Neutral Citation: **[2023] UKUT 00179 (TCC)**

Case Number: UT/2022/000085

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Sitting in public at the Rolls Building, London

Keywords

Heard on: 23-24 May 2023
Judgment date: 25 July 2023

Before

MR JUSTICE RAJAH
JUDGE RUPERT JONES

Between

CAERDAV LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Sadiya Choudhury, Counsel, for the Appellant

For the Respondents: Jim Duffy, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant, Caerdav Ltd ("Caerdav"), appeals the Decision of the First-Tier Tribunal ('FTT') dated 16 March 2022 ([2022] UKFTT 00105 (TC)). The FTT dismissed Cardaev's appeal against a C18 demand note issued by His Majesty's Revenue and Customs ('HMRC') dated 23 April 2018 for £330,633.45 ("the demand"). It was made up of customs duty of £275,547.12 and import VAT of £55,086.33.

2. The demand had been issued in respect of Caerdav's importation of an aircraft (registration number 5HFJA) ("the aircraft") in November 2016. The aircraft had flown from Sofia in Bulgaria and entered the UK at St Athan in Wales for a service check, repairs and maintenance to be conducted by Cardaev on behalf of the aircraft's lessee, Fastjet plc. The aircraft then left the UK for the Republic of Ireland before going on to its final destination in the United States of America ('US').

3. HMRC were initially of the view that no liability arose for Caerdav in respect of the aircraft and suggested as such in two letters in October and November 2017. HMRC then came to a different view and raised a demand for customs duty and VAT in April 2018 on the basis that Caerdav had entered the aircraft into the European Union ('EU') customs special procedure known as "end-use", but it was not entitled to do so because its authorisation to use this procedure had expired. It is not in dispute that the end-use authorisation had expired, or that this was due to an oversight on Caerdav's part.

4. Similar issues arise in this appeal to the Upper Tribunal as were before the FTT. They are set out in full below but include: whether the aircraft's importation into the UK was as part of an indirect export through the EU from Bulgaria and onwards to Ireland and the USA such that the importation qualified for relief under a special procedure, namely Inward Processing; if not, whether the duty payable could and should be remitted by HMRC; and whether HMRC's statements to Caerdav in letters in October and November 2017 gave rise to a legitimate expectation that duty would not be imposed.

5. We are grateful to Ms Choudhury for the Appellant and Mr Duffy for HMRC for the quality of their written and oral arguments on this appeal. We have not found it necessary to refer to Mr Duffy's arguments throughout but have agreed with many of them when giving our reasons.

The issues before the FTT

6. The issues before the First-Tier Tribunal ('FTT') were whether Caerdav was liable for the demand under the applicable provisions of EU customs legislation and, if it was, whether there was any other reason under the applicable law why the demand ought not to be upheld. The FTT dismissed Caerdav's appeal on all grounds finding that the customs debt and VAT were due.

7. The Appellant pursued a number of grounds of appeal before the FTT. The first and primary question in the appeal was whether a special procedure applied, namely Inward Processing, such as to relieve the imposition of any duty or VAT. The FTT next considered whether HMRC should remit the liability under Article 120 of the Customs Code. Third, it considered whether a simplified end use procedure was in breach of EU law and ultra vires. That ground and issue is not pursued before us. Fourth, the FTT considered whether the Appellant had a legitimate expectation, based on letters from HMRC, that the duty and VAT were not due.

8. The FTT recorded its conclusions at [285]:

285. For the reasons set out above, I have decided:

(1) That the aircraft was imported under an expired EUA and that it was not subject to the Inward Processing procedure on arrival in the UK [because it had left the EU when flying through Serbian airspace and was travelling as part of a direct export from Bulgaria to the USA]. Accordingly, the customs debt and VAT are due;

(2) The principles of *Terex* do not apply to require HMRC to remit the customs debt and VAT. Nor can the Appellant require remission on the ground of equity under Article 120 UCC. To the extent that the Appellant seeks to rely on the EU principle of legitimate expectation, this Tribunal does not have jurisdiction in the matter.

(3) This Tribunal does not have jurisdiction to consider the *ultra vires* ground which would not assist the Appellant in any event; and

(4) This Tribunal does not have jurisdiction to consider the UK legitimate expectation ground in the context of this appeal and, in any event, the conditions for legitimate expectation are not made out.

Grounds of appeal before the Upper Tribunal

9. The Appellant was granted permission to appeal to the Upper Tribunal on six grounds through which it submits the FTT erred in law:

(1) By holding that the aircraft was no longer subject to the Inward Processing special procedure once it left EU airspace. It is submitted the FTT erred in finding it was moving as part of a direct export from Bulgaria to the US when it should have found that it was moving as part of an indirect export through the EU and via Shannon in Ireland.

(2) By holding that the customs debt could not be remitted on the grounds of equity under Article 120 of the Union Customs Code ('UCC').

(3) By holding that a legitimate expectation did not arise as a matter of EU law.

(4) By failing to take any account of proportionality in its decision.

(5) By holding that (a) it did not have jurisdiction to consider legitimate expectation in the particular statutory context, (b) a legitimate expectation could only arise as a result of a 'ruling' by HMRC; and (c) no legitimate expectation arose on the facts.

(6) In the exercise of its discretion when considering whether to allow the Appellant to dispute the amount of the customs debt (i.e. whether to allow the Appellant to pursue an argument not raised before the latter stages of the FTT hearing).

The findings of the FTT in relation to the background facts

10. The FTT made its findings in relation to the background facts in its Decision at [7] to [53]. These are summarised below along with reference to paragraph numbers in square brackets.

11. The findings are relevant to the questions of whether the customs debt could be remitted on the grounds of equity under the UCC and whether HMRC's statements in letters and its actions thereafter gave rise to a legitimate expectation that the duty and VAT would not be imposed (grounds of appeal 2, 3 and 5).

12. The FTT had heard evidence from Caerdav's finance director at the time, Christopher Coleman, and its customs consultant, Robert Hina. Officers Rhys Jones and Kevin Snow gave evidence for HMRC.

13. None of these findings are challenged on appeal.

14. At all material times, the UK was a member of the European Union as were Bulgaria and the Republic of Ireland.

15. Caerdav provides maintenance, repair and overhaul services and training services for major airlines involved in the travel sector. It operates from a business park which is part of a former RAF base at St Athan, near Cardiff.

16. Caerdav had been advised by HMRC several years previously to obtain an "end use" certificate for importing aircraft from outside the EU. Under this procedure, goods may be released for free circulation into the EU at a reduced or zero rate of duty on account of their specific use provided that the importer holds an end-use authorisation ("EUA").

17. Caerdav had held an EUA for a number of years. However, it had expired on 31 October 2016. For some reason, its expiry was overlooked. Caerdav nevertheless understood that a renewal application might be made retrospectively for as much as a year after expiry (see the Decision at [9]).

The arrival of the aircraft in the UK

18. The aircraft was owned by BBAM who leased it to Fastjet plc and it was operated by Lufthansa. It was registered out of Tanzania. Fastjet was in financial difficulties and BBAM intended to sell the aircraft to another carrier in the US. Lufthansa flew the aircraft from Tanzania to Sofia in Bulgaria for maintenance work and it arrived in Bulgaria on 2 October 2016 (see the Decision at [11]).

19. The aircraft was imported by Caerdav on 15 November 2016. At that time, Caerdav used a freight forwarder, Rhys Davies Forwarding, to undertake the formal declaration of importation of aircraft to HMRC. The documentation was completed in the mistaken belief that there was still an end use certificate in place. At the time of importation (and indeed subsequently), Lufthansa did not provide any paperwork regarding the customs status of the aircraft prior to its entry into the UK.

20. Caerdav had been engaged by Fastjet plc and addressed its invoice to Fastjet plc. The work undertaken was described by the FTT as "*minor*" (see the Decision at [12]) and "*minimal*" (at [13]). The invoice was for labour and materials of £1,024.65 and £51.14 respectively, £600 for six days parking and £6,785 for aviation fuel. The aircraft then left for the Republic of Ireland and subsequently the USA.

21. Prior to its arrival at the Appellant's facility at St Athan, Wales, the aircraft had already undergone maintenance at Sofia International Airport in Bulgaria, an EU Member State. It had landed there on 2 October 2016 before its arrival in Wales on 15 November 2016. After leaving Wales, it would go on to stop briefly in Shannon, Ireland.

HMRC's involvement

22. Four months following the expiry of the EUA, on 1 March 2017, the Appellant's Nicola Green emailed HMRC to enquire about "*reinstating"* the EUA (see the Decision at [15]-[18]). She sent chasing emails on 2 and 19 March. Mr Wignall of HMRC responded on 20 March 2017 confirming that the EUA had expired on 31 October 2016. On 21 March 2017, he explained that it was not possible to "reinstate" an EUA, and that the Appellant would have to make a new application. He provided Ms Green with the relevant guidance about the application – Notice 3001 – and then confirmed which form needed to be completed.

23. Mr Wignall went on to explain that before the form could be completed a Customs Comprehensive Guarantee ('CCG') would need to be obtained, and that form CCG1 should be used for this. He also provided the Customs Helpline number in case she needed further advice.

24. The FTT noted at [15] that Ms Green started to look into this and that it appeared that obtaining a CCG would require a bank guarantee. The Appellant's only factual witness, Mr Coleman, stated that "*as the company still had plenty of time in which to renew the certificate and there did not seem to be much hinging on it, the question of getting a CCG and renewing the end use certificate fell into limbo."*

25. HMRC's Authorisation and Returns Team set up an audit into the company on 28 March 2017. It had become aware that the Appellant had claimed zero rates of duty on six imports after the EUA had expired. These imports had a value of over £10 million, most of which related to the aircraft in question.

26. It was then that Officer Jones and a colleague attended the company's premises on 31 May 2017. They met with a Mr Cook, who was to leave Caerdav the following September. Mr Jones had requested documents in relation to 11 entries made between 31 July 2015 and 15 November 2016. These included the aircraft. Only some documents could be produced and Mr Jones concluded that the company had not been adhering to the conditions of the authorisation, as they had not been keeping adequate records. The FTT observed at [19] that Mr Jones' notes show he requested the commercial invoice and related documents in relation the import of the aircraft this appeal concerns.

27. Mr Jones advised that the company should make a new EUA application. He explained that it was possible to apply for a retrospective authorisation and that this could be backdated for up to a year from the date of the application. As the FTT noted at [20], if granted this would solve the problem of the company having made imports under an expired authorisation. However, he also explained that a retrospective application had to satisfy a number of conditions and that it could only be applied for in exceptional circumstances. The Judge found at [20] that "*[i]t should have been clear to the company that the grant of a retrospective authorisation was not a matter of routine."*

28. There was a discussion at this meeting about the need for a CCG. This was, however, the second time that the need for a CCG was mentioned by HMRC to the company. As the FTT noted at [21], "*[t]he company, in the person of Ms Green, was aware, from the previous correspondence that it needed a CCG and some effort had been made to take this forward although for some reason the company did not proceed."*

29. The FTT noted at [22], "*It should, however, have been clear to the company that the potential liabilities were large. Mr Coleman agreed that the company was aware that the customs duty was based on value and the potential duty on the import of an aeroplane would have been a large sum of money."*

30. The 31 May 2017 meeting with HMRC was followed up with a letter dated 7 June 2017. Mr Jones asked for additional information/documents in relation to a number of entries where End Use had been claimed, both before and after the expiry of the EUA. Again, this included the aircraft. It provided further guidance, explaining what needed to be done to obtain an EUA, pointing the Appellant to the relevant form and stating that the period of authorisation would not normally be backdated beyond the date of submission of the application. It emphasised the need to explain the reasons for requesting backdating and that they the Appellant would have to produce records showing compliance with the End-use requirements. Mr Jones offered to provide a letter which would negate the company having to provide records "*so that you can make a request for retrospection back to the entries made in November 2016, which were made on an expired authorisation* [23]."

31. The FTT noted at [24] that "[t]he letter, importantly, stated

> "*… I will grant the company until 30th June 2017 without taking any action in regards to the entries made under an expired Authorisation. If the company have not completed all parts of the application in full, including the details regarding the guarantee, and submitted it to the Authorisation and Returns Team… by this date, then I will issue the company a Post-Clearance Demand Notice for the entries that were made on the expired Authorisation, i.e. all entries made on or after 01/11/2016."*

32. These entries encompassed the aircraft in question. The FTT set out at [25] the facts the Appellant must have been aware of at this point.

33. Some documents were then sent by Mr Cook on 5 July 2017, but Mr Jones replied on 10 July explicitly referencing the aircraft; the invoice in relation to it was still needed. He set a new deadline of 17 July 2017 for this and for evidence that the Appellant had applied for a new EUA.

34. On 9 July, Mr Cook said he had been unable to find the further documents, and Mr Jones suggested asking the freight agents (see [26]).

35. While an application for a CCG was made by Ms Green and was acknowledged by the Customs Comprehensive Guarantee Team on 21 June 2017, the FTT inferred that it must have lapsed following the Team's request for completion of a questionnaire (see [27]).

36. On 14 July 2017, Mr Cook emailed Mr Jones explaining, *inter alia*, that the company had exhausted all avenues and could not investigate the missing audit items any further (see [28]).

37. On 24 August 2017, Mr Jones asked the Authorisation and Returns Team for an update on the Appellant's application for an EUA and was informed that none had been received.

38. On 13 September 2017 – prior to HMRC's letter of 10 October 2017 – eight members of Caerdav's staff including Ms Green and Mr Coleman - attended a training course at which it was stated that End Use would no longer be required in relation to aircraft from January 2018 (see [30]). The FTT referred here to Mr Coleman's evidence (see [31]):

> "*Mr Coleman's understanding was that when the company became aware, as a result of the training course, that End Use would no longer apply to the import of aircraft from the near future, and believing "next to no liability hinged on the renewal" of the EUA the company effectively ceased to pursue the renewal of the EUA. I note that had an application been made at this time, it could still have been backdated to cover the import of the aircraft. Mr Coleman accepted that there was nothing in the documents to indicate that HMRC would not pursue any liability."*

39. The FTT found at [32] that there were three reasons why the EUA was not renewed: "First, Mr Cook, who was dealing with the matter left, although if it had been considered important, someone else would have taken it on. Secondly, the company understood that within a few months, it would no longer need the EUA to import aircraft and [thirdly] importantly, the company did not think that it might have a very large liability to customs duty and VAT if it did not renew the EUA."

HMRC's letters of October and November 2017 and the C18 post-clearance demand

40. HMRC's letter of 10 October 2017 stated that, as a result of errors in the company's records, import VAT of £4,708.18 was due. Under the heading "*non-monetary errors"* there was a statement that "*The following entries had errors but these have not caused any*

underpayments of Customs Duty or Import VAT". One of these related to the aircraft. It continued, "*Each of these entries were aircraft entered to End Use. However, a full audit trail of the goods was not presented during the audit. As the goods are qualifying aircraft for VAT relief, there is no underpayment on these goods." (see* [34])

41. HMRC's 10 November 2017 letter stated an intention to issue a demand note for £12,222.34 and contained a similar schedule, stating that there was no underpayment on certain entries, including the aircraft (see [35]).

42. The C-18 demand note relating to this was issued on 1 December 2017. This was followed up with a decision letter that began with the following words in bold (see [42]): "*We've issued this decision without prejudice to any further action that we may take in relation to this matter."* The FTT noted that "*Mr Coleman acknowledged that there was nothing in the correspondence to indicate that the company did not need a backdated EUA" (see* [38]).

43. In February 2018, HMRC's Authorisation and Returns Team carried out a review of the case and found that Mr Jones had overlooked the fact that the wrong commodity codes had been used in respect of the aircraft. This prompted his Right to be Heard letter dated 13 March 2018 stating that £275,547.12 customs duty and £55,086.33 import VAT were due. The C-18 Post Clearance Demand Note relevant to this appeal was issued on 23 April 2018 (see [39]).

44. Officer Jones issued his decision letter on 18 April 2018 confirming the amount of £330,633.45 was due.

45. The Appellant did not make any application for a new EUA until 4 April 2018, requesting that it commence on 1 November 2016. After it had been pointed out (again) that authorisation could only be backdated by a maximum of one year and only in exceptional circumstances, the Appellant declined the invitation to set out any exceptional circumstances, asking for the EUA to commence on 9 April 2018, which it then did (see [44]-[45]).

The aircraft's movements prior to entering the UK and Inward Processing documentation

46. Caerdav had managed to ascertain that prior to its arrival in the UK, the aircraft had been in use in Bulgaria. After leaving Caerdav's premises, the aircraft flew to Shannon airport in the Republic of Ireland.

47. The Bulgarian customs authorities provided documents pursuant to a request ("the Bulgarian documents") to HMRC on 21 July 2021. The documents confirmed that the aircraft did land in Bulgaria on 2 October 2016. Further, they showed that the importer, Lufthansa Technik Sofia ("LTS") had entered the aircraft into the EU customs special procedure of "Inward Processing" on its arrival at Sofia in Bulgaria on 3 October 2016 (see [80]).

48. Under the Inward Processing special procedure, goods can be imported into the EU subject to zero or reduced rates of duty for "processing" (e.g., repairs). LTS also completed an "export accompanying document" ("EAD") according to which the aircraft was to be exported from the customs territory of the EU, from Bulgaria, to the USA (see [82]).

The Law

49. The key provisions of the applicable EU and domestic legislation are set out in the appendix to this decision. The relevant provisions which are in dispute in this appeal are addressed in the discussion of the grounds of appeal.

The grounds of appeal considered

Ground 1 - The FTT erred in its finding that the aircraft was subject of a direct export from Bulgaria to the USA and no longer subject to the Inward Processing special procedure once it left the EU by travelling into Serbian airspace

The arguments before the FTT

50. Caerdav's primary ground of appeal before the FTT was referred to as the "Inward Processing ground" by the FTT and was considered at [76] to [114] of the Decision.

51. The Appellant's main ground of appeal before the FTT was that when the aircraft arrived at St Athan it continued to be subject to Inward Processing so that no duty or VAT was due and it was irrelevant that the EUA had expired. In the Appellant's submission, Shannon (in the Republic of Ireland) was the customs office of exit and the aircraft remained within the Special Procedure until it left Irish airspace on its way to the US. It was argued that there was an indirect export from Bulgaria via Ireland to the US.

52. The argument was that as the aircraft had been the subject of a customs special procedure throughout the time it was present in the EU, there was no liability to customs duty/VAT arising in the UK, or elsewhere in the EU (and if there had been LTS would have been responsible for it). Moreover, the fact that Caerdav's EUA had expired before the aircraft arrived was now irrelevant because it ought not to have been declared to end-use (or to any other customs procedure on arrival in the UK) at all.

53. HMRC submitted that the customs office of exit was Sofia in Bulgaria as part of a direct export to the US and the aircraft was discharged from Inward Processing when it flew over Serbian airspace on its way to St Athan. On arrival it was no longer subject to EU customs control and its arrival constituted a new import on which duty and VAT were due (but would not have been had a valid EUA been in existence).

The FTT's Finding on Inward Processing

54. The FTT agreed with HMRC. As set out below, the FTT concluded that there was a direct export from Bulgaria to the US as opposed to an indirect export via another EU Member State (Ireland). It therefore held that the Inward Processing procedure into which the aircraft had been entered by LTS in Bulgaria had been discharged when it entered Serbian airspace after leaving Bulgaria on its journey to Caerdav's premises in St Athan.

55. The FTT found as a matter fact that when the aircraft was imported in St Athan, it was the subject of a direct export from Bulgaria to the United States and not an indirect export via St Athan (or any other EU member state). It found at [110]:

> 110. The documentary evidence, and in particular the EAD, is consistent with a direct export from Bulgaria to the US, rather than an indirect export via another EU member state. This is supported by the facts there were no ECS entries included in the Bulgarian Documents and that Caerdav did not receive an EAD or the information in it which would have indicated that the export from Sofia was an indirect export. I conclude that the aircraft was the subject of a direct export from Bulgaria and accordingly, under Article 267 of the Implementing Regulation it would have been discharged from the IP procedure when it left the customs territory of the EU. I have found, on the balance of probabilities that the aircraft flew over Serbia, so it left the customs territory of the Union when it flew into Serbian airspace.
>
> …
>
> 112. However, the aircraft was not moving between two points in the customs territory. The movement was from Bulgaria to the US, albeit it stopped at other places on the way. This was a direct export, so Article 136 did not apply and by virtue of Article 267, the aircraft ceased to be subject to the IP procedure when it first left the EU as it entered Serbian airspace.

56. It therefore concluded at [113]-[114]:

> 113. For the reasons set out above, I conclude that the aircraft was not under customs control when it landed at St Athan, the Inward Processing procedure having been discharged when the aircraft entered Serbian airspace.
>
> 114. Accordingly, the aircraft arrived in St Athan from outside the customs territory of the EU and was subject to customs duty and import VAT. Although the entry was declared to End Use, the EUA had expired at the time of import and so the liability arose and is due.

Discussion and analysis

57. The Appellant challenges the FTT's finding of fact that at the time that the aircraft landed at St Athan it was travelling as part of a direct export from Bulgaria to the US. There is no challenge to the FTT's finding that the aircraft left the EU's airspace when it flew over Serbia but it is submitted that the FTT should have found that the aircraft entered the UK as part of an indirect export through the EU.

58. This is a challenge to the fact-finding of the FTT and as such must meet the high threshold explained in the authorities. The Upper Tribunal summarised the position in relation to such a challenge in *HMRC v Anna Cook* [2021] UKUT 15 (TCC), at [18]-[19]:

> "18. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[1].
>
> 19… we have borne in mind the caveats helpfully summarised in *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC), at [54]-[69]. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment. As stated by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:
> … for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged;
> secondly, show that it is significant in relation to the conclusion;
> thirdly, identify the evidence, if any, which was relevant to that finding; and
> fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make.
> What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

59. In *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 Lewison LJ stated at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

[1] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

60. It follows that the question before the appellate court when exercising an "error of law" jurisdiction is not whether it would have made the same decision as the first-instance tribunal. The appeal is not a re-run of the first-instance trial: as Lewison LJ also said in *FAGE* at [114], "*the trial is not a dress rehearsal. It is the first and last night of the show*". The test is whether the FTT's factual findings or evaluative judgments in this case were within a reasonable range of conclusions that a properly directed tribunal could have made on the evidence available to it.

61. Ms Choudhury argues that the FTT erred in giving its reasons for finding that the EAD was accurate when it stated that there was an export from Sofia (Bulgaria as the country of export) with the destination country in the US

62. She challenges each of the reasons that the FTT relied on at [103]-[114] for making its finding of fact that the EAD accurately described the true state of affairs – ie that there was a direct export from Bulgaria to the US.

63. Ms Choudhury submits that the FTT wrongly rejected Caerdav's argument that there was a mistake in the EAD included in the Bulgarian documents. Caerdav had argued that the EAD should have referred to the eventual office of departure from the EU (Shannon) or to St Athan. She submits that both witnesses who spoke to that document, who the FTT said might be described as experts in the field (see [78]), agreed that there was at least one mistake in the EAD in relation to the codes used in the EAD. However, she submits, the FTT refused to contemplate the possibility of there being another mistake on the balance of probabilities.

64. We do not accept this argument.

65. It is not right that the FTT refused to contemplate the possibility of there being a relevant mistake on the EAD where it should have described an indirect export via Shannon. The Judge considered the possibility and set out clearly in the Decision why she was rejecting it, finding that "*there [was] nothing to support this [a further mistake on the EAD] and it [was] inconsistent with the other entries on the EAD"(see* [106]).

66. The FTT found support for its conclusion in the finding that "Caerdav did not receive an EAD or the information in it which would have indicated that the export from Sofia was an indirect export" Miss Choudhury submits that the FTT "*disregarded*" the point that Caerdav did not require a *paper* EAD. The FTT specifically considered the point before rejecting it on the basis of the wider evidential context explained at [108]-[109].

67. The FTT read and heard the evidence of Mr Hina and Officer Snow, rival, specialist witnesses for each party. It broadly preferred that of Officer Snow (see [104]). The Appellant may criticise the process by which information was provided by the Bulgarian authorities and cast doubt as to the quality of that evidence, but the FTT had to determine the appeal on the basis of the evidence before it as opposed to what was not before it and might, possibly, have existed somewhere.

68. Ms Choudhury further submits that the FTT failed to take into account relevant evidence. In particular, she contends that the FTT did not take into account the fact that, if its conclusion were correct that the Inward Processing procedure could be, and was, discharged by the aircraft simply departing Bulgaria, there would be no reason for the Bulgarian customs authority to have made or retained any records showing the aircraft's subsequent destinations and its arrival in the USA. Based on the FTT's reasoning, the Bulgarian authorities should simply have recorded it exiting the EU on its flight out of Bulgaria. The FTT referred to Mr Snow's evidence that the documents would be processed electronically and would not pick up manuscript notes (see [90]**)**. However, that does not explain why the Bulgarian customs authority had made those notes or considered it necessary to do so.

69. Again, we reject this submission.

70. The Appellant points to the presence of handwritten notes on the EAD referring to the aircraft arriving in the United States on 6 January 2017 and asserts that these show that the subsequent movements of the aircraft were "*being tracked*", and that this would only happen if the Bulgarian authorities were effecting an indirect export through the EU.

71. That theory does not appear to have been put to any witnesses and is no more than speculation. Little can reasonably be inferred from the handwritten notes one way or the other as to whether the movement was being tracked as part of an indirect export.

72. The Judge was entitled to reject the Appellant's arguments and, her factual assessment is not properly open to interference by the appellate tribunal in any event.

73. Ms Choudhury submits that it was not established as a fact that there were no computer records in Bulgaria of an indirect export. She argues that the FTT wrongly placed considerable reliance on Mr Snow's oral evidence regarding the necessity to record entries on the Export Control System ("ECS") if there was an indirect export (see [107]). Despite the alleged importance of this system, it had not been referred to in his witness statement or any other document. She argues that the FTT was wrong to rely on the unsupported assertions made by Mr Snow in his oral evidence. This was particularly so given Caerdav's witnesses had given their evidence and Caerdav had no other opportunity of responding to it. In any event, Mr Snow was not in a position to provide an opinion of how, when and why entries were made by the Bulgarian customs authority in the ECS or any other system.

74. We reject this submission. The FTT was entitled to take into account Officer Snow's evidence that there would only be entries on the ECS if it were intended to make an indirect export via another EU country and there was nothing procedurally unfair in him giving this evidence. The Appellant could have sought to recall Mr Hina if they wanted to challenge this evidence and he was available throughout cross examination of Officer Snow. The absence of any evidence as to an entry on the ECS (whose presence would be consistent with an indirect export) was a relevant piece of evidence that the FTT was entitled to rely upon.

75. Ms Choudhury further submits, there was no basis for the FTT's finding at [107] that the Bulgarian customs authority would have provided copies of the ECS entries if there had been any (and assuming Bulgarian customs required such an entry to be made in these particular circumstances).

76. Again, we reject this. The FTT was entitled to take into account this evidence and gave rational reasons for doing so: 'The information ultimately provided was comprehensive and I consider it more likely than not that if there had been any entries, copies would have been provided' ([107]).

77. In summary, Ms Choudhury submits that the FTT could not have sensibly reached the conclusion that there was a direct export from Bulgaria to the US. She argues that it would make no sense for the movement of the aircraft to go through additional bureaucracy of separate importations within the EU rather than moving through special procedure where it would not need to comply with the formalities each time it entered an EU country. She submits that this would involve an alternative and unlikely reality where the aircraft was exported and reimported and reexported through the EU. She contends that the only logical conclusion was that the plane was subject to an indirect export and that there was a mistake made in the EAD.

78. We rejected each of the Appellant's arguments. We are not satisfied there was anything close to an *Edwards v Bairstow* error in the FTT's factual findings that there was a direct export and that the EAD accurately stated the position. There was ample material on which the FTT could properly make those findings. The FTT relied on multiple factors in reaching the view

that, on the balance of probabilities, this was a direct export from Bulgaria to the US rather than an indirect export from the UK or Ireland originating in Bulgaria [105]-[110] such as:

(1) The EAD stated that the intended customs office of exit was Sofia;

(2) The EAD shows Bulgaria as the country of export and the US as the destination country;

(3) The absence of any evidence as to an entry being made on the ECS, which Officer Snow said there would be if the export were an indirect as opposed to direct export (which was consistent with HMRC's guidance on the National Export System for export declarations, NES).

(4) The absence of any ECS entries on the Bulgarian documents.

(5) The fact that the Appellant was not provided with the EAD or the information in it when the aircraft arrived in Wales, which Mr Hina said should have happened (assuming it was an indirect export).

79. Ms Choudhury also challenges the FTT's interpretation and application of the law at [111] in which it states:

111. I also agree with Mr Snow's and Mr Duffy's interpretation of the relationship between Article 267 and Article 136 UCC. Article 136 refers to movements between two points in the customs territory. So if the aircraft was moving from Sofia to St Athan under a Special Procedure, the aircraft would have "temporarily left" the territory while flying over Serbian airspace. In this case, it would have remained within the Special Procedure and there would have been no new import on arriving in Wales.

80. Article 267 of the Commission Implementing Regulation (EU) 2015/2447 ("the IR") provides:

> "**Movement of goods under a special procedure**
> 1. Movement of goods to the customs office of exit with a view to discharging a special procedure other than end-use and outward processing by taking goods out of the customs territory of the Union shall be carried out under cover of the re-export declaration
> …
> 4. Customs formalities other than keeping of records as referred to in Article 214 of the Code are not required for any movement which is not covered by paragraphs 1 to 3
> …
> 5. Where movement of goods takes place in accordance with paragraphs 1 or 3, the goods shall remain under the special procedure until they have been taken out of the customs territory of the Union."

81. Article 136 of the Union Customs Code ("UCC") states:

> "**Intra-Union air and sea services**
> Articles 127 to 130 and 133, Article 135(1) and Articles 137, 139 to 141, and 144 to 149 shall not apply to non-Union goods…, which have temporarily left the customs territory of the Union while moving between two points in that territory by sea or air, provided they have been carried by direct route without a stop outside the customs territory of the Union."

82. Ms Choudhury submits that the FTT's conclusion were based on Article 267(5) of the IR whereby the goods ceased to be under the special procedure (Inward Processing) until they left the EU (entering Serbian airspace). If that conclusion were correct, she maintains that it could lead to an uncertain and unworkable system with goods being inadvertently exported (or imported) if an aircraft's flight path changed unexpectedly as it travelled across the continent of Europe. It would be impossible to keep track of such constant (re-)imports and (re-)exports.

83. Ms Choudhury argues that this conclusion is not supported by Article 136 of the UCC which provides that goods can travel between different parts of the Union without giving rise to customs formalities provided they leave the Union temporarily and travel by means of a direct route without a stop outside the Union. The FTT acknowledged this difficulty with its conclusion but said it was consistent with the objective of the special procedures to prevent goods being diverted to the home market without payment of duty or VAT at [112]. However, she submits that the FTT does not explain how that objective is defeated if an aircraft enters non-EU airspace while travelling to another EU destination and then leaves it without landing so that no diversion of goods could actually take place.

84. We reject this submission. As Mr Duffy argued, the relationship between Article 267 IR and Article 136 UCC explains why this problem would not arise: if goods were actually being exported *indirectly*, they would be covered by Article 136, allowing them to leave the customs territory of the EU temporarily en route to their customs office of exit. In this case, there was a direct export out of the EU and the customs office of exit was Sofia, so Article 136 UCC did not apply and Article 215 UCC did:

> Article 215
>
> 1. … a special procedure shall be discharged when the goods placed under the procedure, or the processed products,…, have been taken out of the customs territory of the Union, …".

90. On that basis the FTT Judge was right to state in her decision refusing permission to appeal that the system is "*a coherent regime which is not "uncertain and unworkable" as stated in paragraph 7 of the Application."*

91. We dismiss Ground 1.

Ground 2 - The FTT erred in holding that the customs debt could not be remitted on the grounds of equity under Article 120 of the UCC

92. Article 120 of the UCC provides for the remission of duty otherwise payable on the grounds of equity:

> "**Equity**
> 1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.
> 2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty."

The FTT's ruling

93. The FTT ruled that Article 120 did not apply so as to allow the customs debt to be remitted for the following reasons at [137]-[144]:

> 137. First, the Appellant has not followed the correct procedure and has not made an application to invalidate the customs declaration. Even if that had been done and if the End Use declaration were invalidated, that would result in a situation where the aircraft had been imported and was

not under any special procedure, so the duty would be due, subject to the application of Articles 116 and 120.

138. Nor has the Appellant made an application for remission of the customs debt as required by Article 121, although the time limit has been suspended by the appeal.

139. The more fundamental reason why I cannot accept the Appellant's submissions is that Articles 116 and 120 do not apply in the present situation. The provisions of the UCC regarding repayment and remission, beginning with Article 116 are about repaying duty which has been charged when a lower amount or no duty was actually due. All of the grounds in Article 116 have conditions attached to them.

140. Article 120 does envisage a situation where a customs debt which is actually due may be remitted. It sets out the conditions applicable to remission on the ground of "equity". First there must be "special circumstances" but that is defined in paragraph 2 of Article 120. There must be something in the circumstances of the taxpayer which puts in it an "exceptional situation" as compared with other operators engaged in the same business and this has caused the taxpayer to be disadvantaged compared with such other operators because duty is being collected from it and not them. Secondly there must be no deception or obvious negligence which can be attributed to the debtor in connection with the special circumstances.

141. If a customs authority grants remission in accordance with Article 120, Article 121(4) requires the Member State to inform the Commission of the fact. This suggests that the Article 120 has effect in truly exceptional circumstances.

142. The circumstances set out at [123] do not amount to special circumstances in this context. If the aircraft had been subject to I[nward] P[rocessing] on entry, no duty would have been due and it would not be necessary to rely on equity. The equity ground applies where a customs debt has in fact been incurred and special circumstances apply. On the basis that no special procedure applied, a customs debt is due, but Ms Choudhury has not put forward any circumstances of the exceptional kind which would constitute special circumstances within Article 120(2). The Appellant has not been treated any differently from other operators in the same business.

143. Further, the customs debt was incurred because the Appellant failed to notice that their EUA had expired and failed to remedy the situation when it was raised by HMRC. I consider that this amounts to "obvious negligence".

144. I therefore find that Article 120 does not apply in the present case and there is no obligation on HMRC to remit the duty which is due.

Discussion and analysis

94. Ms Choudhury challenges the FTT's finding at [142] that Caerdav had failed to put forward any special circumstances of the exceptional kind and had not been treated any differently from other operators in the same business. She submits that both points are wrong. Caerdav has found itself in the highly unusual situation where it has incurred a customs debt of over £330,000 in relation to a maintenance job for £1,500, where: (1) there had been no actual loss of duty as the aircraft had been exported; and (2) HMRC themselves (as represented by Mr Jones) had been unsure whether a customs debt arose having indicated on two occasions that it did not. It is difficult to envisage that other operators find themselves treated in the same manner or that these circumstances cannot be regarded as "exceptional".

95. Secondly, she submits that the FTT erred in holding that remission was not available on the grounds that there had been "*obvious negligence*" by Caerdav (see [143]). This point had not been pleaded by HMRC at any stage. However, the FTT nevertheless allowed them to rely

on it because Caerdav had referred to this requirement in its skeleton argument. That, on any view, was not a sufficient reason for dispensing with the need for HMRC to plead an argument in their statement of case or address it in their evidence when they bore the burden of proof in respect of it.

96. She argues that there was no obvious negligence on the Appellant's part. Even if there was negligence, it was not obvious as is clear from the fact that Mr Jones twice wrote to Caerdav stating that no liability to VAT or customs duty arose in relation to the aircraft and only changed his view after the case was reviewed internally by HMRC.

97. We reject these submissions.

98. We will proceed on the assumption the FTT had jurisdiction to consider remission under Article 120. This is notwithstanding Mr Duffy's objection: the fact that the Appellant had made no application for remission to HMRC; nor had it been determined by HMRC, let alone been appealed to the FTT; and the first time the issue was raised was before the FTT on the appeal. The FTT dealt with the applicability of Article 120 on its merits and so do we.

99. We are satisfied that the FTT did not err in finding that Article 120 did not apply so as to allow remission of the duty on the grounds of equity. There are two limbs which must be satisfied in order for a taxpayer to bring themselves within Article 120 and they are not alternative, but cumulative: special circumstances and no obvious negligence. Contrary to Ms Choudhury's procedural point, the burden of proof was upon the Appellant in relation to each and HMRC were entitled to raise the objection that they did and when they did.

100. We are satisfied that the FTT's finding that the Appellant had not established that there was "*no obvious negligence"*, sufficient to satisfy the second limb of Article 120(2), was one it was entitled to reach, and one with which we should not interfere applying the test in *Edwards v Bairstow*.

101. The Appellant's assertion that the burden rests on HMRC to demonstrate that there <u>was</u> "*obvious negligence*" has no basis in law: the usual principle applies that the burden on the party making the application (particularly for an exemption or other relief) and it was not for Officer Jones or for HMRC to prove that there *was* obvious negligence. Article 120 does not impose such a burden, merely setting a requirement for special circumstances to "*exist*". The burden is on the taxpayer making the application for remission to prove they fall within the conditions of Article 120.

102. Even if the burden did rest on HMRC to prove that there was obvious negligence, the FTT was entitled to find it was comfortably discharged on any reasonable assessment of those facts of the case upon which it relied at [143] – 'the Appellant failed to notice that their EUA had expired and failed to remedy the situation when it was raised by HMRC'.

103. This is amplified by its earlier findings at [7]-[53] of the Decision: the Appellant's allowing the EUA to lapse; its failure to realise it had elapsed until some months later; its failure to obtain a CCG in good time; its failure prior to March 2018 to make an application for renewal (at all, let alone one seeking up to a year's retrospective effect) all support a conclusion that there was obvious negligence on the part of the Appellant.

104. Further, the FTT later returned to the topic at [152] & [154]:

> 152. … I understand her to be arguing that similar principles should apply in considering Article 120. However, in the present case, the payment of duty *is* justified; it is properly due. Further, the question whether the authority's error (in this case stating in the October and November 2017 letters that the relevant entries had not resulted in an underpayment of duty or VAT) was detectable is linked to the issue of obvious negligence. In the present case the

> Appellant should have known, and on the basis of Mr Coleman's evidence, was aware that that the EUA had expired and so duty was due and it should have known that HMRC's statement, that there had been no underpayment of duty or VAT, was erroneous. That is, HMRC's error was detectible and, indeed, detected.
>
> …
> 154. In the present case, HMRC's error, in saying the entries caused no underpayment, did not cause the Appellant to make entries which gave rise to the customs debt. That debt was due as a result of the Appellant's failure to renew its EUA and incorrectly entering the aircraft to End Use.

105. Thus, the FTT did not err in finding that Article 120 did not apply because it was entitled to find that there was obvious negligence on the part of the Appellant. Therefore, there is no need for us to determine the question of whether the FTT erred at [142] in finding that there were no special circumstances and that the Appellant had not been treated any differently to other operators in the same business. Nonetheless, we observe the following. The conclusion, that there were no special circumstances for the purpose of Article 120, is a finding of fact or evaluative judgment which can only be challenged on *Edwards v Bairstow* grounds. There may be room for argument as to whether the Appellant was treated differently compared to other operators by virtue of the fact that it was sent the HMRC letters of October and November 2017 which contained mistakes. All the same, the FTT made findings that those letters were ambiguous and were not causative of the Appellant's negligence - failure to renew and retroactively apply for EUA and nonetheless enter the aircraft to end use. We are satisfied that the FTT's conclusion on this issue was one that a reasonable tribunal could have arrived at on the evidence before it.

106. There is no material error in the FTT's finding that the Appellant had not satisfied all the conditions in Article 120 and this ground of appeal must be dismissed.

Ground 3: The FTT erred in holding that a legitimate expectation did not arise as a matter of EU law when considering Article 120

The FTT's findings

107. Caerdav had relied on the EU concept of legitimate expectation before the FTT as another reason why special circumstances existed so that Article 120 applied. It argued that it had a legitimate expectation that customs duty would not be charged, based upon HMRC's letters of October and November 2017, and this applied to the consideration of special circumstances in Article 120.

108. The FTT considered (at [145]-[160]) the Appellant's argument that the EU principle of legitimate expectation applies to the question of special circumstances for the purpose of Article 120 but concluded that it did not have jurisdiction to consider the matter:

> '153. Ms Choudhury also sought to rely on *Firma Sohl* as authority that the demand for duty must be compatible with the fundamental principle of legitimate expectation. In *Firma Sohl* and *Hewlett Packard*, it was the taxpayer's reliance on incorrect information provided by the customs authority which caused the taxpayer to make the wrong entry which gave rise to the customs debt.
>
> 154. In the present case, HMRC's error, in saying the entries caused no underpayment, did not cause the Appellant to make entries which gave rise to the customs debt. That debt was

due as a result of the Appellant's failure to renew its EUA and incorrectly entering the aircraft to End Use.

155. Following on from these cases, Ms Choudhury also seeks to argue that the EU principle of legitimate expectation applies generally to the statements made by HMRC and that the FTT has jurisdiction to consider it. She referred to the Court of Appeal case of *R (on the application of Drax Power Ltd and another) v HM Treasury* [2016] EWCA Civ 1030 which set out the principle as developed in EU law. For example at [58]:

> "58. *ADJ Tuna Ltd v Direttur ta-Agrikoltura u s-Sajd* [2011] ECR I-1655 makes clear that the need is indeed for these requirements to be satisfied, at paras. 71 and 72:
>
> "71. It should be noted that the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation in which it appears that the Community administration has led him to entertain reasonable expectations (see, to that effect, Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v EEC* [1987] ECR 1155, paragraph 44, and Joined Cases C-37/02 and C-38/02 *Di Lenardo* and *Dilexport* [2004] ECR I-6911, paragraph 70).
> 72. In whatever form it is given, **information which is precise, unconditional and consistent** and comes from authorised and reliable sources constitutes such assurances (see Case C-537/08 *P Kahla Thüringen Porzellan v Commission* [2010] ECR I-0000, paragraph 63). However, a person may not plead breach of that principle **unless he has been given precise assurances by the administration** (see Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147, and judgment of 25 October 2007 in Case C-167/06 *P Komninou and Others v Commission*, paragraph 63)" (emphasis supplied)."

156. And at [62]:

> 62. That *Plantanol* did not establish any different test is also clear from Case T79/13 *Accorinti v ECB* (judgment of 7 October 2015), in which the usual conditions necessary for invoking the principle of the protection of legitimate expectations were set out and the Court referred to, among other cases, *Plantanol*, as follows:
>
> "75. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectation extends to any person in a situation where an EU authority has caused him or her to have justified expectations. Nevertheless, the right to rely on that principle **requires that three conditions be satisfied cumulatively. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must be consistent with the applicable rules** …" (emphasis supplied)

157. It is not disputed that there is an EU principle of legitimate expectation. The question is whether this Tribunal has jurisdiction to consider it.

…

160. I consider the issue of legitimate expectation and jurisdiction in more detail in the part of this decision dealing with the UK concept. My comments there also apply here and my conclusion in relation to the EU principle of legitimate expectation is the same as for the UK principle. To the extent that the Appellant seeks a remission of the duty on the basis that HMRC's statements in the October and November 2017 letters gave rise to a legitimate expectation, this Tribunal does not have jurisdiction to consider the matter. Once I have

established that the duty and VAT are due, I cannot go on the consider whether HMRC should forgo collecting that liability.'

The Appellant's argument

109. Ms Choudhury submitted that the FTT erred in deciding that it did not have jurisdiction to consider the legitimate expectation arguments for the purposes of Article 120. In doing so, she argues that the FTT conflated the EU law and domestic law concepts of legitimate expectation despite them constituting two separate lines of authority. She argued that this conflation also appears in the Decision in the section dealing with the domestic law argument of legitimate expectation (e.g., at [228] and [229]). This is despite the cases based on the EU law concept including those determined in UK courts, such as *R (oao Drax Power Ltd & anor) v HM Treasury* [2017] QB 1221 ("*Drax*"), not referring to the domestic law authorities and vice versa.

110. As to whether Caerdav had a legitimate expectation, she contends that it had provided all the information HMRC had requested in respect of the aircraft (i.e., the invoice) prior to Officer Jones' letter of 10 October 2017. The statement in the letter that the entry for the aircraft (as well as others) "*... had not caused any underpayments of customs duty or import VAT*" satisfies the requirement for legitimate expectation of a statement which is "*precise, unconditional and consistent*" and came from an HMRC officer and thus an "*authorised and reliable source*".

111. At [152], the FTT stated that Caerdav should have known that as its EUA had expired, duty was due and HMRC's statement was erroneous. However, this completely ignored Mr Jones' evidence that he considered this to be the correct position at the time he sent his letters and only changed his mind after HMRC's internal review of the case. If the customs debt were not remitted, this would therefore not be compatible with the legitimate expectation held by Caerdav.

112. She relied, before the FTT and us, on the fact the CJEU has confirmed a post-clearance demand needs to be compatible with the fundamental principle of legitimate expectations.

113. First, she relied on Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, in which a company declared goods to the wrong tariff classification as a result of information, ultimately, provided by a member state customs authority and became liable for duty as a result. No duties would have been due had the correct tariff been used. The company sought waiver of the post-clearance recovery of duty under Article 5(2) of Regulation 1697/79. The ECJ said at [44]-[46]:

> "44 The information thus supplied may cause the trader to entertain legitimate expectations on the basis of which he may believe that he declared his goods in conformity with the tariff rules in force. In those circumstances, the obligation to pay import duties ex post facto is clearly unfair.
> 45 As regards the absence of any negligence or deception, it is for the national court to find whether or not, in circumstances such as those in the present case, those conditions are fulfilled.
> 46 That determination must, however, take account of the fact that Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1679/79 pursue the same aim, **namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations**. Seen in that light, the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1679/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79,

and therefore the conditions laid down by the latter provision must be assessed in the light of those laid down in Article 5(2) of Regulation No 1679/79."

114. Second, she relied on C-48/98 *Firma Söhl & Söhlke Hauptzollamt Bremen*, in which the ECJ stated at [54]:

> "It follows from the judgment in Case C-250/91 Hewlett Packard France [1993] ECRI-1819, paragraph 46, that Article 13 of Regulation No 1430/79 and Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the **post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), pursue the same aim, namely to limit the postclearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations.** It follows that the conditions to which the application of those articles is made subject, that is to say that no negligence or deception may be attributed to the person concerned in the case of Article 13 of Regulation No 1430/79 and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 5(2) of Regulation No 1697/79, must be interpreted in the same manner." [emphasis added]

115. Ms Choudhury submitted that, contrary to the FTT's conclusion on this issue and by analogy with the above cases, it too had a legitimate expectation which ought to be protected and this constituted a special circumstance for the purposes of Article 120.

Discussion and analysis

116. The Appellant's argument is not about whether or not a legitimate expectation arose, but whether the FTT was right to conclude that it had no jurisdiction to consider the EU law concept of legitimate expectation as part of the question of special circumstances for the purpose of Article 120.

117. Under this ground, the Appellant argues that the FTT conflated the domestic law and EU law concepts of legitimate expectation, and that this case was about the latter. The Appellant argues that this alleged error infected the FTT's approach to whether Article 120 applied, because the existence of a legitimate expectation might impact upon whether there were 'special circumstances' to justify remission.

118. Neither of the two authorities relied upon by Ms Choudhury (*Hewlett Packard* and *Firma Sohl*) concerned Article 120 of the UCC or its predecessor but do concern the payment of or waiver of customs duty following a post clearance demand. Our view is that the free-standing substantive EU law concept of legitimate expectation may apply to Article 120 but does not add substantively to the matters which may be relied upon under Article 120. The application of Article 120 to any case allows for special circumstances to be considered which would embrace a wide range of factual circumstances including those might give rise to a legitimate expectation under EU law.

119. Assuming that legitimate expectation, as explained in EU law, does arise in the application of Article 120, its consideration does not give any additional life to the consideration of special circumstances. In other words, any promise or statement made by a customs authority to a taxpayer which might be capable of being relied upon as giving rise to a legitimate expectation for EU law purposes would also be capable of being relied upon as

giving rise to special circumstances for the purpose of Article 120. Therefore, there may be a distinction without a difference.

120. Nonetheless, assuming that the FTT wrongly interpreted and distinguished the CJEU authorities and the principle of legitimate expectation in EU law applies to Article 120 (either as a separate and additional principle which must be directly and independently considered, or at least through consideration of the lens of special circumstances) this does not assist the Appellant.

121. Legitimate expectation, as explained in EU law, could not arise on the facts of the Appellant's case because, given the FTT's factual findings as discussed and approved below, none of the three conditions as referred to at [62] of *Drax* were satisfied. We will go on to consider but reject the domestic law principle of legitimate expectation as arising on the facts when considering Ground 5 (and dismiss its applicability in any event as falling outside the jurisdiction of the FTT on an appeal).

122. It is the inevitable consequence of the FTT's factual findings when applying the domestic law concept of legitimate expectation that the statements made in HMRC's October and November 2017 letters: (1) did not give precise, unconditional and consistent assurances; (2), were not such as to give rise to a legitimate expectation on the part of the person to whom they were addressed; (3), were not consistent with the applicable rules on the imposition of customs duty and VAT which mandated their payment.

123. Therefore, there could be no legitimate expectation created by HMRC for the purposes of EU law which would entitle the Appellant to remission of the duty pursuant to Article 120 (ie. there was not legitimate expectation which could give rise to special circumstances or otherwise lead to the remission of duty).

124. Further, any error as to the applicability of legitimate expectation to Article 120 would be immaterial given that it was not (and could not) be shown that there was "*no obvious negligence*" (see our conclusion on Ground 2, above). So even if the Appellant were right that (a) it had a legitimate expectation, (b) the FTT had jurisdiction to consider it and (c) it ought to have done so, and (d) if it had then it would have concluded that 'special circumstances' exist, this would only ever satisfy part of the Article 120 test.

125. It is important to note that Grounds 2, 3 and 4 overlap. All concern the question whether the customs debt ought to have been remitted under Article 120 of the UCC. Therefore, the difficulties we have identified above in relation to the application of Article 120 to this question are fatal to Grounds 3 and 4.

126. This ground must be dismissed as there was no material error in the FTT's ruling.

Ground 4: The FTT erred in not taking any account of proportionality in the Decision

The FTT's decision

127. The FTT considered the question of proportionality and its applicability to Article 120 at [161]-[164] in the following terms:

> 161. Ms Choudhury also argues that the EU principle of proportionality applies and that a customs debt of over £300,000 as a result of a minimal amount of work is disproportionate. She also argues that the FTT does have jurisdiction to consider this.
>
> 162. She referred to several "restoration" cases where the FTT did consider proportionality. However, in relation to restoration claims, the FTT's jurisdiction is specifically a quasi-judicial

review jurisdiction; it must decide whether HMRC's decision was "reasonable" applying judicial review criteria. There is no such specific jurisdiction in the applicable legislation here.

163. Ms Choudhury also referred to *HMRC v Perfect* [2017] UKUT 475 (TCC) where the Upper Tribunal considered the meaning of UK regulations implementing EU law and accepted that the provisions must be interpreted in a manner which complies with the EU law principles of proportionality and fairness. However, proportionality in this context refers to the proportionality of the domestic/EU legislation as a whole in achieving the objective of the EU Treaties. *Perfect* itself draws a distinction between the proportionality of the legislation as it applies generally and its application to a specific case. At [57], the Tribunal said:

…

164. In the present case, there is no suggestion that the UCC or the special procedure provisions are not proportionate and the suggestion that the liability in this case is unfair in the circumstances cannot be considered by this Tribunal.

Decision on the remission point

165. For the reasons set out above, I have concluded that the Appellant cannot require HMRC to remit the duty and VAT on the ground of equity in Article 120 UCC, first because it has not complied with the procedural requirements, but in any event, it has not demonstrated that the conditions of Article 120 apply. I.e. it has not shown that there are "special circumstances" as defined and that there has been no "obvious negligence" on the part of the Appellant….

Discussion and analysis

128. Ms Choudhury submits that the FTT erred in its analysis. She submits that Caerdav has incurred a customs debt of over £330,000 in relation to a maintenance job for less than £1,500 and where there is no dispute that there has been no diversion of the aircraft in question into the EU without the payment of duty and VAT.

129. She argues that the FTT made a further and serious error in failing to take any account of whether the duty demand was proportionate, and whether this constituted an exceptional or special circumstance for the purposes of Article 120 in the Decision. She contends that the FTT's reasons for refusing to consider proportionality at [162] to [164] disclose several errors.

130. She submits that the FTT appears to have completely disregarded the fact that proportionality is a general, and substantive, principle of EU law under Article 5(4)EU of the EU Treaty, which states, "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*"

131. The FTT, however, appeared to treat proportionality as a principle of judicial review as opposed to substantive EU law.

132. When applying the principle to the facts, she contends that a demand for duty and VAT of almost a third of a million pounds, especially when arising from work done that earned less than £1,500, is wholly disproportionate. According to Mr Coleman's evidence on behalf of Caerdav, it may even be "*a fatal blow*" for it. In this context, it is worth noting that Caerdav's failure to produce the documents requested by HMRC resulted in a demand of just over £12,000 in respect of other import entries and a penalty of £4,000 in respect of four entries including that for the aircraft. It cannot be regarded as justification for the demand of over £330,000 which is the subject of the appeal.

133. In summary, Ms Choudhury contends that the FTT erred in not taking proportionality into account at all and further erred in not considering that proportionality, as well as legitimate expectation, formed part of the consideration of whether exceptional circumstances existed so that the amount demanded ought to be remitted under Article 120 of the UCC.

134. We reject these submissions.

135. While we may have some sympathy for the Appellant as regards the size of the demand compared to the value of the work done on the aircraft, in reality the Appellant's submission as to proportionality is a complaint about the customs and VAT regime as a whole as opposed to how the FTT approached this case. It was not the FTT's decision that customs and VAT ought to be charged as a percentage of the value of goods, as opposed to via some other method of calculation – rather, the legislation compelled it.

136. The importance of that 'wide lens' approach to proportionality can be illustrated by the facts of this case – there is a system that charges duty as a percentage of the value of goods, but the same system provides for customs special procedures like End Use and Inward Processing that enable taxpayers to avoid or reduce the otherwise potentially blunt effect of that overarching system. Further, Article 120 provide an additional method of redress should a taxpayer be able to satisfy the conditions for the remission of duty on the grounds of equity which includes the application of special circumstances. The FTT did not err in dealing with this point as it did at [163]-[164], i.e. that the question of proportionality in EU law applies to the proportionality of the legislation as a whole. For the reasons it gave, it was right to find that the scheme – the EU and domestic legislation under consideration - is proportionate.

137. Therefore, we reject any suggestion that the FTT – out of a concern for proportionality – ought to have frustrated the application to this case of the EU-wide system for the assessment of VAT and customs duty on the facts of this case. If it were right, then it would prevent the lawful imposition of customs and VAT debts in any case where the value of the goods appeared disproportionate to the amount of the debt. This would replace a rule of EU law – that duty is owed relative to the value of goods *per se* – with another rule altogether – that duty is owed relative to the value of goods *to the taxpayer*. That cannot be right. It would also entail a breach of the UK's unqualified duty under EU law (at the time) to collect customs duty.

138. Therefore, the FTT was not compelled to consider any further question of proportionality based on the facts of this case. The relevant legislation as a whole is proportionate and it was lawfully applied in the Appellant's case.

139. In any event, just as we have found in relation to legitimate expectation, applying the principle of proportionality to the specific facts would not expand the application or scope of Article 120. The test of special circumstances would embrace any finding of disproportionality on the facts so that the application of additional principle or concept of proportionality in EU law would add nothing. The terms of Article 120 would be wide enough to cover a proportionality assessment on the facts of any given case. A proportionality assessment would not add to or amplify the threshold for remission on the grounds of special or exceptional circumstances under Article 120 which the Appellant did not satisfy.

140. Importantly, the FTT properly considered the question of remission on the grounds of equity under Article 120 but refused it on the grounds of obvious negligence. Therefore, even were we satisfied that there is a free-standing principle of proportionality which applies to each individual set of facts and which should be considered as part of the factual matrix under Article 120, it would have made no material difference to the outcome before the FTT.

141. For the same reasons as we have set out above in relation to Ground 3, Ground 4 is academic. It faces the same immateriality as Ground 3, because even if we were to find that there was a failure to consider proportionality on the specific facts, and the question of proportionality could go to the existence of 'special circumstances' under Article 120 UCC, the Appellant would still have faced the obstacle that the FTT did not err in finding the Appellant had not satisfied the "*no obvious negligence*" condition in Article 120. There was no material error in the FTT finding Article 120 did not apply.

142. We dismiss this ground of appeal.

Ground 5 The FTT erred in holding that:
(i) it did not have jurisdiction to consider this issue in this particular statutory context;
(ii) a legitimate expectation could only arise as a result of a "ruling" by HMRC; and
(ii) no legitimate expectation arose on the facts.

The FTT's ruling on the jurisdiction to determine the legitimate expectation ground

143. The FTT ruled it did not have jurisdiction to consider legitimate expectation as a ground of appeal and it was only a matter that could be raised on judicial review. The FTT concluded it did not have jurisdiction to consider this argument as a matter of statutory construction of the applicable provisions of s.83(1)(b) Value Added Tax Act 1994 ('VATA') and the relevant provisions in Finance Act 1994. The FTT considered the arguments at [180]-[200] and stated that this was on the basis that these provisions were concerned with the mandatory wording as to appealing the amount of tax due as opposed to HMRC's powers to assess which are expressed in discretionary terms.

144. It concluded at [192] onwards:

> 192.Mr Duffy submits that the comments in *Henryk* about jurisdiction were *obiter*, but, in any event, it does not assist the Appellant. The Upper Tribunal in [*KSM Henryk Zeman PP Z.o.o. v HMRC* [2021] UKUT 182 (TCC)] made it clear that each subsection of section 83(1) VATA had to be looked at on its terms and the question of jurisdiction was a matter of statutory construction. The Tribunal distinguished between section 83(1)(c) VATA which relates to the actual amount of input duty which can be credited and section 83(1)(p) which can relate to the assessment itself or the amount of the VAT. The Tribunal said at [49]
>
> > "…So far as relevant in the context of the current proceedings, an appeal under Section 83(1)(p) is permitted "with respect to … an assessment … under section 73(1) … or the amount of such an assessment."
> >
> > 50. … It can be seen that in cases where certain requirements are fulfilled - i.e., where a person has failed to make any returns or to keep relevant documents or where it appears that returns are incomplete and incorrect - then the Commissioners "may assess the amount of VAT due from him to the best of their judgment and notify it to him" (emphasis added).
> >
> > 51. What, then, does the appeal jurisdiction undersection 83(1)(c) encompass?
> >
> > 52. We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in *Oxfam* and *Noor*), because an appeal lies not only with respect to the amount of an assessment but instead with respect to "an assessment … under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – the Commissioners may assess the amount of VAT due to the best of their judgment and notify it."
>
> 193. In other words, the Tribunal drew a distinction between an ability to appeal against an *amount* of tax where there is no jurisdiction to consider legitimate expectation and appeals where HMRC has discretion about the assessment, when the FTT may have jurisdiction to consider such issues.
>
> 194. Section 83(1)(b) VATA provides for appeals with respect to the VAT chargeable on the importation of goods from a place outside the Member States. This relates to the amount of tax due and gives HMRC no discretion. Similarly, under Article 28 of the Treaty on the Functioning of the European Union, all Member States must apply the common external tariff to imports from third counties. HMRC does not have a discretion about whether or not to apply customs duty.

> 195. Mr Duffy submits that, in this sense, section 83(1)(b) is analogous to section 83(1)(c) and that the distinction which the Tribunal in *Henryk* drew between sub-paragraph (c) and sub-paragraph (p) also applies to sub-paragraph (b).
>
> …
>
> 200. It seems clear, from *Noor* and the comments on that case in *MIS* and *Henryk* that the FTT does not have jurisdiction to consider legitimate expectation where the appeal in question relates to the amount of tax due and HMRC has no discretion. The provisions of section 83(1)(b) and the corresponding provisions for customs duty seem to me to fall within that category. The appeal lies with respect to "the VAT chargeable…on the importation of goods". That relates to the amount of VAT which is due and the same applies in relation to the customs duty.'

The Appellant's submissions

145. Ms Choudhury submits that the FTT erred in law in holding it did not have jurisdiction to consider an appeal ground based on the domestic law principle of legitimate expectation. She submits that the FTT came to this conclusion notwithstanding the relevant and recent UT authority in the case of *KSM Henryk Zeman PP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) ("*Henryk*").

146. In *Henryk*, the Upper Tribunal ('UT') carried out an extensive review of the relevant authorities stating that the FTT may have jurisdiction to consider arguments based on public law (such as legitimate expectation) depending on the particular statutory context. It stated at [69] to [70]:

> "69. It is clear from the detailed list of appeal subjects in section 83 that the FTT does not have a general supervisory jurisdiction (Corbitt). We agree with that proposition and nothing we say is intended to derogate from it.
>
> 70. That is not, however, the same thing as saying that a taxpayer may not in at least certain of the cases described in section 83(1) defend himself by challenging the validity of a decision on public law grounds. The starting point is that he should be able to (see *Beadle* at [44]). The question which arises is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence (again, see *Beadle* at [44])."

147. The UT in *Henryk* went on to hold that the FTT in that appeal did have jurisdiction to consider a legitimate expectation argument on an appeal brought under s. 83(1)(p) VATA brought against an assessment made under s. 73 VATA. In *Oxfam* [2009] EWHC 3078, the High Court had also considered that the FTT did have jurisdiction to consider a public law argument in relation to s. 83(1)(c).

148. Ms Choudhury submits that, adopting a similar approach to that in *Henryk*, the wording of sections 83(1)(b) VATA and 13A(2) & 16(5) Finance Act 1994 are wide enough to permit a taxpayer to rely on public law arguments such as legitimate expectation when bringing an appeal. Section 13A(2) defines "relevant decision" as "*any decision by HMRC, in relation to any customs duty…of the European Union*". Section 16(5) provides the FTT with full appellate jurisdiction on appeal from such a decision.

149. She submits that there is nothing in this particular statutory context to suggest that the FTT could not consider an argument based on legitimate expectation (cf. the statutory regime regarding partner payment notices at issue in *Beadle v HMRC* [2020] EWCA Civ 562 where the FTT does not have jurisdiction to consider public law arguments in an appeal against a penalty imposed under that regime). She maintained the submission made to the FTT that s.

83(1)(b) VATA is closer in wording to s. 83(1)(p) which was considered in *Henryk* than to s. 83(1)(c), as held by the FTT.

Discussion and analysis on jurisdiction to consider legitimate expectation

150. The FTT dealt with the jurisdictional question at [155]-[160] and [180]-[203]. It concluded [202] that "*[i]t is clear from the authorities referred to above that this [a legitimate expectation ground of appeal] is not a matter within the jurisdiction of this Tribunal."*

151. There was no error of law in that conclusion. The starting point as to the FTT's jurisdiction to consider legitimate expectation arguments is as correctly recorded by the FTT at [196] in the arguments on behalf of HMRC:

> 196. Further, Mr Duffy argues that the matter is, in any event, covered by the Court of Appeal authority *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 ("*MIS*") which was not considered in *Henryk*. *MIS* concerned whether section 84(10) VATA enabled MIS to advance a legitimate expectation claim in the context of appeals to the First-tier Tribunal rather than by way of judicial review. The Court of Appeal considered *Noor* at [19] where Newey LJ said:
>
> "19. Secondly, the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do so, it could be suggested that the assessment depended on a prior decision that could be impugned on public law grounds.
>
> 20.That would be a very surprising result. In *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998, the UT (Warren J and Judge Bishopp) held, departing from views expressed by Sales J in *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), [2010] STC 686, that "the right of appeal given by s 83(1) [of the VATA] is an appeal in respect of a person's right to credit for input tax under the VAT legislation" and that the FTT did "not have jurisdiction to give effect to any legitimate expectation which [the taxpayer] may be able to establish in relation to any credit for input tax" (paragraph 87). The UT observed:
>
> > "a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83" (paragraph 87)."
>
> In the UT's view, a number of features "point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the FTT in relation to appeals under s 83 of the VATA 1994" (paragraph 78). The UT noted that the Tribunals, Courts and Enforcement Act 2007 conferred a judicial review function on the UT but not the FTT (paragraph 29) and that the approach Sales J had favoured would have conferred a very extensive judicial review jurisdiction on the FTT "without any of the procedural safeguards, in particular the filter of permission to bring judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject" (paragraph 76). The UT also cited this passage from the judgment of Nicholls LJ in an income tax case, *Aspin v Estill* [1987] STC 723 (at 727):

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.

153. Thus, the statutory context is key, as the UT in *Henryk* explains.

154. In this appeal, the taxpayer appeals under s.83(1)(b) VATA, which permits appeals to the FTT with respect to "*the VAT chargeable… on the importation of goods from a place outside the member States."* Like the right of appeal under s.83(1)(c) VATA, the VAT chargeable on the importation of goods is not a matter of discretion but is mandatory and in an appeal the FTT is concerned with whether the conditions prescribed for a charge to arise under the legislation are present and the amount of the charge.

155. This is in contrast to the manner in which s.83(1)(p) VATA provides a right of appeal against the discretion of HMRC whether to make an assessment under section 73(1). Hence there is a distinction drawn between subsections 83(1)(c) and (p) VATA set in the authority on which the Appellant relies – *Henryk*:

> "We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in *Oxfam* and *Noor*), because an appeal lies only with respect to the amount of an assessment but instead with respect to "*an assessment… under section 73(1)*." And the wording of section 73(1), on the face of it, is permissive not mandatory – 'the Commissioners may assess the amount of VAT due to the best of their judgment and notify it.*"*

There is a discretion inherent in s.83(1)(p) VATA read together with section 73, which were the statutory provisions considered in *Henryk* which led it to decide public law arguments could be pursued in the FTT appeal. However, there is no discretion conveyed by subsections 83(1)(b) or (c) VATA which are the mandatory provisions concerning the appeals applicable in this case and in *Noor* respectively.

156. The same point applies to the appeal against the Customs duty. Section 13A(2) of the Finance Act 1994 defines a relevant decision for customs duty:

> *"(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union], as to*
>
> *(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;*
>
> *(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;*
>
> *(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or*

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."

157. These are mandatory provisions. As noted in *Noor* at para 194 "all Member States must apply the common external tariff to imports from third count[r]ies. HMRC does not have a discretion about whether or not to apply a customs duty". On an appeal[2], the FTT is concerned with whether the facts prescribed for a charge to arise are present and the amount of the charge.

158. We thus agree with the FTT's analysis set out at [200] above and reject Ms Choudhury's suggestion that the statutory provisions under consideration conveyed any right of appeal against the exercise of a discretionary power by HMRC. There was no error of law in the FTT concluding that, as a matter of statutory interpretation, it had no jurisdiction to consider public law grounds, such as legitimate expectation, in appeals brought under sections 83(1)(b) VATA and sections 13A(2) and 16(5) Finance Act 1994.

The FTT's ruling on legitimate expectation on the facts

159. Notwithstanding its ruling on jurisdiction being terminal for the Appellant's case, the FTT nonetheless considered the application of legitimate expectation to the facts at [237]-[243]. In particular, it decided that HMRC did not make a clear and unambiguous statement to the Appellant that customs duty would not be payable on the importation of the aircraft such as to give rise to any legitimate expectation:

> 237. I agree with Mr Duffy that the Appellant's submission that all the elements for Caerdav's legitimate expectation are made out are not borne out by the facts.
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> …
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> 239. It might be argued that, on the face of it, the statements "The following entries had errors, but these have not caused any underpayments of Customs Duty or Import VAT:" were "clear, unambiguous and devoid of relevant qualification" but this has to be viewed in context. The letters also referred to the expiry of the EUA and that some of the entries related to aircraft. Given the earlier correspondence, this should have at least raised a doubt in the Appellant's mind as to whether this really meant that duty was not to be pursued on the import of the aircraft, especially as the non-monetary errors were stated to related to a failure to produce documents.
>
> 240. The very fact that HMRC issued a right to be heard letter in October saying that £4,708,18 VAT was due in respect of one entry and then issued another right to be heard letter in November, stating that VAT was due on a further five entries because of the expired EUA, so that the liability was now £12,222.34 indicates that HMRC might change its mind about the amount of liability and emphasised the inconsistency between the Monetary Errors where the expired EUA had given rise to a liability and the Non-Monetary Errors where the expired EUA had not, in relation to the aircraft, apparently triggered a liability. Nor did the letters specifically state that, despite the expired EUA, HMRC did not propose to seek duties or VAT on the aircraft.
>
> 241. It is also relevant that these were "right to be heard" letters which set out HMRC's current view and invited the Appellant to provide any further information and comment on their findings. It was not a decision letter.

[2] Appeals are governed by section 16(5) of the Finance Act 1994 which provides: *'In relation to other decisions [relevant decisions], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.'*

242. The decision letter was issued on 15 December 2017 and referred to the 10 November letter. As was pointed out in the review conclusion letter, immediately underneath the heading "Check of your records-our decision" it said:

"We've issued this decision without prejudice to any further action that we may take in relation to this matter" [emphasis in original]

243. "This matter" refers back to the 10 November 2017 letter and so refers to errors made by Caerdav in relation to its EUA and the expired EUA (which was also the "matter" dealt with in the October letter). This left it open to HMRC to take the action which it subsequently did take, on discovery of Officer Jones' mistake, to assess the duty and VAT on the aircraft which had been imported under the expired EUA.

244. HMRC had changed its mind about the amount of the liability between October and November, albeit in relation to other entries, but this indicates a lack of consistency.

245. Both the October and November letters were issued before the first anniversary of the import of the aircraft which is relevant to the Appellant's ability to apply for backdated EUA which would cover that import. The decision letter was, however, issued after that point.

160. Thereafter at [245]-[254] the FTT decided that HMRC's letters of October, November and December 2017 did not cause the Appellant not to pursue the retrospective EUA application by November 2017 (the one year deadline in which it could have obtained an end use authorisation covering the period from 1 November 2016 when the aircraft was imported).

161. Finally, at [255] – [260], the FTT gave reasons for its conclusions that even if the Appellant had relied on HMRC's mistaken statement in the October 2017 letter, it did not cause detriment to the Appellant.

The domestic law on legitimate expectation

162. In order to found a claim of legitimate expectation, a promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, Lord Hoffmann said, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

163. As further explained by Sir Ross Cranston in *Glint Pay Services Ltd, R (On the Application Of) v Commissioners for His Majesty's Revenue & Customs* [2023] EWHC 1621 (Admin) at [36]-[38] there is a high threshold to satisfy before legitimate expectation can be made out in the taxation context:

> 36. '…The hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice: *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioner* [2019] EWHC Civ 1643, [27], per Rose LJ (as she was).

37. In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 Arden LJ (as she was) helpfully gathered together the legitimate expectation principles relevant in the taxation context: HMRC is a public body invested with the power to collect tax, and taxpayers must expect to pay the right amount of tax; a taxpayer's only legitimate expectation is, prima facie, that they will be taxed according to statute, not concession or a wrong view of the law; in assessing the meaning, weight and effect reasonably to be given to statements of HMRC, the factual context, including the position of HMRC themselves, is all important; a statement formally published by HMRC to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them; there was a distinction between a decision that amounted to "mere unfairness" (conduct 'a bit rich' but understandable), and a "decision so outrageously unfair that it should not be allowed to stand": [37], [40], [42].

38. As to unfairness, Rose LJ explained in *Aozora* that it "has to reach a very high level; it has to be outrageously or conspicuously unfair." She also said:

> "47…There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas … But there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law."'

Discussion and analysis on the application of legitimate expectation to the facts

164. Given our decision that the FTT did not err in ruling that it had no jurisdiction to consider legitimate expectation as a ground of appeal in this case, we do not need consider the remaining challenge to its factual findings. Nonetheless, we go on to consider the FTT's finding that the statements made by HMRC in correspondence with the Appellant were not such as to give rise to any legitimate expectation.

165. First, Ms Choudhury argues that HMRC's two letters of October and November 2017 made clear and unambiguous statements that the Appellant would not need to pay customs duty and VAT on the importation of the aircraft notwithstanding the expiry of its end use authorisation.

166. Second, she argues that the FTT took a very narrow approach to the circumstances in which a claim based on legitimate expectation can arise and that it could only do so where Caerdav had sought and obtained a "*ruling*" from HMRC [238]. As it had not done so, no legitimate expectation arose. However, "ruling" in this context simply means a representation by HMRC on which a taxpayer has relied. The higher courts are often asked to determine judicial review applications based on HMRC published guidance which cannot, on any view, be regarded as a "ruling" in respect of a particular taxpayer: see, for example, the Supreme Court's decision in *R (oao) Davies & anor v HMRC* [2011] 1 WLR 2625 which concerned HMRC's guidance in their booklet IR20 and *R (oao Aozora GMAC Investment Ltd) v HMRC* [2019] EWCA Civ 1643 which concerned HMRC guidance in their published internal international tax manual. The FTT thus erred at [238] that the statements in Mr Jones' letters to Caerdav that no liability arose in relation to the aircraft could not found a legitimate expectation because they did not amount to "rulings".

167. Thirdly, the FTT made a further error in considering whether the statements in Mr Jones' letters of 10 October and 10 November 2017 had been relied on by Caerdav to its detriment. The FTT held at [239] that the statements in those letters that no underpayment of customs duty or import VAT caused by errors in import entry for the aircraft could be regarded as clear,

unambiguous and devoid of relevant qualification. It then went on to state that they had to be viewed in context of the earlier correspondence that they should have at least raised a doubt in Caerdav's mind as to whether this really meant that duty was not to be pursued on the import of the aircraft, especially as the non-monetary errors were stated to relate to a failure to produce documents.

168. We do not accept the Appellant's first submission for the reasons set out below.

169. In respect of the second alleged error, even though the need for a ruling from HMRC is not necessary where the 'EU law' or domestic law concept of legitimate expectation is concerned, we do not read [238] of the Decision as stating that a ruling was required. Rather, we read the FTT as noting the absence of a ruling as part of the factual matrix when finding that there were no clear and unambiguous assurances given by HMRC.

170. In respect of the third submission, we are unconvinced there is any error in the FTT's findings that the Appellant did not rely on the statements in HMRC's letters to its detriment (see [246]-[259] of the Decision). It was entitled to reach the findings it did on the facts at [253]-[254]:

> 253. All this indicates that Officer Jones' October and November 2017 letters were not the reason, or at least not the only reason, for the Appellant failing to pursue a new EUA. It seems that the decision was made earlier, at the time of the training, in the belief that little liability turned on it or at least, following Mr Cook's departure, no-one else continued with the application. Further, Mr Coleman indicates that the EUA application could not have been made at the time anyway as the company was still struggling to obtain the CCG.
>
> 254. Mr Jones' October letter might have reinforced the Appellant's belief that a failure to pursue the EUA would not result in significant consequences, but based on the evidence it did not cause the Appellant to take that view in the first place. In other words, the Appellant did not decide not to pursue the EUA application in reliance on the letter.

171. Nonetheless, we will assume for current purposes that the Appellant did not need to prove that the statements made by HMRC in the October and November 2017 letters caused it any detriment – see *Aozora* at [44]: '*It is true as Leggatt J said in GSTS, that some cases have recognised a legitimate expectation without detrimental reliance….But Leggatt J's observation was limited to stating that it is not essential in all cases but that it is still relevant, he said, to the question of whether it would be unjust for the authority to frustrate the expectation created*.'

172. Even had there been jurisdiction to consider legitimate expectation, we are not satisfied that the FTT erred in finding it did not arise on the facts. It is implicit in its Decision that the FTT did not find there was any outrageous unfairness created by HMRC's demand for customs duty and VAT notwithstanding the statements made in the letters. The FTT was entitled to find that HMRC had not made clear and unambiguous statements in its October and November letters that were devoid of relevant qualification and which gave rise to a legitimate expectation that the Appellant was not liable to customs duty and VAT on the importation of the aircraft.

173. The FTT was entitled to find that the statements in HMRC's letters of October and November 2017 were not clear and unambiguous based on terms of the letters, the context and the history of its contact with HMRC.

174. This was part of a determination by the FTT reached after a careful review of the facts (addressing legitimate expectation on the facts across 59 paragraphs of its judgment at [204]-[262]). The FTT was entitled to reach the determination it did on those facts – the findings were within a reasonable range of findings open to a properly instructed tribunal. The FTT was entitled to find that the statements in the letters fell short of creating any legitimate expectation for the reasons it gave, in particular due to the history and context of

correspondence, the terms of the wording and caveats supplied and absence of consistency: there was no error in the FTT's findings and reasons given at [237]-[245] as set out above.

175. We dismiss this ground of appeal. There was no material error of law in the FTT's decision.

Ground 6 The FTT erred in the exercise of its discretion when considering whether to allow Caerdav to dispute the amount of the customs debt

The FTT's ruling

176. The FTT rejected the Appellant's application, made on the third day of the hearing, to introduce a new ground of appeal and evidence on the value of the aircraft. It gave its reasons beginning at [263]:

> 263. On the morning of the third day of the hearing, Ms Choudhury sought to introduce a new ground of appeal: that the value of the aircraft was not, as declared by the Appellant on import, $12.5 million, but was only $4 million, the value stated on the Import Declaration into Sofia, provided by the Bulgarian authorities.
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> …
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> 275. However, *Quah*, places a heavy burden on the Appellant to show why she should be allowed to raise the point now.
>
> 276. There was no good reason for the argument being introduced at such a late stage. Ms Choudhury frankly admitted she had missed the point in the pressure of the other work occasioned by the Bulgarian Documents. She has had the Bulgarian documents since August 2021 and although this is not a long time, they were still available for several weeks before the hearing. The relevant documents were also included with Officer Jones' amended witness statement which was filed on 1 September 2021, over a month before the hearing.
>
> 277. Mr Duffy submits that there has been no formal application to amend. The amount of the demand note has never formed part of the appeal. When the point was raised, on the morning of the resumed hearing, 12 days after a two day hearing of the evidence, there was no notice of application and nothing had been sent to HMRC or the Tribunal.
>
> 278. In addition, the Appellant had sent a 270 page Supplementary Authorities Bundle to HMRC the night before the resumed hearing which had to be considered overnight in the absence of written submissions.
>
> 279. The lateness is extreme.
>
> 280. Nor was the value issue put to the witnesses or mentioned in the Appellant's skeleton argument. There was no opportunity for HMRC to respond and no opportunity for witness or other evidence to be produced about the true value. Mr Duffy submitted that it was not credible that the aircraft was worth only $4 million.
>
> …
>
> 282. There was no good reason why the value was not challenged following receipt of the Bulgarian documents.
>
> 283. Nor can it be said that the actual value can be established without further evidence. There are at least three different values given for the aircraft by different people in different contexts at different times:
>
> …

> 284. I have considered the submissions carefully in the light of *Quah* and I have also considered the importance of the overriding objective. In view of the extreme lateness of the application-two thirds of the way through the hearing, the lack of a good reason for the lateness, the uncertainty about the actual value of the aircraft which would require a further hearing or submissions and further evidence to resolve, I have decided not to allow the Appellant to argue this new ground of appeal, challenging the amount of the assessment on the basis of the value of the aircraft.

Discussion and analysis

177. Ms Choudhury submits that the FTT was wrong to refuse Caerdav permission to argue that the wrong customs value had been used in determining the amount of customs duty and VAT due because it had been raised too late. In relation to this ground, she accepts that this was a case management decision with which the appellate tribunal will be slow to interfere: *BPP Holdings Ltd & Ors v HMRC* [2017] UKSC 55 at [33] citing *Walbrook Trustee (Jersey) Ltd v Fatta*l [2008] EWCA Civ 427. Nevertheless, she contends that the FTT made an error of law.

178. She argues that in reaching its conclusion on this issue, the FTT stated at [268] that Caerdav had already made one late application to amend its grounds of appeal on 1 October 2021. That date was incorrect. The application to amend had been made on 17 September 2021 but the Tribunal only determined it on 1 October. This is a clear error. The FTT sought to excuse it in its permission to appeal decision as not material to its conclusion not to grant permission.

179. However, the FTT clearly had Caerdav's actions in mind and made no reference to why it had made the application to amend when it did, i.e. the late disclosure by HMRC of the Bulgarian documents. The FTT only made a brief reference to this in [271]. There was a further brief reference at [5] to HMRC having received them "*following a request for assistance which was requested by Caerdav*".

180. Ms Choudhury contends that the FTT focused exclusively on Caerdav's conduct with barely any reference to how HMRC had produced the evidence late in breach of earlier directions and after Caerdav had to ask HMRC to rectify their earlier errors in making the mutual assistance request (going so far as to raise the prospect of a judicial review claim if it refused to do so).

181. However, even if it did, the FTT applied the wrong legal test when doing so. It merely focused on the lateness of the point. It did not consider the duty of the FTT to determine the correct amount of tax in accordance with the "venerable principle" as discussed by the Court of Appeal in *Investec Asset Finance plc & anor v HMRC* [2020] EWCA Civ 579 at [60] (see [264]) which is a clear distinction from the position in the civil courts where the judge is required to adjudicate a dispute between two private parties.

182. Further, such a dispute must be determined in accordance with the overriding objective which includes the requirement to avoid undue formality: see the recent discussion of how a late application to amend ought to be determined bearing in mind the FTT's role in determining the correct amount of tax in *Exchequer Solutions v HMRC* [2022] UKFTT 181 (TC).

183. We reject each of these submissions.

184. Ultimately, the Appellant challenges a discretionary case management decision. It is trite that a generous ambit of discretion is entrusted to first instance judges taking such decisions.

185. We would have to be satisfied that the FTT was "*plainly wrong*" before interfering: see for example, *Westminster Trading Ltd v HMRC* [2017] UKUT 23 (TCC), paras 49-50.

186. We are satisfied that there was no error of law in the FTT's case management decision and it was not close to being plainly wrong. It performed a multifactorial assessment taking into account: the lateness of the application; the reason for this, the reliability of the material to be presented; the practical consequences of it needing to be tested and HMRC filing evidence in reply; the prejudice to HMRC in admitting the material; and the overriding objective - whether it was just and fair to both parties to admit the evidence and consider the appeal ground. It gave more than sufficient reasons in its decision at [275]-[284] as set out above.

187. The suggestion that the error of date mentioned "*was material to the FTT's conclusion not to grant permission*" is not credible in the overall context of the numerous factors considered by the FTT at [263-284]. Whether that - other - application was made on 17 September or on 1 October 2021, it was plainly very late, meaning the Judge was right to note that the Appellant "*had already applied to make one late amendment to the grounds of appeal to take account of the Bulgarian documents…"* [268]. As the Judge pointed out, if the Appellant had "*any doubt about the value, they have had five years to query it"* [281]. In her decision refusing permission on Ground 6, the Judge confirmed that the error in the date of the (other) late application "*is not material".* She went on to observe that the "*lateness of the application was extreme".*

188. The suggestion that inadequate weight was given to the procedural history and to every aspect of it is also an insufficient ground on which to appeal the decision. The Judge stated when refusing permission to appeal that she "*did not consider it necessary to rehearse the history of how the Bulgarian Documents came to be received when they were. I was well aware of the background, as set out in the facts section of the Decision."* The FTT took into account the key point that the Appellant had had to deal with the Bulgarian documents at a fairly late stage (August 2021), noting that the point had not then "*been made because, Ms Choudhary [Counsel for the Appellant] admitted, she had missed it given the amount she had to do and the documents she had to review since receipt of the Bulgarian documents in August."* The Judge's conclusion was that there "*was no good reason why the value was not challenged following receipt of the Bulgarian documents"* [282].

189. The Appellant also asserts that the FTT "*did not consider the duty of the FTT to determine the correct amount of tax in accordance with the "venerable principle"…",* referring to the *Investec* case. Yet the FTT expressly considered that principle, including with reference to *Investec* at [264], [266] & [272].

190. The FTT referred to the overriding objective at [266], [269] and [284], and it is apparent that it did not simply rely upon the lateness of the application but performed a multifactorial assessment which was reasoned and reasonable. There was no error of law in its analysis.

191. We dismiss this ground of appeal.

Conclusion

192. In our view, the FTT's Decision was careful and well-reasoned. It contained no material error of law. Each of the Appellant's grounds of appeal is dismissed and the FTT's Decision is confirmed.

MR JUSTICE RAJAH
JUDGE RUPERT JONES

Release date: 25 July 2023

Appendix 1: applicable law

EU law provisions

1. The Union Customs Code ("**UCC**") governed the import and export of goods in the EU at the time the aircraft entered the UK. It is supplemented by the Commission Delegated Regulation (EU) 2015/2446 ("**the DR**") and Commission Implementing Regulation (EU) 2015/2447 ("**the IR**").

2. The "customs territory of the Union" is defined in Article 4 of the UCC where it lists the territories of the EU Member States and includes their territorial waters, internal waters and airspace. The other definitions used in the UCC are set out in Article 5. These include:

"*(12)"customs declaration" means the act whereby a person indicates, in the prescribed form and manner, a wish to place goods under a given customs procedure, with an indication, where appropriate, of any specific arrangements to be applied;*
(16) "customs procedure" means any of the following procedures under which goods may be placed in accordance with the Code:
(a) release for free circulation;
(b) special procedures;
(c) export;
…
(18) "customs debt" means the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force;"

3. Title III is headed "***Customs Debt and Guarantees***". Section 1, Chapter 1 includes Article 79, "*Customs debt incurred through non-compliance*", which states as follows:

"*1. For goods liable to import duty, a customs debt on import shall be incurred through non-compliance with any of the following:*
(a) one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union, their removal from customs supervision, or the movement, processing, storage, temporary storage, temporary admission or disposal of such goods within that territory;
(b) one of the obligations laid down in the customs legislation concerning the end use of goods within the customs territory of the Union;
(c) a condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of import duty.

2. The time at which the customs debt is incurred shall be either of the following:
(a) the moment when the obligation the non-fulfilment of which gives rise to the customs debt is not met or ceases to be met;
(b) the moment when a customs declaration is accepted for the placing of goods under a customs procedure where it is established subsequently that a condition governing the placing of the goods under that procedure or the granting of a duty exemption or a reduced rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. In cases referred to under points (a) and (b) of paragraph 1, the debtor shall be any of the following:
(a) any person who was required to fulfil the obligations concerned;

(b) any person who was aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who was obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation;
(c) any person who acquired or held the goods in question and who was aware or should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled.

4. In cases referred to under point (c) of paragraph 1, the debtor shall be the person who is required to comply with the conditions governing the placing of the goods under a customs procedure or the customs declaration of the goods placed under that customs procedure or the granting of a duty exemption or reduced rate of import duty by virtue of the end-use of the goods.

Where a customs declaration in respect of one of the customs procedures referred to in point (c) of paragraph 1 is drawn up, and any information required under the customs legislation relating to the conditions governing the placing of the goods under that customs procedure is given to the customs authorities, which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the customs declaration and who knew, or who ought reasonably to have known, that such information was false shall also be a debtor."

4. Section 3, Chapter 3, Title III of the UCC is headed "***Repayment and remission***". Article 116 relevantly states:

"***General provisions***
1. Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:
(a) overcharged amounts of import or export duty;
(b) defective goods or goods not complying with the terms of the contract;
(c) error by the competent authorities;
(d) equity.
Where an amount of import or export duty has been paid and the corresponding customs declaration is invalidated in accordance with Article 174, that amount shall be repaid.

2. The customs authorities shall repay or remit the amount of import or export duty referred to in paragraph 1 where it is EUR 10 or more, except where the person concerned requests the repayment or remission of a lower amount…

4. Subject to the rules of competence for a decision, where the customs authorities themselves discover within the periods referred to in Article 121(1) that an amount of import or export duty is repayable or remissible pursuant to Articles 117, 119 or 120 they shall repay or remit on their own initiative.

5. No repayment or remission shall be granted when the situation which led to the notification of the customs debt results from deception by the debtor…".

5. Article 120 states:

"***Equity***
1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in

the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty."

6. Title IV concerns goods brought into the customs territory of the Union. It includes Article 136 which states:

"***Intra-Union air and sea services***
Articles 127 to 130 and 133, Article 135(1) and Articles 137, 139 to 141, and 144 to 149 shall not apply to non-Union goods…, which have temporarily left the customs territory of the Union while moving between two points in that territory by sea or air, provided they have been carried by direct route without a stop outside the customs territory of the Union."

7. The aircraft constituted "non-Union goods" as it originated from outside the Union. The Articles referred set out various conditions which need to be complied when goods are brought into the customs territory.

8. Section 4, Chapter 2, Title V of the UCC sets out the provisions applying to all customs declarations. Article 174 states:

"***Invalidation of a customs declaration***
1. The customs authorities shall, upon application by the declarant, invalidate a customs declaration already accepted in either of the following cases:
(a) where they are satisfied that the goods are immediately to be placed under another customs procedure;
(b) where they are satisfied that, as a result of special circumstances, the placing of the goods under the customs procedure for which they were declared is no longer justified.
However, where the customs authorities have informed the declarant of their intention to examine the goods, an application for invalidation of the customs declaration shall not be accepted before the examination has taken place.
The customs declaration shall not be invalidated after the goods have been released unless where otherwise provided."

9. The Articles concerning special procedures are in Title VII and include both end-use (Article 254) and Inward Processing (Article 256). Chapter 1, Title VII is headed "*General provisions*". Article 214 imposes a requirement for keeping appropriate records. This Article is supplemented by Article 178(1) of the DR which specifies the records in question.

10. Article 215 is headed "*Discharge of a special procedure*" and states:

"*1…, a special procedure shall be discharged when the goods placed under the procedure, or the processed products, are placed under a subsequent customs procedure, have been taken out of the customs territory of the Union,...*
2. …
3. The customs authorities shall take all the measures necessary to regularise the situation of the goods in respect of which a procedure has not been discharged under the conditions prescribed.
4. The discharge of the procedure shall take place within a certain time-limit, unless otherwise provided."

11. Article 219 is headed "*Movement of goods*" and states:

"*In specific cases, goods placed under a special procedure other than transit or in a free zone may be moved between different places in the customs territory of the Union.*"

12. This Article is supplemented by Article 179 of the DR. Article 179(1) states:

"*Movement of goods placed under Inward Processing, temporary admission or enduse may take place between different places in the customs territory of the Union without customs formalities other than those set out in Article 178(1)(e).*"

Article 178(1)(e) of the DR requires records to be kept of the "*location of goods and information about any movement thereof*".

13. Article 267 of the IR also supplements Article 219. It states:

"***Movement of goods under a special procedure***
1. Movement of goods to the customs office of exit with a view to discharging a special procedure other than end-use and outward processing by taking goods out of the customs territory of the Union shall be carried out under cover of the re-export declaration
...
4. Customs formalities other than keeping of records as referred to in Article 214 of the Code are not required for any movement which is not covered by paragraphs 1 to 3
...
5. Where movement of goods takes place in accordance with paragraphs 1 or 3, the goods shall remain under the special procedure until they have been taken out of the customs territory of the Union."

14. Finally, Article 329 of the IR sets out how the customs office of exit is determined:

"*1. Except where paragraphs 2 to 7 apply, the customs office of exit shall be the customs office competent for the place from where the goods leave the customs territory of the Union for a destination outside that territory.*"

15. The customs office of exit is the office from which the goods leave the EU. It may be the same or different from the customs office of export where the goods are declared for export.

Domestic law provisions

16. At the relevant time, s. 1(1)(c) of the Value Added Tax Act 1994 ("**VATA**") provided that VAT was charged on the importation of goods from places outside the member states. Section 1(4) provided:

"*VAT on the importation of goods from places outside the member States shall be charged and payable as if it were a duty of customs.*"

17. Section 15 VATA provided:

"***General provisions relating to imported goods***
(1) For the purposes of this Act goods are imported from a place outside the member States where—
(a) having been removed from a place outside the member States, they enter the territory of the European Union;

(b) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory; and
(c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the European Union would be incurred.

(2) Accordingly—
(a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the European Union would be incurred, and
(b) the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt."

18. Section 16(1) VATA then provided:

"***Application of customs enactments***
(1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—
(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and
(b) the EU legislation for the time being having effect in relation to EU customs duties charged on goods entering the territory of the European Union, shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, EU customs duties."

19. Section 83(1) VATA in so far as relevant provides:

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

...

(b)the VAT chargeable on the supply of any goods or services ... or, subject to section 84(9), on the importation of goods ... ;

(c)the amount of any input tax which may be credited to a person;

...

(p)an assessment—

(i)under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii)under subsections (7), (7A) or (7B) of that section; ...

(iii). . . . . .

or the amount of such an assessment;

20. Article 44 of the UCC gives a person a right of appeal against any decision taken by the customs authorities relating to the application of the customs legislation which concerns that

person. This right is given effect in domestic law by certain provisions in Finance Act ("FA") 1994. Section 13A(2) provides:

"*A reference to a relevant decision is a reference to any of the following decisions –*
(a) any decision by HMRC, in relation to any customs duty or any agricultural levy of the European Union, as to –
(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or
(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."

21. The right of appeal against a "relevant decision" is provided by s. 16 FA 1994. S.16(5) states:

"*In relation to [decisions other than ancillary decisions[4]], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.*"