CSA. (Mr Thornton's explanation of how the error arose reinforces this.) Mr Thornton's subsequent argument that the Goods could at one and the same time be held in the premises for excise and customs purposes is fundamentally inconsistent with the terms of Article 4(7): defining a DSA as an arrangement *inter alia* for the movement goods "not covered by" a CSA. The Goods were held in the premises *qua* an excise warehouse under a CSA. The fact that those premises were also authorised as an excise warehouse is only an incidence of the dual authorisation of the premises, but has no legal effect for so long as the Goods were held there under the CSA. This is not to conflate suspension arrangements with the tax warehouses, as Mr Thornton argued. Rather, this respects the mutually exclusive character of the two regimes, a proposition Mr Thornton accepted at the outset of the appeal hearing before the UT. Returning the Goods to the premises *qua* excise warehouse would also have enabled the appellants to comply with regulation 16 in respect of the removal of the goods thereafter, under a properly constituted DSA.

88. The problem for the appellants is that their first failure (constituting the irregular importation) was compounded by their further failure to recognise at the material time that there had been an irregular importation, and to take the requisite steps to bring the Goods under a DSA in the prescribed manner (including making the appropriate entries). This was not done at that time. It is that double failure that is the cause of the appellants' difficulties, not the terms of the domestic legislation. That is no basis to afford them more latitude than to compliant warehousekeepers or to justify some alternative reading of the domestic legislation. Article 7(1)(d) does not contemplate the possibility of bringing irregularly imported goods immediately under a DSA. Article 8(1)(d) identifies that the person liable to pay excise duty that has become chargeable includes, following an importation falling within Article 7(1)(d), "any other person involved in the importation". *Prima facie* these provisions of the EDD squarely fix the appellants with the liability for the excise duty that the respondents have assessed. For these reasons there is, in my view, no warrant for reading

in the "missing" words in regulation 6(1)(d) of the Holding 2010 Regulations, as Mr Thornton contends, or construing the domestic legislation accordingly.

The control argument

89. Mr Thornton accepts that he is extending Polihim beyond its *ratio*. In my view, the case is not capable of supporting the appellants' control argument. In the first place, its facts are wholly different: it is concerned with the question of whether goods could be released for consumption in the sale from P to PO, but where the goods never left the seller's (ie P's) warehouse. The focus in that case was on P's retention of the physical possession of the goods after the sale. Mr Anderson is right to emphasis the observations of the CJEU to that effect in paragraphs 54 and 55, which state:

> "54. …excise goods under a duty suspension arrangement are to be held by an authorised warehousekeeper in a tax warehouse. It follows that excise duties are not chargeable for so long as the goods concerned are held by the authorised warehousekeeper in its tax warehouse, since they cannot be regarded, in that situation, as having been removed from a duty suspension arrangement within the meaning of Article 7(2)(a) of Directive 2008/118.
>
> 55. It follows from the foregoing considerations that Article 7(2) of Directive 2008/118 must be interpreted as meaning that the sale of excise goods held by an authorised warehousekeeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from that tax warehouse." (Emphasis added)

The observations in the passages underlined reinforce the focus on the location of the goods in a tax warehouse while under a DSA (which supports the FTT's Decision on the excise duty issue) and on the consequence of the goods physically leaving an excise warehouse. This also accords with the features of the excise regime that carefully stipulate how liability arises by reference to when, where, and by whom dutiable goods are held or moved. In my view, the case affords no support for a contrived argument based on a "temporary mobile warehouse" or a form of civil, rather than actual, control being maintained over the Goods, or for any kind of deemed DSA.

90. In this context, the case of Vakaru was also cited, as following Polihim. To the extent that it did so, it is for the more general observation (at para 59 of Polihim; see para 45 of Vakaru) about compliance by the member states with the principle of proportionality (as one of the legal principles of the legal order of the EU) when laying down conditions for exemption under Article 14 of the EDD. Article 14 of the EDD has no relevance to any of the issues in this appeal. Given the respondents rely on the terms of the EDD, no wider issue of proportionality arises. These cases afford no support for the control argument, which I also reject as ill-founded and at odds with the provisions that fall to be applied.

91. It is convenient at this point to note that it is from this case that Mr Thornton extracted the proposition that, as a tax on consumption, excise duty should be chargeable as close to the point of consumption as possible. (Mr Thornton also relied on this proposition in support of ground of appeal 3, that if the tax is to be collected as far down the chain of consumption as possible, this (it was said) informs the reasonableness or otherwise of the Assessment.) Read in full, and in the context of the facts of the case, the passage Mr Thornton points to does not in fact support that proposition. What the CJEU said was:

"51. :…since excise duty is a tax levied on consumption and not on sale, the time at which it becomes chargeable must be very closely linked to the consumer.

52. Accordingly, so long as the goods in question remain in the tax warehouse of an authorised warehousekeeper, there can be no consumption, even if those goods have been sold by that authorised warehousekeeper." (Emphasis added.)

The CJEU are not saying that excise duty should (in effect) be postponed as far as possible along the chain of transmission toward the end consumer. That would be inimical to the provision that excise duty generally arises upon importation. In this passage the CJEU are giving priority to the fact of the physical location of the goods (as having remained in a tax warehouse), rather than to the terms of a sale contract. This is consistent with the emphasis in the excise regime on the location of goods in tax warehouses, and the consequences of being held in or leaving such premises.

A deemed or simulated DSA movement

92. As noted above, Mr Thornton's arguments appeared to proceed on different hypotheses, either that what occurred was a DSA or that what occurred wasn't, but should be treated as such. The impossibility argument seems to be addressed to the former; the control argument might be seen as straddling both hypotheses.

93. It seems to me implicit in some of Mr Thornton's arguments that the appellants accept that they did not enter the Goods into excise control in the prescribed manner. (They could have done so, had the Goods been discharged from the CSA. See paragraph 95 of the Decision.) If that is correct, it may be inferred that whatever entries or documents were generated, they were not generated for the purpose of initiating a DSA or otherwise intended to comply with *that* regime.

94. So far as I understood it, Mr Thornton also argued that goods left the premises under a DSA or DSA-like movement. This was coupled with a submission that, for so long as that occurred, the Goods were not available for consumption in a practical sense. Thus, so this argument ran, the purposes of the excise regime were served and whatever the technical or formal failures to comply with the legal requirements, what the appellants did should be deemed to be a DSA or treated as a simulation of movement under a DSA.

95. It was in this context that Mr Thornton contended that a DSA was simply "the absence of goods being released for consumption". It seems to me that this is to argue, in effect, that a DSA arises by default, so long as goods are retained in the "control" of the authorised warehousekeeper or his agents. In my view, this is untenable as this inverts the whole structure of the excise regime, which has detailed requirements that must be complied with in order to bring goods under a DSA. In other words, one must take steps to opt into a DSA; it cannot occur by default, as was the import of the appellants' argument.

96. The appellants' argument also ignores the clear terms of Article 17(1)(a)(i) of the EDD, that valid movements under a DSA are "from a tax warehouse" to "another tax warehouse"(emphasis added). Article 7(2)(d) also requires that goods "be placed" under a DSA "(emphasis added).

97. Furthermore, this argument is premised on a state of affairs that did not exist. It will be recalled that the appellants led no evidence before the FTT. The findings of fact are at paragraphs 53 to 61 of the Decision. The only authorised movement which an authorised warehousekeeper can initiate under a DSA, is from inside an authorised tax warehouse. It is essential, therefore, to any argument about the creation of a DSA, a deemed DSA (eg the travelling temporary warehouse), or something functionally akin to a DSA, is that the movement is initiated from within a tax warehouse (ie one that is authorised for *excise* purposes). However, the positive findings in fact (especially at para 54) undermine this argument (and there is no challenge to any finding in fact by the FTT). There was simply no evidence to establish that the Goods had been transferred to the appellants' premises (*qua* an excise warehouse) prior to the dispatch of the Goods to the third party recipients. Furthermore, as Mr Thornton explained, the appellants thought the Goods were leaving under a CSA when they left the premises. There is no provision in the EDD recognising a transfer from a holder under a CSA to a recipient under an excise authorisation as constituting a valid movement under a DSA. There is simply no competent or valid legal basis to treat the dispatch of the Goods *qua* keeper of an authorised *customs* warehouse as a dispatch by authorised *excise* warehousekeeper. Mr Thornton's attempt to suggest that the presence of the Goods in the premises constituted at the same time their presence in an excise and in a customs warehouse, is misconceived. It offends against the mutually exclusive character of the two regimes, which the appellants have conceded.

98. Notwithstanding the various arguments advanced by the appellants, none addressed another feature of Article 7(2)(d), namely that the goods had to have been brought under a DSA "immediately" upon their importation. Even if the preposition argument were correct, and the Goods did not first require to be placed in a tax warehouse, this would not suffice. Similarly, the control and other arguments failed to address this requirement that the Goods be brought under a DSA immediately.

99. For all of these reasons, ground of appeal 1(ii) and (iii) fail.

<u>The appellants' submissions on ground of appeal 2 (the EMCS entries)</u>

The appellants' submissions in support of the ground of appeal 2 (the EMCS entries)

100. So far as I understand this ground of appeal, it is premised on two facts (i) that before the FTT on the first morning of the hearing the appellants insisted on their written motion to have a large volume of documentary materials received by the FTT; and (ii) that the FTT failed to determine this matter or to have regard to this material (the asserted error).

101. Mr Thornton did not address this ground in his initial oral submissions. The points made in his written skeleton, included the following:

1) HMRC's refusal to accept the relevance of these documents was, it was somewhat tendentiously put, demonstrative of a "closed mind" and evidenced HMRC's "fixation on the normal procedure". The HMRC's "closed mind should not be held against" the appellants;

2) The entries were said to evidence that the movements of the Goods were issued in accordance with the EDD. It was also suggested that the report of receipt at

the front of the paperwork for each movement is evidence that the Goods reached the destination tax warehouse, as provided for in Article 28(1). This follows from the first argument, that the Goods had been placed under a DSA;

3) These documents were sought to be put before the UT for the purposes of this appeal, on the basis that, if the UT were with the appellants on the excise duty point comprising the first ground of appeal, then the UT could itself consider all of these. If satisfied that they evidenced that the Goods were all received by an authorised excise warehouse, then the UT could accept this and, so it was suggested, the appeal would need not be remitted back to the FTT, if it were allowed.

4) Finally, these documents were said to be relevant to demonstrating that the purpose of a DSA had been satisfied in this case. This was relevant to the control/*Polihim* argument in ground of appeal 1 and for the purposes of ground of appeal 3 (ie to show, it was said, what reasonable actings are). The inferences the appellants proposed could be drawn were that the Goods had been properly processed in accordance with the excise regime; and that the "right action can be expected to have taken place in respect of all of these goods at the imposition of a charge for excise duty in these circumstances is little more than an attempt to create a windfall as a result" of the appellants' mistake.

102. Mr Thornton did briefly address this issue in his reply. The documents were to be relied on as providing a basis for the FTT to conclude that there was a "framework" for a DSA to be in place. If accepted, the documents were to be relied on to show that the Goods reached their destination. This was said to inform ground of appeal 3 and the issue of reasonableness.

103. In relation to whether or not he had made the motion for all of the EMCS records to be admitted before the FTT at the hearing on 5 May 2016, Mr Thornton's position was at times equivocal. In his submission, the FTT did not have enough time to consider this material and so left it over. The matter had therefore not been adjudicated upon. He relied on paragraph 5 of the Note to the Direction of Judge Reid QC dated 9 May 2016 ("the Direction"), which was in the following terms:

> "It seemed to me that the bulk of the hearing could be conducted on the two days allocated for this *complex* appeal leaving over the question of whether the movements of the goods in question were properly conducted without any irregularities in the course of the movement. That question and others may arise at a later stage. In the meantime, the EMCS documents need not be admitted in evidence with the exception of two such documents to be used for illustrative purposes"

He did not rely on any other parts of the Note to the Directions.

The respondents' reply to the ground of appeal 2 (the EMCS issue)

104. Mr Anderson began by explaining the background to this ground of appeal, and what was said to have occurred before the FTT. Two folders of EMCS entries had been sent to the respondents shortly prior to the hearing before the FTT, and in advance of any permission having been granted by the FTT for reference to be made to them. It was clear at the hearing of the application that, were the appellants to insist on the application, Judge Reid QC was unlikely to grant it. In the event, a compromise application was made in relation to two "representative" entries. On pragmatic grounds, in order to allow the hearing to proceed, the respondents did not oppose the application to have those two entries admitted in evidence. As is recorded in the FTT's Directions, at para 5, the question of whether the movements of the goods in question *were* properly conducted without any irregularities in the course of the movement was left over.

105. As the respondents understood matters, the appellants amended their written application (which had been in respect of a very large volume of documents) to confine the application made orally at the FTT hearing to just two entries being admitted in evidence. This was done in order to save the hearing dates. Mr Anderson explained that had the appellants insisted on their application to have all the entries admitted for the purpose of their primary case, either the application would have been refused or, had the FTT judge acceded to it, the hearing before Judge Reid QC would have had to have been discharged. The case was designated as a complex case before the FTT. Had the appellants' application necessitated the hearing being discharged, the respondents would have moved for the expenses of the discharge in terms of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10(1)(c)(i).

106. In short, the context in which to approach this ground was on the basis that the appellants modified their written application orally in the course of the hearing, with some success: the FTT judge admitted two representative entries in evidence: see the FFT Directions, 9 May 2016. In other words, the FTT Judge granted the motion, as amended, and admitted these documents in evidence. It is therefore difficult to see how the FTT judge can be said by the appellants to have erred in law in having done as he was asked to do. It was not the case, as the appellants suggest, that the FTT Judge failed to adjudicate upon this matter. He addressed and determined the motion (in its modified form) that was made to him.

107. More to the point, at the hearing before the FTT the appellants had not offered any witnesses to give oral evidence, never mind any advance witness statements, addressing what was to be taken from the EMCS entries. The appellants led no oral evidence as to what was to be taken from the EMCS entries. In all these circumstances, it cannot be said that Judge Reid QC's decision in relation to the admission of the two representative entries contained any error of law.

108. Given that two of the EMCS entries had been admitted in evidence before the FTT, Mr Anderson addressed these entries. He submitted that they must be considered against the background where the appellants accepted that the Goods were never entered into their excise/tax warehouse. That concession is reflected in the findings of the FTT at paragraphs 95, 112 and 114 of the Decision. It is against that factual background that the two representative EMCS entries fell to be considered. Contrary to what is now conceded by the Appellants, that the goods were never properly entered into the stock records of their excise/tax warehouse, the two EMCS entries which were admitted state in the "origin type description" the following entry: "tax warehouse". This was patently incorrect. The Goods

had not originated in an excise warehouse. They had been released from the premises *qua* customs warehouse, where they had been held under a CSA. In any event, one of the two entries related to fermented beverages, with which the appeal is not concerned. The two entries are demonstrably factually inaccurate. Further, these entries had never been spoken to in evidence. The appellants chose not to put these parts of the EMCS entries to Officer Cowie. It is not now open to the appellants to seek findings based upon these EMCS entries.

109. The contentions in relation to the EMCS entries are in any event irrelevant in law. They proceed on the proposition (set out in paragraph 26 of the appellants' skeleton), that the Goods were dispatched under an excise DSA. If the UT is not with the appellants on ground of appeal 1, there is no need to consider Ground of appeal 2. The FTT Judge rightly concluded that the two representative entries, which were admitted in evidence, were of no relevance to the issues before him: see the Decision, paragraph 112.

110. Even if the EMCS entries were admitted in their entirety and even if it were presumed (taking the appellants' contentions *pro veritate*, for the sake of argument) that the entries exhaustively covered all 8 million cigarettes comprising the Goods, these EMCS entries cannot remedy the singular failure on the part of the appellants to enter any of the 8 million cigarettes into their excise warehouse. As a result, it was not legally possible, in terms of the EDD, the Holding 2010 Regulations and the EWER for the appellants, as an authorised warehousekeeper, to initiate an excise DSA in circumstances where it is accepted that the goods were never entered into the tax warehouse (ie the premises *qua* an excise warehouse). The appellants' contentions in relation to the EMCS entries must necessarily fail, even if all of the EMCS entries were admitted. Even on the hypothesis that the FTT Judge refused the application to admit the folders (which Mr Anderson maintained was not factually correct), his decision cannot be described as an error in law in relation to the legal issues which formed the subject of the appeal before him.

<u>Discussion and decision on ground of appeal 2 (the EMCS entries)</u>

111. The parties dispute what actually occurred before the FTT in relation to the appellants' written application of 20 April 2016 for receipt of what Judge Reid QC described as "two large bundles of EMCS records": see paragraph 1 to the Note to his Direction dated 9 May 2016. Mr Thornton asserts that the motion was moved but undetermined, whereas Mr Anderson asserts that the motion was likely to have been refused, if insisted in, and so a compromise was reached to the effect that the appellants only moved for two sample EMCS entries to be lodged. These were received.

112. It is unsatisfactory to consider a ground of appeal which is predicated on a certain state of facts as to what occurred before the FTT, but which is disputed. The onus is of course on the appellants to establish the factual basis on which they wish to advance this ground. Rather than determine that as a matter of onus, however, it is helpful to note the context in which paragraph 5 of the Note to the Direction of 9 May 2016 (founded upon by Mr Thornton) is made.

113. The appeal hearing before Judge Reid QC had been designated as a "complex" hearing and took place on 4 and 5 May 2016. In paragraph 1 of the Note to the Direction, Judge Reid QC records that the appellants moved for amendment of their grounds of appeal and they also tendered the two large bundles of EMCS documents referred to. These appear to have been tendered in association with the appellants' application

> "for a preliminary finding that if there had been no excise duty point, and the goods in question could properly be kept in duty suspense by a duty suspended movement, the movements to which the present appeal relates should be considered to have been properly conducted without any irregularities in the course of the movement, nor absence or shortfall of the required arrangements. Mr Thornton tendered two large bundles of EMCS records."

It is a reasonable inference from the foregoing, and consistent with Mr Thornton's submissions to me, that the EMCS entries were tendered to vouch the preliminary finding proposed to the FTT. On a fair reading of the Note to the Direction, it is also clear that Judge Reid QC did not grant this preliminary finding. Indeed, the substance of the proposed preliminary finding was one of the issues contested before the FTT and was embodied in one of the new grounds of appeal he allowed. That this is so is put beyond doubt by the terms of the two amended grounds of appeal Judge Reid QC permitted to be added. These were:

> "21a For the avoidance of doubt, the appellant submits that the decisions made by the initial decision making officer and the review officer were wrong in law, unreasonable and/or not to best judgment. They each failed to consider that the goods in question would not be consumed in the UK or even the EU and as such that the UK properly ought not to collect excise duties on these goods. Any duty which may have been due could and should be remitted by way of drawback claims in any event.
>
> 24a For the avoidance of doubt the appellant's position is that upon release of the goods in question from customs' suspensive procedures the fact that the goods travelled under cover of valid excise duty arrangements means that the goods were immediately placed into excise duty suspended movement arrangements. Therefore, no duty point was raised under regulation 6(1)(d)."

114. In other words, the second of the additional grounds of appeal (para 24a) was the legal proposition upon which consideration of the EMCS documents was predicated. If that proposition were ill-founded, there would be no need for consideration of what was a large volume of material presented to the FTT on the first morning of a two-day complex hearing. (The EMCS documents were intended to evidence that the Goods moved under a DSA.) After dealing with the allowance of the amended grounds, the Note to the Direction continues:

> "5. It seemed to me that the bulk of the hearing could be conducted on the two days allocated for this *complex* appeal leaving over the question of whether the movements of the goods in question were properly conducted without any irregularities in the course of the movement. That question and others may arise at a later stage. In the meantime, the EMCS documents need not be admitted in evidence with the exception of two such documents to be used for illustrative purposes.
>
> 6. After a short adjournment, parties intimated agreement along the foregoing lines. The two EMCS documents were selected by Mr Thornton without objection and admitted in evidence. Evidence was led from the HMRC witness Laura Cowie and submissions made. As matters transpired, Ms Cowie was not asked any questions about either of the two selected EMCS documents. The hearing concluded on 5 May 2016 and a decision will be issued in due course, following further written

submissions by parties along the lines discussed and agreed at the conclusion of the hearing. For various reasons, it is unnecessary, meantime, to stipulate express deadlines for the lodging and intimation of such submissions.

7. For the avoidance of doubt, I record that all were, in effect agreed that the hearing was proceeding in order to make good use of the time allocated. The intention is that neither party should be prejudiced by this arrangement. Depending on the decision made, a further hearing may be required to hear evidence and/or submissions about the EMCS documents if they are allowed to be re-submitted, and any other relevant matters."

115. Judge Reid QC proceeded on the basis that, as he was told, there was an agreement between the parties, reached after a short adjournment, reflecting what he recorded in paragraph 5 of the Note to the Direction. The substance of this agreement was for two sample EMCS documents to be admitted. The reasonable and most likely inference from this is that any motion in respect of receipt of all of the EMCS entries was not made. A compromise agreement in these terms is explicable given the lateness of the application, the volume of the materials sought to be introduced, the respondents' opposition, the likely impact on the hearing if allowed and the fact that the issue had been kept live by the amended ground of appeal. This inference is also entirely consistent with the paragraph 7 of the Note to the Direction, in which Judge Reid QC was scrupulous to record that by this manner of proceeding it was intended that neither party be prejudiced. Depending on the decision made, the EMCS documents may or may not be relevant. All of this accords with Mr Anderson's submissions to me and undermines the appellants' asserted factual basis for this ground of appeal. In other words, there is no credible basis for the appellants' contention that they insisted on their original motion (in respect of all the EMCS documents). It follows that there is no arguable basis to contend that the FTT erred in law in failing to give the appellants permission to rely on these documents. The FTT cannot be criticised for not dealing with a motion which was effectively abandoned or not insisted in. It follows that it is also unarguable that there was any error of law on the part of the FTT in failing to consider "evidence" which, in fact, was not placed before the FTT.

116. That suffices to dispose of this ground. For completeness, I record that there was no recognised legal ground identified to support this ground of challenge. It bears to relate to a procedural matter, and the exercise of a discretion. Even had the factual premise of this ground been established, the appellants failed to identify any legal basis to challenge. Disagreement with the outcome, even if asserted as an "error of law", of course, would not suffice.

117. Ground of appeal 3 concerns the Finance Act 1994, and it is appropriate that I refer to its terms before turning to the parties' submissions on this last ground.

The Finance Act 1994

Introduction

118. The appellants appealed to the FTT against the Assessment *inter alia* on the basis that HMRC failed to exercise best judgment and is challengeable on Wednesbury grounds: see paragraph 8 of the Decision. The background to this was, as I understood it, the EMCS

records and the asserted failure on the part of HMRC to confirm the destination of the Goods.

119. Judge Reid QC proceeded on the basis that the jurisdiction he exercised arose under section 16(5) of the Finance Act 1994 ("FA 1994") (see para 9 to 10 of the Decision); that there was no scope under that section nor any inherent power of the FTT to exercise a judicial review-type jurisdiction or to consider questions of procedural unfairness on the part of HMRC. He disposed of the appeal on that basis (see paras 123 to 139 of the Decision).

Section 16(4) and (5) of the FA 1994

120. The arguments about the jurisdiction of the FTT in the present case referred to subsection 16(4) and (5) of the FA 1994 .Subsections 16(4) and 16(5) provide as follows:

> "(4) In relation to **any decision as to an ancillary matter**, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, <u>where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it</u>, to do one or more of the following, that is to say—
>
> > (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
> >
> > (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
> >
> > (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.
>
> (5) In relation to **other decisions**, the powers of an appeal tribunal on an appeal under this section shall also <u>include</u> power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

The appellants rely on the passages I have underlined; the respondents rely on the passages in bold.

<u>The appellants' submissions on ground of appeal 3 (the jurisdiction issue)</u>

121. In their skeleton, the appellants had argued that the FTT erred in concluding that its jurisdiction was under section 16(5) and that its powers were confined to those set out in that subsection. They argue that this is "manifestly and unarguably wrong". This was modified to some extent in oral submissions, as Mr Thornton accepted that the appeal was one under section 16(5). The question was whether, for the purpose of an appeal brought under section 16(5), the tribunal could also exercise the powers listed in section 16(4).

122. Mr Thornton argued that a tribunal exercising the jurisdiction under section 16(5) also had the powers available under section 16(4). This was because, when the tribunal was sitting with "full" appellate powers (under section 16(5)) the powers under section 16(5) are additional to, and not instead of, those set out in section 16(4)(a) to (c). This was to be contrasted with the powers available for decisions challengeable under section 16(4), and which powers were "confined to" one or more of those in section 16(4)(a) to (c). In other words, to be "confined down" to these powers, the full powers (under section 16(5)) must be these "plus more". Accordingly, the FTT has always had jurisdiction to adjudicate on the reasonableness of decisions falling within section 16 of the FA 1994. This was regardless of whether the decision was fully appealable (under section 16(5)) or an ancillary matter (under section 16(4)).

123. It was also submitted that the power under section 16(4) amounted to a "quasi-judicial review" role. It was sufficient for the FTT to be satisfied that the Decision could not have been reasonably arrived at.

124. In the skeleton reference was made to paragraphs 320 to 322 of Corbelli Wines v HMRC [2017] UKFTT (TC) and to paragraph 48 of Atom Supplies Ltd (t/a master of Malt) v HMRC [2015] UKFTT 388 (TC). It was further submitted in the skeleton that the FTT had erred in relying on the cases of Hok and Race (neither of these cases was produced to the UT) and that the FTT was plainly wrong in law. None of these cases was referred to in oral submissions.

125. As to the consequences of this error, it was suggested that when the tribunal sat with its full appellate powers, there was no express restriction as to what the tribunal may do with decisions it considered were unreasonably made. While Mr Thornton acknowledged that there was authority under the Value Added Tax Act 1994 ("VATA") that where there a discretion existed it was to be exercised by HMRC, being the case of Best Buy v HMRC [2011] UKUT 497 (TCC), the jurisdiction under section 16 was different and so, he submitted, the same restrictions might not apply. As applied here, if the UT concluded that the Assessment was incorrect, it had powers under section 16(5) to vary the amount. If the question is whether the Assessment should have been made at all, the UT had power to quash the Assessment. It was further suggested that if the UT were satisfied that the respondents' decision was not reasonably made, the UT should itself make the decision. This was the position in VAT cases and the same approach should be adopted under FA appeals. Mr Thornton suggested that this had not been argued before so there was a need to interpret the provisions afresh.

126. It was suggested that the Assessment should be reduced because, it was asserted, the respondents' witness "clearly and unequivocally accepted during cross examination that all items marked with a tick in [production 34/355] had been exported".

127. This was developed in oral submissions as follows. The case of TDG (UK) Ltd v HMRC [2015] UKUT 167 (TCC), [2015] STC 1954 (at paragraphs 28 and 29) was cited as an example where HMRC did not know what had happened to goods. In that circumstance, it was reasonable for HMRC to say that they had been released for consumption and the onus shifted to the taxpayer/warehousekeeper to prove otherwise. Nonetheless, in that case, there had been extensive investigations before HMRC had made that assessment, using its best judgement. That, it was said, was to be contrasted with the instant case. This supported his contention that an assessment under section 12 required to be made after some reasonable level of investigation. This overcame any argument by the respondents based on any strict

liability. HMRC had just made the Assessment and left it for the appellants to find out what had happened to the Goods. Further, it could be presumed that the recipients of the Goods dealt with them in an appropriate way. If they paid the duty, then the result would be that excise duty was paid twice. This was not fair and further tax, ie pursuant to the Assessment, would not be due. At the very least, there was a possibility that the recipient excise warehouses had paid the duty. HMRC failed to investigate this. They had an ability to do so and a duty to do so.

128. Under passing reference to the cases Technip Clofexip Offshore Ltd v HMRC [2005] UKVAT V19298 and Easter Hatton Environmental (Waste Away) Ltd, 6 November *2007,* in which the tribunal chair, Gordon Coutts QC had referred to an exercise of discretion to make an assessment (albeit in different statutory contexts), Mr Thornton submitted that in like fashion the word "may" in section 12 of the FA suggested a discretion. The cases referred to by HMRC in their skeleton- the cases of R (on the application of Wilkinson) v Inland Revenue Commissioners [2003] EWCA Civ 814; and [2005] UKHL 30 and Anthony Boscher v HMRC [2013] UKUT 0570 were all distinguishable. In relation to TDG, he maintained his reliance on this case, because it supported his proposition that if there had been a failure to exercise best judgment, which was discretionary, then if the appeal were allowed the tribunal should not remit back, but should itself take the decision.

The respondents' submissions on ground of appeal 3 (the jurisdiction point)

129. The respondents submitted that this ground of appeal was without merit. In any event, it was academic standing the facts found by the FTT and the lack of any factual material adduced by the appellants which would allow the UT, even if persuaded that there was an error of law on the part of the FTT, to allow the appeal. The two key points to note from the appellants' submissions were that Mr Thornton effectively conceded that there are no cases to support his interpretation of section 16(5) and there was no factual basis for his submissions. In responding, Mr Anderson divided his submission into three chapters:

1) The jurisdiction of the FTT under section 16 of the FA 1994:
2) The respondents' power to assess; and
3) The absence of any factual basis for a s 16(4) case, as there was no permission for an Edwards v Bairstow appeal against the facts as found by the FTT.

130. Mr Anderson developed those submissions as follows.

The jurisdiction of the FTT under section 16 of the FA 1994

131. In relation to the jurisdiction of the FTT under section 16 of the FA 1994, he noted that the appellants opened their "reasonableness" attack with the submission that the FTT's jurisdiction is found in s 13A of the Finance Act 1994. This was not correct. Section 13A(2) of the FA 1994 sets out what is a "relevant decision". Although the appellants do not specify whether their attack is on liability or quantum of the assessment, it appears that the attack is on liability.

132. The FTT's jurisdiction under s 16(4) on an "ancillary matter" (defined in s 16(8) and schedule 5) is limited. It would not allow the FTT or the UT, for instance, to quash the decision complained of: CC&C Ltd. v HMRC [2015] 1 WLR 4043 at 16 *per* Underhill LJ. The present appeal is not a s 16(4) appeal. Authorities under s 16(4) were thus not relevant.

133. This construction is consistent with the statutory framework set out in The Courts Tribunals and Enforcement Act 2007 ("2007 Act"). Section 21(2) of the 2007 Act confers on the UT in Scotland the same as the powers of review of the Court of Session in an application to the supervisory jurisdiction of that Court. But s 21 applies only on the Court of Session transferring the matter to the UT: 2007 Act, s 20 and s 21(1). (The only order made under s 20(3) is the Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 in relation to a "procedural decision or a procedural ruling of the First-tier Tribunal".) There has been no application to the supervisory jurisdiction of the Court of Session in the present case, not least because a statutory right of appeal is open to the appellants. Because there was no application to the Court of Session which was transferred to the UT, the UT in this case cannot exercise a judicial review jurisdiction: see Trustees of the BT Pension Scheme v HMRC [2015] EWCA Civ 713, [2016] STC 66 at para 143 *per* Patten LJ. And the UT, in hearing an appeal from the FTT under s 16(4) or (5), also has no such judicial review jurisdiction. The construction for which the Respondents contend has a long pedigree.

The power to assess

134. The "discretion" to assess conferred upon the Respondents under s 12(1A) of the Finance Act 1994 is limited. The boundaries of the discretion contained in s 12(1A) are those contained in s 12(4). No point is raised by the Appellant in relation to s 12(4). The use of the word "may" in s 12(1A) must also be considered in the context of the respondents' statutory responsibility for the collection of revenue, including excise duty, under Commissioners for Revenue and Customs Act 2005, section 5. The "discretion", it is submitted, relates to management decisions not to matters of whether to assess once an excise duty point has arisen. It may be recalled that the FTT has found that the excise duty point in question arose on an irregular importation: see para 140(4) of the Decision. Managerial discretion does not extend to enabling the respondents to concede an allowance in relation to assessing the duty point: R (on the application of Wilkinson) v IRC [2003] STC 1113 (CA) at paras 43-46 *per* Lord Phillips of Worth Matravers MR affd [2006] STC 270 (HL) at paras 20-21 *per* Lord Hoffmann. By way of illustration, reference was made to Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd [1981] AC 22 at 60H-61A, where Lord Lane held that there were no words to be found in the legislation before him according to the tribunal a general supervisory jurisdiction over the respondents' exercise of discretion.

135. The application of these principles is clear within the statutory framework of excise duty. That framework makes express provision for the situation where there is evidence of non-consumption in the UK after an excise duty point arises: Excise Goods (Drawback) Regulations 1995 (SI 1995/1046) (the "Drawback Regulations"), regulation 3. An excise duty point arose on an irregular importation of the goods: Article 7(2)(d) of the EDD, regulation 6(1)(d) of the Holding 2010 Regulations, as read with regulation 12(2) of those Regulations. The duty thus became payable. If there is evidence that, despite the excise duty point having arisen, the Goods were never consumed in the UK, the appellants' remedy was, as the FTT recognised (at para 90), by way of a claim under the Drawback Regulations. Mr Anderson made the subsidiary point that, as Lord Scarman put matters in Preston v IRC [1985] STC 282 at 299, "a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance." *A fortiori* it was not appropriate for the FTT to review the exercise of the decision to assess where no Drawback claim has been made. A claim under the Drawback Regulations arises on the hypothesis that an excise duty point had arisen. Evidence of non-consumption in the UK

after an excise duty point has arisen is thus not a relevant consideration to whether or not the respondents should have raised the Assessment.

136. Furthermore, the appellants have declined to make a claim under the Drawback Regulations. No such claim having been made, no such claim has been considered by the respondents. Evidence as to the Goods after passing the excise duty point is thus not relevant either to whether an excise duty point arose or, indeed, to the decision to assess. It is significant that the appellants make no submissions in relation to the Drawback Regulations.

137. Section 16(4) of FA 1994 confers a limited jurisdiction on the FTT to examine the reasonableness of "ancillary decisions", but with very limited powers to give effect to such findings. Mr Anderson submitted that the limited powers in s 16(4) are not designed to apply to sums due under assessments: see the decisions referred to in FA 1994, Schedule 5 which relate, in the main, to decisions about allowing goods entry, to the grant or withdrawal of permissions and authorisations etc. The FTT decisions cited by the appellants of United Wholesale (Scotland) Ltd v HMRC [2017] UKFTT 70 (TC) and Corbelli Wines v HMRC [2017] UKFTT 615 (TC) each involved ancillary decisions, one in relation to forfeiture, the other in relation to a refusal of an approval for registration as a wholesaler. These are classic ancillary decisions with which s 16(4) is concerned. They are irrelevant to section 16(5).

138. Assessments to duty, in contrast, are not "ancillary decisions". As the Court of Appeal in CC&C Ltd v Revenue and Customs Commissioners [2014] EWCA Civ 1653, [2015] 1 WLR 4043, at paras 15-16 *per* Underhill LJ (with whose judgment, Lewison LJ and Arden LJ concurred) observed, s 16(4) deals with management decisions involving some element of subjective assessment. There is no subjective assessment involved once an excise duty point has arisen. The construction for which the appellants contend would transpose the limited jurisdiction under s 16(4), which is not a judicial review jurisdiction, into a full-blown judicial review jurisdiction on the question of whether to assess in terms of the legislation which creates an excise duty point. The different powers contained in s 16(4) and s 16(5), and judicial review remedies, are "carefully calibrated" (CC&C Ltd v HMRC at para 16 per Underhill LJ). The construction for which the Appellant contends would, Mr Anderson put it, crush the workings of that carefully calibrated structure into dust.

139. For the foregoing reasons, he submitted that the FTT had no jurisdiction under section 16(5) to consider a Wednesbury unreasonableness challenge to an assessment issued on the basis that an excise duty point was triggered, and on facts which appear not even to be disputed (the appellants accept there was an irregular importation). The FTT's Decision (at para 123), follows the relevant Court of Appeal authority (BT Pension Scheme v HMRC, CC&C Ltd v HMRC). The FTT judge carefully considered those authorities. He cannot be said to have erred in law in his application of s 16(5). This ground of appeal should be refused.

140. Mr Anderson also argued, under reference to Van Boeckel v Customs and Excise Commissioners [1981] STC 290 at 296, that there was no general obligation on the part of HMRC to investigate. There is no authority to support this, or that any such investigation wold be subject to a reasonableness review under section 16(5) of the FA 1994. Mr Anderson turned to his third chapter.

The absence of a factual basis

141. For the avoidance of doubt, Mr Anderson rejected the submission (in paragraph 28 of the Appellant's skeleton), that the Appellant's written submissions following the proceedings, can be taken to have been accepted by the FTT unless they were expressly rejected. In the event, it is clear that the FTT accepted the respondents' submission in relation to what Ms Cowie actually said in her evidence: see the Decision, paragraphs 85-9, and the respondents' Written Submissions (at tab 24, para 13). Mr Anderson indicated that the respondents did not accept the assertion (in paragraph 38 of the appellants' skeleton) that the respondents' witness unequivocally accepted during cross-examination that all items marked with a tick had been exported. In any event, there was, he said, an air of unreality in submissions about the ultimate destination of the Goods being outside the EU. For if the Goods were really never intended to be consumed within the EU, why have the appellants paid the customs duty and import VAT? Having paid the customs duty, and not appealed the finding that the customs duty or import VAT was due, he submitted that it was not now open to the appellants, who led no evidence on the ultimate destination of the goods, to seek to argue that this was a relevant inquiry which ought to have been pursued by the respondents.

142. Suppose, contrary to the respondents' submission, that the FTT did commit an error of law in its application of s 16(5). The FTT judge recognised that he might be wrong. He therefore expressly considered whether there was any factual basis for the argument advanced by the appellants on the hypothesis that they were correct: see paragraphs 126, 130 and 132 of the Decision. On the appellants' hypothesis that the FTT and the UT have jurisdiction to entertain a judicial review-type challenge to the reasonableness or rationality of the respondents' decision to assess (which Mr Anderson rejected), there is no was factual basis for it. Accordingly, the third ground of appeal discloses no error of law on the part of the FTT.

143. For completeness, Mr Anderson submitted that paragraphs 39 to 42 of the appellants' skeleton were irrelevant. The Assessment under s 12(1A) is not subject to "best judgment" considerations. The assertions in relation to the evidence of officer Cowie at paragraphs 45 to 47 are no more than a disagreement with the findings in fact, which cannot be revisited by the UT. It is regrettable, Mr Anderson submitted, that HMRC's officer should be subjected on appeal to the attacks contained in the appellants' skeleton in circumstances where the FTT has accepted her evidence and the appellants do not have permission to attack the FTT's findings in fact. The involvement of a customs officer is shortly explained by the fact that the excise duty point was triggered by an irregular importation. In addition, permission to appeal has not been granted in respect the matters contained in paragraphs 56 to 62 of the Appellant's Skeleton. Paragraphs 59 to 62, indeed, raise various points which were not raised before the FTT: see FTT Decision, paras 62 to 64.

144. For all of these reasons, he submitted, this ground of appeal fails.

<u>Discussion and decision on ground of appeal 3 (the jurisdiction issue)</u>

145. My determinations of the other grounds of appeal render this ground academic. I note that, again, Mr Thornton advanced his appeal without reference to the relevant parts of the Decision or without identifying in what manner the FTT was said to have erred. The jurisdiction issue was dealt with concisely by Judge Reid QC, at paragraphs 123 to 139 of the Decision.

146. It appears now to be accepted by the appellants that the jurisdiction invoked by the appellants' appeal to the FTT was under section 16(5) and not that under section 16(4).

147. Nothing Mr Thornton has said has persuaded me that there is any error on the part of the FTT on the jurisdiction issue. Leaving aside the legal arguments as to the interpretation of subsections 16(4) and (5), and the cases concerning the kinds of decisions by HMRC that do or do not involve a discretion, the fatal difficulty for the appellants, and which Mr Thornton simply did not address, was the absence of any foundation in fact for the best judgment submission and which was the basis of the proposed attack on reasonableness grounds. The appellants' argument proceeded on an assertion as to the ultimate destination of the Goods, ie that they had not been consumed in the UK or even elsewhere in the EU. (This also led to ancillary arguments about unfairness and double taxation, albeit Mr Thornton did not engage with HMRC's response to the latter point under reference to the Drawback Regulations.) However, as noted by Judge Reid QC (at paras 85, 88, 91, 127 and 131 of the Decision), the appellants failed to lead any evidence in support of this contention. This is a matter for which the appellants are responsible. I agree with Judge Reid QC's conclusion, which Mr Thornton did not address, that in these circumstances no question of best judgment or a judicial review type reasonableness arises in respect of the Assessment.

148. In any event, as noted above, the EDD provides for strict liability on "any other person" involved in an importation, including an irregular importation, within the meaning of Article 7(2)(d): Article 8(1)(d) of the EDD. It was not suggested that the appellants were not caught by this provision. Mr Thornton never addressed this feature of the excise regime. However, this feature, it seems to me, is inimical to the existence, much less the exercise, of a discretion. Accordingly, even if there were a factual basis established about the ultimate destination of the Goods, the nature of the strict liability, and the general obligation of HMRC to collect the duty that is due, would preclude the exercise of discretion or best judgement which the appellants seek to attribute to the making of the Assessment. Arguments about what might have happened to the Goods or about the presumed regularity of any dealings by the recipient excise warehouses are irrelevant. Any overpayment of tax could be addressed under the Drawback Regulations. It follows that I accept the respondents' submission, as well as the FTT's reasoning, that there is no discretion involved in an assessment such as that the appellants wish to challenge. No question of best judgment arises.

149. In any event, I am not persuaded by any of the appellants' submissions that there is any error law disclosed in the analysis or approach of the FTT to this issue.

150. In relation to the interpretation of subsections 16(4) and (5) and the cases cited, the appellants' submissions had the effect of conflating the two separate provisions. These subsections identify different types of decisions to which they apply: subsection 16(4) governs "any decision as to an ancillary matter" (there is no need to track through the statutory definition of "ancillary matter"); whereas subsection 16(5) governs "other decisions". The basis of review in section 16(4), that the decision-taker could not have reasonably arrived at the decision, is not repeated in subsection 16(5), in respect of "other decisions". That must be seen as reflecting a deliberate choice by the legislature. Had it been intended that the basis of review in section 16(4) be available in respect of "other decisions" under section 16(5), this could have readily been provided for. It wasn't. The appellants' interpretation impermissibly conflates the two subsections. The same cases as were cited by the appellants to the FTT were referred to before me. Judge Reid QC considered these. As I

accept the correctness of Judge Reid's reasoning, and his treatment of the authorities cited to him, I need not rehearse these. The cases under section 16(4) of FA 1994, or under other taxing regimes, are of no relevance. Nothing in the appellants' submissions persuades me that these words, or a like test, fall to be imported into section 16(5) or applied to decisions reviewable thereunder.

151. It follows that I accept the respondents' submissions regarding the distinct jurisdictions of the FTT under subsections 16(4) and (5) and as regards its power to assess, as correct in law and are to be preferred. I am particularly persuaded by the observations of Lord Lane in J H Corbitt (Numismatics) Ltd (anent an absence of a general supervisory power residing in the tribunal) and Underhill LJ in CC&C Ltd (anent the careful calibration of the remedies and powers as between subsections 16(4) and (5)). While technically not binding on me, I find the reasoning in these authorities cogent and persuasive. In my view, there was no error in law on the part of the FTT in its determination of the jurisdiction issue. I am not persuaded by any of the appellants' submissions that there is any error law disclosed in the analysis or approach of the FTT to this issue.

Disposal

152. For the foregoing reasons, the appellants' challenges under grounds of appeal 1(ii) and (iii), 2 and 3 fail. The appellants' appeal falls to be refused. I shall reserve meantime any question of expenses.

Other matters

Preliminary ruling on the scope of the appeal

153. At the outset of the appeal before me, the appellants made an application in respect of additional materials (which I address below) and also sought to argue that it was within the scope of the permitted grounds for the appellants to challenge an asserted failure on the part of the FTT to make a finding in fact about the receipt of the Goods by third party excise warehouses. Mr Thornton based this argument on the terms of the Decision Notice of UT Judge Bishopp and, it was suggested, a discrepancy between two sentences at the end of paragraph 2 of his Decision Notice. After recording the procedural history of the appellants' application to appeal and the reformulation of these grounds by Judge Richards, Judge Bishopp stated (in para 2) of the Decision Notice:

> "2. While I would normally err in favour of enlarging permission to appeal should there be any reason to think that the F-tT has inadvertently granted a more restricted permission than intended, I am not persuaded in this case that the judge has done so: I see nothing in the grounds now advanced which is not encapsulated by the permission granted. Accordingly I refuse to grant any further permission."

The appellants argued that the penultimate sentence meant that the reformulated grounds permitted them to advance a challenge that the FTT had erred in not making a finding about the destination of the Goods. The respondents rely on the final sentence as precluding this.

154. It is notable that in his Decision on the appellants' application to the FTT for permission to appeal, Judge Richards felt compelled to remind the appellants of the rule in Edwards v Bairstow and that (*per* Georgiou v HM Customs and Excise [1996] STC 643) an unfocused generalised complaint about a tribunal's findings in facts was not a permitted ground of

appeal. Having done so, Judge Richards then reformulated the unfocused application of the appellants into appropriate grounds for an appeal on several errors of law. At paragraphs 8 to 10, Judge Richards explained that it was "not entirely clear" to him whether the appellants were criticising findings in fact made by the FTT. He went on to note that there was no clear basis identified, nor any explanation as to why the FTT should not have reached the conclusion that it did. He then stated: "Any appeal against the FTT's factual conclusion is therefore prescribed by Georgiou." In the next paragraph, he stated:

> "10. To the extent that the appellant is criticising a conclusion on the part of the FTT that, as a matter of law, customs suspensive arrangements came to an end before the Goods left the appellant's warehouse, that point is addressed in the Grounds set [in his reformulation of grounds of appeal 1 and 2]".

In responding to this argument, the respondents pointed out that no evidence was led by the appellants. If they now wished to argue that the FTT should have made a finding, eg about the ultimate destination of the Goods, the fundamental difficulty remained that they simply failed to lead evidence on this point. Anything done now would be a wholly artificial exercise based on conjecture. In any event, it remained the case that the ultimate destination of the Goods was irrelevant to the issue of whether an excise duty point arose.

155. I ruled against the appellants on this issue. On a fair reading of Judge Bishopp's Decision Notice, he confirmed the approach of Judge Richards as regards the scope of the grounds of appeal. It is patent that these did not include a challenge to the findings in fact by the FTT (or any asserted failure to make a finding). Judge Richards was at pains to explain, generally, the limited basis for such a challenge, and to note the absence of any identifiable basis for such a challenge in the application before him.

156. I do not read the penultimate sentence of paragraph 2 of Judge Bishopps' Decision Notice as, in effect, a rowing back on the reformulation made by Judge Richards such as to allow the appellants to make this kind of attack. The absence of any foundation for such a challenge, and which Judge Richards recorded at paragraphs 8 and 9 of his Decision Notice, subsisted. Judge Bishopp was not extending the permitted grounds. He stated in terms that he was not persuaded that there has been an inadvertent grant of a more restricted permission. His decision confirmed the grounds and scope of permission granted by Judge Richards, and which, as Judge Richards made clear, precluded any Edwards v Bairstow challenge to any findings of fact, or failure to make a finding, on the part of the FTT.

157. Even if not a question of construction of paragraph 2 of Judge Bishopp's Decision Notice, the additional difficulties for the appellants is that the reformulated grounds themselves do not admit of any such challenge. It remains the case, as Judge Richards noted, that there was simply no attempt to layout a proper basis on which to advance such an appeal. The appellants are unable to point to any evidence affording a basis for any finding that they propose. They chose to lead no evidence. If they rely on a passage of cross (a concession was said to have been extracted from the HMRC witness), they took no steps to request the notes of the FTT. Furthermore, and more fundamentally, in his submissions before me, Mr Thornton adopted a position in submissions that was inconsistent with this ground. At times, Mr Thornton appeared to suggest that this related to matters of fact that the appellants could not prove and that HMRC had instead a duty to investigate. In other words, it was not so much the case that this was a passage extracted in cross, but rather there was a duty on HMRC to investigate and, had they done so, they would have ascertained that the Goods had been received by third party recipient excise warehouses. This was offered as a sort of

inference the Tribunal could draw. In response to a question from the Tribunal, Mr Thornton accepted that the argument, framed in this way, had not in fact been put to the FTT. He had not advanced a case, then, about what might have happened to the Goods. (Indeed, this would have been inconsistent with the appellants' position at that time that the Goods were still under a CSA.) Appeals to the UT are not a rehearing. Nor are they a platform to give appellants the first bite of the cherry, as it were, of matters of fact not canvassed before the FTT. Finally, I accept the respondents' submission that the subject matter of any proposed finding (even had one been articulated in the permitted grounds) was irrelevant to the excise duty point.

The appellants' application for additional documents

158. As noted at the outset of this Decision, the appellants moved for a large volume (comprising some 600 or more pages) of documents to be received, as well as a witness statement from a director of the appellants and two letters post-dating the appeal to the FTT. The documents bore to be the same documents about which there was the compromise I have noted above (ie the appellants selected two samples to be placed before the FTT) and in respect of the remainder, no motion had been insisted in before the FTT. The witness statement was new, as the appellants had produced no witness statements before the FTT.

159. The stated purpose of the documents being received at this stage, notwithstanding that these were not before the FTT, was in respect of disposal. If the UT were with the appellants on the excise duty issue (comprising ground of appeal 1(ii) and (iii)), then, it was suggested, the UT could consider all of these documents, form its own view of the material, and avoid the need to remit back to the FTT. This was appropriate because HMRC continued to "turn a blind eye" to these documents.

160. In opposing this application, Mr Anderson referred to the case of Lithuanian Beer Limited v HMRC [2017] UKUT 245 (TCC) at paragraph 23, as an example of a refusal by the UT to admit further evidence in the form of a witness statement that had not been placed before the FTT and which was otherwise not "new" (in the sense of unknown to the appellants at the time of the FTT hearing). Mr Anderson also the made the following points:

1) There was no explanation in the application as to what these entries provided or purported to show. There was no explanation as to why a witness statement was to be lodged at this stage, and after the appellants had heard the evidence of the respondents' witness at the hearing before the FTT. The appeal was not a rehearing.

2) Before the FTT the appellants did nothing with the 2 entries that had been admitted in evidence. They had been admitted for the avowed purpose of putting them to Officer Cowie, but in a context where the respondents chose not to lead any witnesses. They had elected to lead no evidence before the FTT. They had lodged no witness statements at that time.

3) The documents were simply not relevant to any issue under appeal. The ultimate destination of the Goods was not a relevant issue. The only issue before the FTT was whether an excise duty point had arisen. The appellants had no permission to make an Edwards v Bairstow challenge to the FTT's findings in fact.

4) The respondents have not considered these documents, as they had not been admitted into evidence before the FTT. That gave rise to a practical question: what was to be done

with these? The relevant context was that the onus was on the appellants, eg to show that these entries covered all of the Goods in question. The onus had been on the appellants to establish, if they wished, that all of the Goods (ie 8 million cigarettes) moved under EMCS. They had done nothing to discharge that onus. If they had wished to obtain documents in the hands of third parties, they took no steps to secure these.

5) Further, the appellants' application discloses a fundamental misunderstanding of the nature of the appeal. There is no onus on the respondents to carry out factual investigations in relation correspondence from third parties which post-date the appeal; which relate to matters that are not relevant to the findings on appeal, and which came from parties whose procedures the appellants wish to criticise on appeal.

161. I accepted the respondents' submissions on this application. The application appeared to seek to trespass on the subject matter of ground of appeal 2. There was no explanation as to why these documents came as late as they did. Further, they did not appear to me to be relevant to any of the issues properly before the UT in terms of the permitted grounds. It also appeared to be naïve to assume that in respect of a very large volume of factual material, none of which had been considered by HMRC or been adjudicated upon before the FTT, or otherwise spoken to or explained by any witness or in any witness statement, that the UT would, in those circumstances, sift through a very considerable volume of material and make its own findings; and to do so where there was no Edwards v Bairstow appeal. If the suggestion were that this documentation was relied on, simply to avoid the need for a remit back, this seemed to me to be a disproportionate use of the resources of the UT for that purpose. Had the appellants succeeded on ground of appeal 1, for aught yet seen, parties might have been able to agree the terms of these documents. Alternatively, having had an opportunity to consider them, HMRC might have wished to challenge this documentation or sough to produce additional documentation in response. The approach Mr Thornton urged upon me would unduly restrict the procedural rights of HMRC in respect of these materials, if they chose to exercise them, if I were to proceed as Mr Thornton suggested.

162. For these reasons, and in exercise of the powers and discretion available to me, I refused this application.

The appellants' submission regarding a reference

163. The foregoing arguments consumed the morning of the first day of the two-day hearing. It was therefore necessary to fix a third day to enable the hearing to conclude. Prior to the resumption of that third day, Mr Thornton indicated (by email to the respondents) an intention to raise with the UT the prospect of a reference to the CJEU. This prompted the respondents to lodge Supplementary Written Submissions and a further bundle of cases concerning that question.

164. In the end, in his submissions in reply Mr Thornton simply mentioned this as a possibility. He did not move any motion to this effect (though this would not preclude a reference *ex proprio motu*) and he did not formulate the terms of what any question referred might be.

165. In the respondents' Supplementary Written Submissions reference was made to the cases of R v International Stock Exchange of the UK and the republic of Ireland ex p Else [1993] QB 534 at 545D; Capernwray Missionary Fellowship of Torchbearers v HMRC [2015] UKUT 368 (TCC) at paragraph 15, X v Mid Sussex Citizens Advice Bureau [2-13] ICR 240 at paras 46 to 48 and Cilfit Srl v Ministro della Sanita [1983] 1 CMLR 472 at para 18,

concerning the correct approach by a domestic court to the making of a reference to the CJEU. These passages (and the correct approach), are well known and I need not set these out. Mr Thornton did not take issue with any of these passages (and it would appear that he also referred to some of these in the emails exchanged between the parties prior to the resumption of the Hearing on Day 3).

166. Reference was also made to the French and German language versions of recital 17, and Articles 4(1), 4(11), 7(2)(d), 17(1)(a) and 20(1)(a) of the EDD. The prepositions used to describe movements or the location of goods were highlighted in the side-by-side passages set out. Having considered these different versions, they are all consistent with one another (as one would expect). Certainly, their terms do not give rise to a doubt or ambiguity about the meaning, or any variation in the meaning of the equally authentic different language versions, of the provisions. For completeness, I note that in the German language version of Article 17(1)(a), the proposition used ("*aus* einem Steuerlager") is that used to indicate "out of", not just "from" in the English and French versions ("*d'un* entrepôt fiscal"). This supports the respondents' submissions on the excise duty issue.

167. In short, in my view, the proper interpretation of the provisions of the EDD, and in particular Article 17(1)(a) concerning the initiation of a movement under a DSA, is *acte clair*. Enjoined as I am to approach this matter with a degree of caution, I nonetheless have no real doubts about the issue such as to incline me to make any reference. As I have concluded on the merits of the excise duty issue, the respondents are correct in law. Their submission is in accordance with the EDD. I can see no basis for a reference to the CJEU in respect of a submission, such as that advanced by the appellants, which is not compatible with the language of the EDD.

LADY WOLFFE
JUDGE OF THE UPPER TRIBUNAL

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