[2019] UKUT 0023 (TCC)

Appeal number: UT/2016/0173

PROCEDURE – Article 267 TFEU – whether FTT erred in law in referring questions to CJEU - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

EURO TRADE & FINANCE LIMITED

Respondent

Tribunal: Judge Greg Sinfield
Judge Ashley Greenbank

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 6 February 2018

Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

John Shelley, CTA, for the Respondent

DECISION

Introduction

1. This appeal concerns whether the First-tier Tribunal ('FTT') erred when it decided that a reference to the CJEU was necessary in this case.

2. In January 2012, the Appellants ('HMRC') approved the Respondent ('Euro Trade') as a registered owner under regulation 5 of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ('WOWGR'). Euro Trade was not itself a warehousekeeper; it stored excise goods that it had acquired but not yet sold in approved warehouses owned by others. The WOWGR registration was subject to conditions. Euro Trade subsequently applied for one of the conditions, which provided that Euro Trade could only purchase duty suspended alcohol from five named suppliers, to be varied to increase the number of approved suppliers. In March 2013, HMRC had a meeting with Euro Trade to consider whether the application should be allowed. As a result of the meeting, HMRC was provided with a list that showed that all of Euro Trade's duty suspended stock had been purchased from suppliers other than the five from whom it was authorised to purchase such goods. Following that discovery, HMRC made four decisions, namely:

> (1) a decision, of 21 March 2013, to direct the owners of two tax warehouses in which Euro Trade's goods were stored that any goods held in Euro Trade's account could not be removed in duty suspense without HMRC's written permission ('the Commissioners' Direction Decision');
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> (2) a decision, dated 2 May 2013, to refuse to restore the goods which were the subject of the directions in (1) above and which had been seized (Euro Trade had not challenged the seizure in condemnation proceedings) ('the Refusal to Restore Decision');
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> (3) a decision, dated 2 May 2013, to refuse Euro Trade's application to amend the conditions attached to Euro Trade's registration under the WOWGR ('the Refusal to Amend Decision'); and
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> (4) a decision, dated 13 December 2013, to revoke Euro Trade's WOWGR registration ('the Revocation Decision').

3. Euro Trade appealed to the FTT against those decisions. Euro Trade's appeal was heard by the FTT together with another appeal by a related company, Pierhead Drinks Limited ('Pierhead'), against a decision by HMRC refusing an application by Pierhead for authorisation under the WOWGR to trade in duty suspended excise goods. As Euro Trade and Pierhead were associated companies and had the same shareholders and directors, who were all members of the same family, and the appeals had some facts in common, the FTT had directed that the appeals should be heard together. This decision is not concerned with Pierhead's appeal.

4. In a decision released on 25 April 2016, [2016] UKFTT 286 (TC), ('the Decision'), the FTT dismissed Euro Trade's appeal against the Revocation Decision. There is no appeal by Euro Trade against that part of the Decision.

5. In relation to Euro Trade's other appeals, the FTT decided that it could not determine them without first referring a question or questions, the form of which is yet to be decided, to the Court of Justice of the European Union ('CJEU'). HMRC now appeal,

with the permission of this Tribunal, against the FTT's decision to make a reference to the CJEU. HMRC's overarching point is that, in view of the FTT's decision to dismiss Euro Trade's appeal against the revocation of its WOWGR registration and as Euro Trade no longer traded in duty suspended goods, a reference to the CJEU is unnecessary for the disposal of the case.

Factual background

6. The factual background, so far as relevant to this appeal, may be summarised as follows.

7. In 2011, Euro Trade applied to be registered under the WOWGR. The application was granted, in January 2012, subject to four conditions. The conditions restricted Euro Trade's ability to trade in duty suspended goods as follows:

(1) it could not re-export any such goods that had previously been imported;

(2) it could only store alcohol in three named excise warehouses;

(3) it could only purchase duty suspended alcohol from five named suppliers ('the supplier condition'); and

(4) it could only sell duty suspended alcohol to five named customers.

These conditions reflected Euro Trade's business plan which it had provided to HMRC as part of its application to be registered under the WOWGR.

8. Euro Trade did not initially challenge the imposition of the conditions. However, in April 2012, Euro Trade applied to amend the conditions by adding new trading partners and, in June 2012, it applied for an unconditional WOWGR registration.

9. On 29 August 2012, and before either of the above applications had been refused or allowed, Euro Trade's WOWGR registration was revoked on the ground that the then director of Euro Trade, Richard Hercules, was no longer regarded by HMRC as a fit and proper person to be a director of a company authorised under the WOWGR. That was on the ground that he was director of another company that traded in excise goods which had incurred and failed to pay a debt of £1.4 million to HMRC.

10. In October 2012, following a review by HMRC, Euro Trade's WOWGR registration was reinstated with effect from 29 August 2012. The registration was reinstated because Richard Hercules had resigned as a director of Euro Trade leaving his son, Ian Hercules, as the sole director of the company. The WOWGR registration remained subject to the same conditions as before save that the fourth condition (restricting sales to five named customers) was removed.

11. In November 2012 and January 2013, Ian Hercules applied to HMRC to amend the supplier condition to add more authorised suppliers. Those applications triggered a visit by HMRC on 1 March 2013 to assess whether the applications should be allowed. At and after the visit, HMRC requested a list of Euro Trade's stock and the names of the suppliers from whom Euro Trade had bought it.

12. Euro Trade provided the list of stock and suppliers on 19 March 2013. The list showed that all of Euro Trade's duty suspended stock had been purchased from suppliers other than the five named suppliers from whom it was authorised to purchase duty

suspended alcohol. In the FTT, Richard Hercules accepted that he knew at the time of the purchases that Euro Trade was trading in breach of the supplier condition.

13. Having received and considered the list of stock and suppliers, HMRC made the Commissioners' Directions which prevented the stock held in the two warehouses being sold without HMRC's prior consent.

14. Subsequently, HMRC seized the stock held by Euro Trade in the two warehouses that had been purchased from non-authorised suppliers. The stock had an estimated value of approximately £58,000. Euro Trade did not challenge the seizure by way of condemnation proceedings but it subsequently asked HMRC to restore the goods. HMRC refused to restore the goods in the Refusal to Restore Decision issued on 2 May 2013 on the ground that there were no exceptional circumstances justifying a departure from HMRC's normal policy that seized goods would not be restored.

15. On 2 May 2013, HMRC also refused Euro Trade's applications to amend the supplier condition in the Refusal to Amend Decision on the ground that Euro Trade had failed to comply with the conditions of its existing WOWGR registration.

16. On 13 December 2013, HMRC notified Euro Trade that its WOWGR registration was revoked on the ground that Euro Trade had traded in breach of the conditions of its registration under the WOWGR.

17. Euro Trade appealed to the FTT against all four decisions described above.

The Decision

18. It is clear from [131] of the Decision that the FTT considered that if, as Euro Trade sought to argue, the WOWGR registration conditions imposed on Euro Trade were unlawful then, subject to a point discussed at [19] below, the four decisions under appeal were also unlawful as they were all based on the assumption that the conditions were lawfully imposed and unlawfully breached.

19. In the FTT, Euro Trade sought to argue that the supplier condition was unlawful under the Treaty on the Functioning of the European Union ('TFEU') as it restricted intra-EU trade in breach of Article 34. HMRC contended that, having failed to challenge the seizure of the goods in condemnation proceedings, the goods were deemed to have been lawfully seized which meant that Euro Trade could not challenge the lawfulness of the supplier condition. HMRC submitted that where a seizure of goods has not been challenged by way of condemnation proceedings then it is not open to a person to argue that the goods were not lawfully seized because of the deeming provision in paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 ('CEMA 1979'). That paragraph provides that, where no notice of claim leading to condemnation proceedings has been given within the specified time limit, the seized goods are "deemed to have been duly condemned as forfeited". Such a submission had been accepted by the Upper Tribunal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 ('*Jones*') and in *HMRC v Nicholas Race* [2014] UKUT 0331 ('*Race*').

20. At [142] - [151], the FTT concluded that *Jones* and *Race* did not support the proposition that the deemed condemnation of the goods meant that the supplier condition must be deemed to be lawful and that, therefore, Euro Trade could not challenge the legality of the condition in the appeal before the FTT. The FTT reached this conclusion

on the basis that *Jones* and *Race* referred only to facts when considering the effect of the deeming and did not suggest that a failure to challenge a seizure could result in the law being deemed to be what it was not. The FTT also expressed the view, at [149], that even if they were wrong in concluding that the deeming provision only applied to facts and not law, the effect of section 2(1) European Communities Act 1972 was that, in any case involving EU law, the deeming in CEMA 1979 could not deem a condition that was contrary to EU law to be lawful.

21. Euro Trade submitted that the supplier condition was unlawful because it was a breach of the prohibition on quantitative restrictions on imports between Member States in Article 34 TFEU which was not justified under Article 36. Those articles are as follows:

> "**Article 34**
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> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.
>
> **Article 36**
>
> The provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

22. In [165], the FTT accepted that the supplier condition did not prevent Euro Trade from trading in excise goods with whoever it chose because the condition only applied to goods in duty suspense and there is no directly effective right to trade in duty suspended goods. Nevertheless, the FTT held that the supplier condition breached Article 34 because it was a financial disincentive to purchase from anyone other than the named suppliers, as only those purchases could be in duty suspense. The FTT also concluded, in [172], that the supplier condition was justified by public policy but that was not, by itself, enough as the condition also had to be proportionate. The test for proportionality, as explained by the Supreme Court in *R. (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41, depended on whether the condition was imposed as part of the implementation of a Directive (in this case, Directive 2008/118 ('the Excise Directive')) or was a derogation from a fundamental freedom under the TFEU. If the supplier condition was part of a regime that implemented the Excise Directive then it would only fail the proportionality test if it was a "manifestly inappropriate" means of implementing that Directive. If, on the other hand, the supplier condition was a derogation from the right to free movement, it would only pass the proportionality test if it were the least restrictive means of achieving the end of controlling trade in duty suspended goods. The FTT concluded, at [207] and [208], that the supplier condition was not manifestly inappropriate as a way of implementing the public policy of reducing excise duty fraud but that if the supplier condition were a derogation from Article 34 TFEU then it would not be the least restrictive means of controlling trade in duty suspended goods and would, therefore, not be proportionate or justified under Article 36. It was common ground that the supplier condition had been phased out and replaced by a less restrictive due diligence condition by the time the appeals were heard by the FTT.

23. The FTT considered whether a question should be referred to the CJEU at [230] – [236]. The FTT referred to Article 267 of the TFEU which, in relation to a question about the interpretation of EU law, provides that

> "Where such a question is raised before any … tribunal of a Member State, that ... tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

24. The FTT also set out the well-known passage from the judgment of Sir Thomas Bingham MR in *R v International Stock Exchange ex parte Else (1982) Ltd* [1993] QB 534 at 545:

> "… if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself … If the national court has any real doubt, it should ordinarily refer."

25. The FTT considered that they could not decide, with complete confidence, whether the WOWGR under which the supplier condition was imposed on traders in duty suspended goods was in derogation from the TFEU or in implementation of the Excise Directive and, therefore, what test for proportionality should be applied in this case. The FTT also concluded that, as that question would be referred, they should also ask the CJEU to give preliminary rulings on whether the supplier condition breached Article 34 and, if so, whether it was justified under Article 36.

26. The FTT held, at [240], that they were not able to determine Euro Trade's appeal against the Commissioners' Direction Decision without knowing whether the supplier condition was part of an implementing measure or a derogating measure. This was because the Commissioners' Direction had been made on the ground that Euro Trade had breached the supplier condition and if that condition was itself unlawful then the Commissioners' Direction Decision was flawed because it would not have been unlawful for Euro Trade to breach an unlawful condition.

27. In relation to the Refusal to Restore Decision, Euro Trade's case was that the supplier condition was unlawful and, therefore, the seizure was unlawful. At [247], the FTT found that Euro Trade had knowingly flouted the supplier condition and, if that condition had been lawfully imposed, the Refusal to Restore Decision was entirely reasonable. However, as in the case of the Commissioners' Direction Decision, the FTT concluded, in [248], that the outcome of Euro Trade's appeal against the Refusal to Restore Decision turned on whether the supplier condition was lawful or unlawful which was the subject of the proposed reference to the CJEU.

28. Similarly, in relation to the Refusal to Amend Decision, the FTT held, in [250], that the decision would be unreasonable if it had been based on an error of law, i.e. if HMRC had relied on Euro Trade's breach of a condition that was unlawful. The FTT concluded that they needed the decision of the CJEU in order to determine this appeal.

29. The FTT considered Euro Trade's appeal against the Revocation Decision in [263] – [266]. The FTT concluded that it was a reasonable decision for HMRC to take in the circumstances, i.e. because Euro Trade had traded in breach of the conditions of its WOWGR registration. The FTT also observed in [265] that, even if the conditions were

unlawfully imposed, HMRC must still have revoked Euro Trade's WOWGR registration because HMRC ought to take all relevant matters into account, and those matters were those that the FTT had found they should have taken into account in the case of Pierhead, namely that Mr Ian Hercules was not a fit and proper person to be the director of a company with a WOWGR registration for the reasons given at [99] – [105] of the Decision. In summary, the FTT found that Mr Ian Hercules lacked the knowledge and experience necessary to run an excise business registered under the WOWGR and, while he was sole director, Euro Trade had traded in breach of the conditions of its WOWGR registration. The FTT also found that Mr Richard Hercules was the 'guiding mind' behind Euro Trade and he was not a fit and proper person to be in such a position. For those reasons, the FTT concluded, at [266], that "whatever the outcome of the reference to the CJEU, it would make no difference to our conclusion that the appeal against the revocation of Euro Trade's WOWGR must be dismissed."

Submissions and discussion

30. HMRC's main ground of appeal was that the FTT was wrong to make a reference to the CJEU because, having dismissed Euro Trade's appeal against the revocation of its WOWGR registration, such a reference was unnecessary for the disposal of the appeals against the three other decisions. HMRC relied on four arguments in support of this contention in their skeleton argument which Mr McGurk, who appeared for HMRC, re-ordered and clarified before us.

31. In summary, the first argument was that the FTT were wrong to conclude that the lawfulness of the supplier condition must be determined before Euro Trade's appeals against the Refusal to Amend Decision and the Commissioners' Direction Decision could be determined. Mr McGurk submitted that, once the FTT had decided that the WOWGR registration had been validly revoked (and there was no appeal against that decision) so that Euro Trade could no long lawfully trade in duty suspended goods, the reference to the CJEU was not necessary to determine those other appeals. This was because if there was no longer any WOWGR registration then the supplier condition ceased to have any practical effect and any appeal against a refusal to amend that condition would be purely hypothetical. Similarly, where there was no trade in duty suspended goods because the WOWGR registration had been revoked then any restrictions on such trade as a result of the Commissioners' Direction Decision became irrelevant.

32. Mr McGurk submitted that, as a reference was not necessary to dispose of the appeals, the CJEU would hold that the reference was inadmissible because Article 267 of the Treaty stated that the decision of the CJEU on a reference must be "necessary to enable [the FTT] to give judgment". He said that the reference would only be necessary and thus admissible if Euro Trade were still trading under the WOWGR registration or if Euro Trade had a damages claim against HMRC as a result of the supplier condition. Neither circumstance existed in this case. Mr McGurk referred us to decisions of the CJEU that showed that the Court would not entertain hypothetical questions or answer questions that were not necessary to determine the case before the referring national court. We do not need to set out those decisions as it is well established that Article 267 requires that a question should be referred to the CJEU only if a decision on it is necessary in order that the referring court or tribunal can give judgment and that references that do not meet that condition will not be admitted.

33. In response, Mr Shelley, who appeared for Euro Trade, accepted that if the decision to revoke the WOWGR registration was accepted as being reasonable irrespective of the

lawfulness of the supplier condition then the views of the CJEU on the lawfulness of the supplier condition would not have any effect on the revocation of the WOWGR registration. Mr Shelley's principal submission was that the FTT had a discretion, if not an obligation, to refer questions concerning issues of EU law to the CJEU and that we should not interfere with the exercise of that discretion. Mr Shelley suggested in his skeleton that, by their appeal, HMRC were in effect seeking a judicial review of the FTT's decision to refer questions to the CJEU. He contended that the FTT was entitled to make such a reference under Article 267 TFEU because the law was not 'acte clair'.

34. Mr Shelley did not really engage with the point that once the FTT had concluded, in [265] and [266], that Euro Trade's appeal against the Revocation Decision must be dismissed whatever the CJEU decided, the lawfulness of the supplier condition became irrelevant because the appeals against the Refusal to Amend Decision and the Commissioners' Direction Decision fell away once the WOWGR registration ceased to exist. The FTT seemed to recognise this in the decision refusing HMRC permission to appeal. At paragraph 36, the FTT acknowledged that a decision by the CJEU in favour of Euro Trade would be no more than a Pyrrhic victory in its appeal against the Refusal to Amend Decision because the revocation of the WOWGR registration had been upheld. The FTT nevertheless refused permission to appeal, saying:

> "I … think it pointless to appeal this issue by itself because nothing turns on whether the Tribunal determined point 3 at the time it determined issues 4 & 5 or it waits until after the CJEU reference on points 1 & 2."

35. We do not consider that the FTT's statement addresses the point that a decision by the CJEU on whether the supplier condition was lawful would have no effect on the outcome of Euro Trade's appeal against the Refusal to Amend Decision (and, we note, the appeal against the Commissioners' Direction Decision) because they fall away once the WOWGR registration is revoked so the reference is not necessary for the FTT to determine the outcome of those appeals.

36. We agree with HMRC that the appeals against the Refusal to Amend Decision and the Commissioners' Direction Decision which imposed conditions on the purchase and sale of duty suspended goods by Euro Trade were predicated on the continuing existence of Euro Trade's registration under WOWGR. Without a WOWGR registration, Euro Trade could not buy or sell duty suspended goods and the direction and decision against which Euro Trade had appealed became irrelevant and the appeals must be dismissed.

37. Clearly, if the FTT had allowed Euro Trade's appeal against the Revocation Decision then the FTT would have been obliged to go on to consider the other appeals and the lawfulness of the supplier condition. Even if the FTT had decided, as was the case, to dismiss Euro Trade's appeal against the Revocation Decision, they could also have decided that they should consider the other appeals because Euro Trade might decide to appeal against the FTT's decision in relation to the revocation of its WOWGR registration. In such circumstances, it is appropriate for the FTT to make findings of fact and determine the other appeals in case the decision in relation to the Revocation Decision is overturned on appeal. That is because the FTT is the primary fact finder (see Jacob LJ in *HMRC v Proctor & Gamble UK* [2009] EWCA Civ 407 at [7]) and dealing with the matter in the decision may obviate the need for the case to be remitted in the event that all or part of the decision is overturned on appeal. In such a case, it is not appropriate or, in our view, permissible consistently with Article 267 TFEU to make a reference to the

CJEU in relation to other appeals or issues which, absent any further appeal, are of academic interest only. That would be a matter for the Upper Tribunal or higher appellate court if they allowed an appeal against the FTT's decision upholding the Revocation Decision and considered that the reference was necessary.

38. HMRC's second point was that there is no EU law right to trade in duty suspended goods and that trading in such goods is a privilege not a right. This was the term used by Underhill LJ in *CC&C Limited v HMRC* [2014] EWCA Civ 1653 at [42]:

> "The statute describes the right to trade in duty-suspended goods as a 'privilege', and the nature of the business is such that it is a privilege that should only be accorded to those whom HMRC believe they can trust."

39. The same view was taken by Cobb J in *R (oao HT & Co (Drinks) & Anor) v HMRC* [2015] EWHC 659 (admin). The FTT acknowledged at [206] that it was bound by these authorities. In [164] and [165], the FTT accepted that there is no directly effective right to trade in duty suspended goods. However, the FTT, relying on a passage from the judgment of the CJEU in Case C-456/10 *ANETT* [2012], held that a wide definition is to be applied to the terms in Article 34 TFEU and conditions such as the supplier condition imposed on Euro Trade would act as a financial disincentive to make purchases from anyone other than the named suppliers, as only those purchases could be in duty suspense.

40. Mr McGurk submitted that Euro Trade had abused the privilege of trading under a WOWGR registration by breaching the conditions through the activities of Mr Richard Hercules. He contended that, following the FTT's dismissal of its appeal against the Revocation Decision, Euro Trade's only rights were the right to apply for a new registration under the WOWGR and the right for such application to be considered fairly. Absent any right to trade in duty-suspended goods, any restriction on such trade could not be regarded as a restriction that contravened EU law (even if the supplier condition could otherwise be described as a derogating measure).

41. Mr Shelley's submissions on this point were the same as in relation to HMRC's first ground (see [33] above). In his skeleton argument, Mr Shelley also stated that HMRC's assertion that there is no directly effective right to trade in duty suspended goods was contrary to "numerous leading decision [sic] of the CJEU" but without citing any or acknowledging that the FTT had been of the same view as HMRC on this point.

42. We agree with Mr McGurk's submissions on this ground, essentially, for the same reasons as we have given in relation to the first ground. As Euro Trade did not have any existing right to trade in duty suspended goods that engaged Article 34 TFEU, the lawfulness of the supplier condition that applied when it was registered under the WOWGR and carrying on a trade in duty suspended goods no longer arose and a reference to the CJEU about whether the supplier condition was lawful is not admissible.

43. HMRC's third argument related to Euro Trade's appeal against the Refusal to Restore Decision. Mr McGurk did not press the argument, relied on in the FTT, that the fact that, as the FTT found, Euro Trade had knowingly flouted the supplier condition was sufficient reason to justify HMRC's refusal to restore the seized goods irrespective of whether the supplier condition was lawful. Mr McGurk relied primarily on the alternative argument put to the FTT, namely that the deeming provision in paragraph 5 of Schedule 3 to CEMA 1979 meant that, as it had not contested the seizure of the goods in

condemnation proceedings, Euro Trade could not challenge the legality of the supplier condition in the appeal against the Refusal to Restore Decision. The FTT had rejected this argument on the ground that *Jones* and *Race*, relied on by HMRC, were only authority for the proposition that the deeming provision in Schedule 3 to CEMA 1979 applied to the facts that gave rise to the seizure and did not prevent an appellant raising arguments of law. Further, the FTT held that, if they were wrong on that point, section 2(1) of the European Communities Act 1972 meant that EU law must prevail over domestic provisions in CEMA 1979.

44. Mr McGurk's point was simple. He submitted that the decision of the Upper Tribunal in *Denley v HMRC* [2017] UKUT 0340 (TCC) ('*Denley*'), which was issued after the FTT had released the Decision, showed that the deeming provision in paragraph 5 of Schedule 3 to CEMA 1979 applied equally to matters of fact and law that are implicit in the deemed conclusion that the goods "have been duly condemned as forfeited". The Upper Tribunal in *Denley* held in [47] that, where a person has not sought to challenge the seizure of goods and they are deemed by paragraph 5 of Schedule 3 to CEMA 1979 "to have been duly condemned as forfeited", the person whose goods had been seized could not dispute the lawfulness of the seizure, on domestic or EU law grounds, in proceedings before the FTT and the seizure must be regarded as having been lawful.

45. The Upper Tribunal also held that it made no difference that Mr Denley was relying on EU rather than domestic law. Mr McGurk submitted that it followed that Euro Trade could not contend that HMRC's refusal to restore the seized goods which had been purchased in breach of the supplier condition was flawed because the condition was contrary to EU law. Accordingly, Euro Trade should not have been permitted to raise the argument that the supplier condition was unlawful in its appeal against the Refusal to Restore Decision which the FTT should have dismissed.

46. Mr Shelley submitted that the Upper Tribunal's judgment in *Denley* only goes so far and does not permit something that is unlawful to be lawful. He contended that the question was whether, in considering the question of restoration, HMRC were acting reasonably or unreasonably.

47. We do not consider that there is anything useful that we can add to the reasoning in the decision in *Denley*. We consider that it applies in this case and, therefore, Euro Trade cannot contend that the supplier condition is unlawful in the appeal against the Refusal to Restore Decision. That means that the FTT should have considered Euro Trade's appeal on the basis that the seizure was lawful. However, given that the FTT concluded, at [246] and [247], that if the supplier condition had been lawfully imposed then the Refusal to Restore Decision was entirely reasonable, it must follow that it would have reached the same conclusion if it had regarded the seizure as lawful. If so the inevitable conclusion must be that no reference to the CJEU is necessary and Euro Trade's appeal against the Refusal to Restore Decision must be dismissed.

48. HMRC's fourth point was that any EU law rights must derive from the Excise Directive and not the TFEU and are, therefore, a form of implementation of the Directive and not a derogation from the TFEU. In view of our conclusions in relation to the other points, HMRC's appeal must be allowed and Euro Trade's appeals to the FTT must be dismissed. Accordingly, this point does not arise and we do not consider that it is appropriate for us to determine it when it is not necessary to do so.

Disposition

49. For the reasons set out above, HMRC's appeal against the FTT's decision to refer preliminary questions to the CJEU is allowed. Accordingly, we set aside the Decision insofar as it relates to the reference to the CJEU concerning the Commissioners' Direction Decision, the Refusal to Restore Decision and the Application to Amend Decision. Having set those parts of the Decision aside, we remake it to dismiss Euro Trade's appeals against the Commissioners' Direction Decision, the Refusal to Restore Decision and the Application to Amend Decision.

Judge Greg Sinfield
Upper Tribunal Judge

Judge Ashley Greenbank
Upper Tribunal Judge

Release date: 05 February 2019