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UT (Tax & Chancery) Case Numbers: UT-2024-000030 & UT-2025-000007

Upper Tribunal

(Tax and Chancery Chamber)

Hearing venue: The Rolls Building

London EC4A 1NL

Heard on: 17-18 June 2025

Supplementary submissions: 9 and 21 July 2025

Judgment date: 23 September 2025

EXCISE DUTY – drawback claim – non compliance with three year time limit following payment of the excise duty provided by Regulation 7(6) of The Excise Goods (Drawback Regulations) 1995 ("EGDR") - other conditions of public notice Excise Notice 207 ("EN 207") not being complied with (the requirements to obliterate duty stamps in accordance with Duty Stamp Regulations 2006 and to provide certain documents as proof of export) – exercise of discretion to waive conditions or otherwise allow claim under Regulation 7(1)(a) – extent of the FTT's jurisdiction to consider reasonableness of HMRC's decision in appeal pursuant to section 16(5) of the Finance Act 1994 – whether HMRC agreed to waive the time limit for making the claim – whether other conditions satisfied

Before

JUDGE RUPERT JONES

JUDGE KEVIN POOLE

Between

DRINKS AND FOOD UK LIMITED

Appellant / Cross Respondent

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents / Cross Appellants

Representation:

For the Appellant: Mr Tristan Thornton tax consultant of TT Tax

For the Respondents: Ms Isabel McArdle of counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Drinks and Food UK Ltd ("the Appellant" or "DFUK") appeals the decision of the First-tier Tribunal ("FTT") dated 16 November 2023: [2023] UKFTT 1044 (TC) ("the Decision"). The Decision dismissed, for the most part, the Appellant's appeal against the decision of the Respondents ("HMRC") to refuse its claim for drawback of excise duty in the sum of £385,165.31. The FTT allowed the appeal to a limited extent in the sum of £9,695.27.

2. A Notice of Intention ("NOI") to claim drawback of excise duty paid was lodged by the Appellant with HMRC on 16 November 2020 in respect of excise goods, namely alcoholic drinks, that had previously been assessed to excise duty which the Appellant paid in June 2014. The Appellant then exported the excise goods from the UK in a number of tranches between 7 December 2020 and 8 April 2021. The Appellant thereafter made the excise duty drawback claim on 21 April 2021.

3. HMRC gave a number of reasons for refusal of the drawback claim in its original decision dated 2 September 2021 and in its review decision dated 24 November 2021. These included: i) the claim being made outside the three year time limit following payment of the excise duty provided by Regulation 7(6) of The Excise Goods (Drawback Regulations) 1995 ("EGDR"); and various other conditions of public notice Excise Notice 207 ("EN 207") not being complied with, such as ii) the requirement to obliterate duty stamps in accordance with applicable regulations; and iii) the requirement to provide certain documents as proof of export.

4. In its Decision the FTT did not uphold the failure to comply with the time limit for making the claim as a reason to refuse it because it found HMRC had agreed in correspondence not to rely upon the time limit. Nonetheless the FTT confirmed that i) the failure to obliterate duty stamps in accordance with the Duty Stamp Regulations 2006 ("DSR"); and ii) the lack of proof of export of the goods exported in April 2021, each disentitled the Appellant to drawback of the excise duty paid and HMRC acted reasonably in relying upon these grounds and not exercising its discretion to otherwise allow the claim.

5. The Appellant now appeals to the Upper Tribunal ("UT") against the Decision. It submits that the FTT erred in law in largely upholding HMRC's decision to refuse the excise duty drawback claim. The Appellant was granted permission to appeal on three grounds:

   Ground 1- The FTT erred in law in deciding that paragraph 4.5 EN207 contained a lawful condition pursuant to the DSR forming part of the drawback claim procedure that the independent person removing duty stamps from bottles had to record the number of each stamp removed and/or that the claimant had to satisfy himself that such a record had been kept and/or that positive steps were ordinarily required by any claimant to ensure compliance (see Decision at [123]).

   Ground 2 - The FTT erred in law in deciding that the provision found at paragraph 7.4 of EN 207 requiring an S8 document showing status 60 was a valid, lawful condition which applied to Roll-on Roll-off ("RoRo") exports from the UK, whether by concession or at all (see Decision at [131-132]).

   Ground 3 - The FTT erred in law by dismissing the appeal instead of remitting the decision back to HMRC to make a new decision. In particular, the Decision found that HMRC did take into account irrelevant factors insofar as there was any considered

exercise of discretion at all. In any event, HMRC presented no evidence or argument to support a finding that any decision would inevitably be the same again, and that aspect was not considered by the FTT in relation to the export condition.

6. In HMRC's Response to the UT, they oppose the Appellant's grounds of appeal. They seek to uphold the FTT's decision on alternative grounds by which they also cross-appeal, seeking that the appeal be dismissed, the Decision be remade and the drawback claim be refused in its entirety. In the Response / Cross-Appeal HMRC submit that the FTT erred in law based upon three grounds for which they have been granted permission:

   Ground 1 – The FTT erred in deciding that the meaning of HMRC's letter of 27 December 2019 constituted a waiver of the time limit condition for making a claim without HMRC having an opportunity to making oral submissions on the issue at the hearing. There was a serious procedural irregularity for a disputed issue to have been determined by the FTT before hearing and considering submissions of a party on the point.

   Ground 2 - In any event that there was a material error of law in the FTT finding as fact that the terms of HMRC's letter of 27 December 2019 constituted a waiver of the time limit conditions for a drawback claim without any caveat**.** As a finding of fact, it was not open to the FTT on an *Edwards* v *Bairstow* basis but it also constituted a misinterpretation of the wording of the letter.

   Ground 3 - The FTT erred in concluding that it had jurisdiction to consider HMRC's operation of their discretion to allow or disallow a drawback claim after the time limit expired. A challenge to that exercise of discretion is a public law matter and a refusal to waive the time limit can only be challenged by way of judicial review by the High Court. The FTT erred in finding that the power in s16(4) Finance Act 1994, to consider the reasonableness of the decision, was also available in respect of HMRC's refusal of the drawback claim because it is one of the 'other decisions' for which the powers and remedies are circumscribed by way of s16(5).

7. We are very grateful to Mr Thornton who appeared for the Appellant and Ms McArdle who appeared for HMRC, for their helpful written and oral submissions. We have considered them all but only referred to those necessary to determine the appeal and cross-appeal.

8. We will address the cross-appeal grounds first and in reverse order because they raise the scope of the FTT's jurisdiction on appeal as a prior question. We therefore determine all grounds in the order in which we were addressed at the hearing because they follow a logical course.

9. Numbers in square brackets [] are references to paragraph numbers of the Decision unless the context requires otherwise.

BACKGROUND – HMRC'S REFUSAL OF EXCISE DUTY DRAWBACK CLAIM

10. HMRC's original decision dated 2 September 2021 refused the Appellant's excise duty drawback claim. The original decision relied upon a conclusion that the Appellant's claim did not meet the conditions of the EGDR. The reasons given for refusal were summarised by the FTT at [54]-[55] of the Decision:

"54. In the Original Decision dated 2 September 2021 Officer O'Rourke identifies a number of respects in which the Appellant's Claim does not meet the conditions of EGDR, including those specified in EN 207:

(1) The NOI[1] had been completed on the basis that the goods would be dispatched to an EU country (the Netherlands) whereas the final tranche of goods had been exported and not dispatched (as by 8 April 2021 there was no basis for dispatch of goods – the UK having left the EU). Further, the dispatch documentation for the earlier movements had included goods which were not within the NOI (i.e. the 112 cases of vodka). Therefore, the circumstances on which the NOI had been completed had changed and the Appellant should have notified HMRC of the change prior to export in accordance with paragraph 4.12 EN 207.

(2) The requirement that the export on 8 April 2021 be evidenced by way of a CHIEF printout showing a "departed status of 60" had not been met as required by paragraph 7.4 EN 207.

(3) There was no evidence of a record of the URNo for each duty stamp obliterated such that the provisions of paragraph 4.5 EN 207 were not met.

(4) The regulation 7(6) time limit had not been met and no satisfactory explanation for that failure had been articulated justifying waiver of the condition.

55. The letter concludes that as the conditions for drawback have not been satisfied the Claim is rejected."

11. The FTT then summarised the basis of the Appellant's request for a review of HMRC's original refusal decision at [56]-[57]:

"56. A review was sought. The request for review asserted that the Original Decision had been unreasonable on four grounds which were summarised and then particularised. The summary stated:

"a. [the decision to refuse] has failed to meet the portion of the claim in which there is no suggestion of any breaches of conditions or advance criteria required.

b. It has taken into account or given improper weight to irrelevant factors including elements of the movement which were not subject to the claim or factors preceding November 2019 when assurance was sought that the claim could be accepted by HMRC.

c. It has failed to take into account or give sufficient weight to relevant factors including the guidance published by HMRC, the legislation introduced by HMRC, and the system operated by HMRC in such a way as to make one of the export conditions impossible to meet.

d. It fails to properly consider the exercise of the Commissioners' discretion to waive any and all conditions which necessarily calls for a proper consideration of the impact on DFUK for rejecting the claim and any countervailing considerations."

57.The particularised errors were identified as:

(1) The shipment of 112 bottles of vodka along with the goods which were the subject of the Claim was irrelevant to whether the Claim was valid and met the statutory conditions. They had not been included in the NOI or claim.

[1] Notice of Intention (to claim drawback)

(2) There was no requirement to amend the NOI, the information required in EX75 had not changed; in particular, there was no requirement to notify that some of the goods were exported post 31 December 2020.

(3) HMRC were not entitled to reject the whole of the claim on the basis of a failure to provide the appropriate export documentation. They could, at most, cause the Claim to be reduced, excluding the duty claimed in respect of the goods exported on 8 April 2021. Further, and in any event, as it was impossible to obtain the documentation HMRC purportedly required to support a post Brexit shipment by roll-on-roll-off ferry there was no basis for rejecting the claim in respect of the April shipment.

(4) There was no basis for rejection of that part of the claim pertaining to goods for which there was no requirement to obliterate. Further, sufficient and adequate records had been produced to HMRC of obliteration to justify a conclusion that either the requirement to obliterate had been met or, to the extent that a record of the obliterated URNo was a condition, it should be waived.

(5) HMRC had failed to meet the Appellant's legitimate expectation that the claim would not be rejected for failure to comply with the time limit condition."

12. The FTT then summarised at [58] the basis of HMRC's review decision dated 24 November 2021 and reasons for upholding the refusal of the claim:

"58. The Review dated 24 November 2021 focusses on the time limit condition. It rejects the Appellant's contention that the email of 27 December 2019 represented a waiver of the time limit. The position adopted in the letter is that because other conditions for drawback have not been met and there are no other exceptional circumstances, there can be no waiver of the time limit. The letter does not indicate that HMRC had the power to waive any of the other conditions. The identified failures are as previously:

(1) The inclusion of 112 cases of vodka on which duty had not been paid.

(2) A failure to provide the relevant evidence of export for the April 2021 shipment.

(3) The absence of a record of the unique reference of the duty stamps obliterated.

(4) The failure to notify that some of the goods were not exported by way of dispatch."

THE APPEAL AND CROSS APPEAL

13. As explained at [8] above, we consider the cross appeal first before turning our attention to the appeal, following the order in which matters were addressed at the hearing before us.

THE CROSS APPEAL

Ground 3 - The FTT erred in concluding that it had jurisdiction to consider the reasonableness of HMRC's exercise of their discretion (see [6] above)

The Law

HMRC's powers in relation to claims for drawback of excise duty

14. Section 133 of the Customs and Excise Management Act 1979 makes general provisions as to the form and manner in which claims for the drawback of any excise duty should be made.

15. Section 2(1)-(2) of the Finance (No 2) Act 1992 contain the powers for the making of regulations to provide for the drawback of excise duty, such as the EGDR, in the following terms:

> "Power to provide for drawback of excise duty.
>
> (1) Subject to the following provisions of this section, the Commissioners may, in relation to any duties of excise, by regulations make provision
>
> (a) conferring an entitlement to drawback of duty in prescribed cases where the Commissioners are satisfied that goods chargeable with duty have not been, and will not be, consumed in the United Kingdom; and.
>
> (b) conferring an entitlement to drawback of duty, in prescribed cases, on the shipment as stores, or warehousing in an excise warehouse for use as stores, of goods chargeable with duty
>
> (2) The power of the Commissioners to make regulations under this section shall include power—
>
> (a) to provide for, or for the imposition of, the conditions to which an entitlement to drawback under the regulations is to be subject;
>
> (b) to provide for the determination of the person on whom any such entitlement is conferred;
>
> (c) to make different provision for different cases, including different provision for different duties and different goods; and
>
> (d) to make such incidental, supplemental, consequential and transitional provision as the Commissioners think necessary or expedient.
>
> …"

16. Part II of the EGDR, Regulations 5-13, is headed "Entitlement to Drawback". Regulations 5 and 6 of the EGDR provide that claims for excise duty drawback may only be made in respect of eligible goods by eligible claimants. Eligible goods include ones on which 'duty has been paid and not remitted, repaid or drawn back and those goods have been a) exported…" by virtue of Regulation 5(2)(a). There was no dispute that the Appellant and the goods satisfied the eligibility criteria.

17. Regulation 12(1) provides that "No drawbacks shall be payable unless it is shown to the satisfaction of the Commissioners that the claimant is an eligible claimant and that the goods are eligible goods" and 12(3) provides (3) "If the Commissioners are not satisfied that the amount of duty claimed may be drawn back but are satisfied that some lesser amount of duty may be drawn back they may, in such circumstances as they see fit, permit the drawback of that lesser sum."

18. Regulation 7(1), (2), (3) & (6) of the EGDR provide relevantly that eligible claimants shall comply with the conditions imposed by the regulations and by HMRC in public notices or in notices imposing additional conditions:

> "7.— (1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the [Customs & Excise Management] Act, every eligible claimant shall—
>
> (a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and

(b) in addition to those conditions, comply with such other conditions as the Commissioners see fit to impose in a notice published by them and not withdrawn by a further notice.

(2) If the Commissioners consider it necessary for the protection of the revenue they may, by a notice in writing delivered to a revenue trader, require him to comply with such additional conditions as they think fit to impose.

(3) Sections 14 to 16 of the Finance Act 1994 shall have effect in relation to any decision of the Commissioners to impose additional conditions under paragraph (2) above as if that decision were a decision of a description specified in Schedule 5 to that Act.

…

(6) No claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid."

19. HMRC's powers under Regulation 7 therefore clearly include a discretion under Reg.7(1)(a) EGDR to 'otherwise allow' a claim for drawback where conditions imposed by the regulations are not complied with. We will sometimes describe HMRC's discretion to 'otherwise allow' a claim despite non-compliance with regulations as a power to 'waive' compliance with conditions imposed by the EGDR.

The FTT's powers on appeal against a drawback decision

20. A drawback decision is defined as a 'relevant decision' in s13A(2)(e) of the Finance Act 1994 ("FA 94"). Section 13A(2)(e) FA 94 provides that a relevant decision includes "(e) any decision by HMRC as to whether or not any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled".

21. Section 15C FA 94 then provides the power for HMRC to review a relevant decision, such as the drawback decision in this case, and uphold or vary their decision.

22. Section 16(1B) FA 94 provides the jurisdiction for an appellant to appeal a relevant decision to refuse an excise duty drawback claim directly to the FTT. Section 16(1C) provides the further jurisdiction for an appellant to appeal to the FTT against HMRC's decision on review under section 15C and provides the time limit in which the appeal should be brought as 30 days from the conclusion of the review ("the conclusion date").

23. Section 16(4) & (5) distinguish the powers available to the FTT on an appeal in respect of different types of decision: s.16(4) for decisions on ancillary matters (as defined in s.16(8) and Schedule 5 to FA 94) and s.16(5) for "other decisions". The subsections provide:

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

24. There is evidently an express statutory jurisdiction in relation to ancillary decisions, by virtue of section 16(4) FA 94, for the FTT to determine whether such a decision of HMRC could not reasonably have been arrived at and, if so, to exercise the powers in s.16(4)(a)-(c).

25. Ancillary decisions are defined in s.16(8) & (9) FA 94 and in Schedule 5, FA 94. Ancillary decisions include those involving the exercise of a statutory discretion by HMRC, for instance the granting or revocation of certain types of excise approval. This will be addressed in further detail below.

26. There is no dispute that the drawback decision under s.13A(2)(e) FA 94, as subject to this appeal, is an "other decision", in contrast to an "ancillary decision". This is made clear by virtue of section 16(8) FA94:

"(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above."

27. The UT in *Butlers Ship Stores Ltd v HMRC* [2018] UKUT 58 (TCC) ("*Butlers Ship")* decided that in relation to 'other decisions' the FTT's full appellate jurisdiction under section 16(5) FA 94 does not include the power to determine the reasonableness of HMRC's decision to make an assessment to excise duty in an appeal.

28. The UT in *Butlers Ship* began its discussion of the jurisdiction ground at [145] by stating it had been rendered academic by the determination on the other grounds of appeal. The UT then went on to conclude in relation to subsections 16(4) & (5) FA 94 at [150]-[151]:

"150. In relation to the interpretation of subsections 16(4) and (5) and the cases cited, the appellants' submissions had the effect of conflating the two separate provisions. These subsections identify different types of decisions to which they apply: subsection 16(4) governs "any decision as to an ancillary matter" (there is no need to track through the statutory definition of "ancillary matter"); whereas subsection 16(5) governs "other decisions". The basis of review in section 16(4), that the decision-taker could not have reasonably arrived at the decision, is not repeated in subsection 16(5), in respect of "other decisions". That must be seen as reflecting a deliberate choice by the legislature. Had it been intended that the basis of review in section 16(4) be available in respect of "other decisions" under section 16(5), this could have readily been provided for. It wasn't. The appellants' interpretation impermissibly conflates the two subsections. The same cases as were cited by the appellants to the FTT were referred to before me. Judge Reid QC considered these. As I accept the correctness of Judge Reid's reasoning, and his treatment of the authorities cited to him, I need not rehearse these. The cases under section 16(4) of FA 1994, or under other taxing regimes, are of no relevance. Nothing in the appellants' submissions persuades me that these words, or a like test, fall to be imported into section 16(5) or applied to decisions reviewable thereunder.

151. It follows that I accept the respondents' submissions regarding the distinct jurisdictions of the FTT under subsections 16(4) and (5) and as regards its power to assess, as correct in law and are to be preferred. I am particularly persuaded by the observations of Lord Lane in *J H Corbitt (Numismatics) Ltd* (anent an absence of a general supervisory power residing in the tribunal) and Underhill LJ in *CC&C Ltd* (anent the careful calibration of the remedies and powers as between subsections 16(4) and (5)). While technically not binding on me, I find the reasoning in these authorities cogent and persuasive…"

29. It is not in dispute that the FTT properly summarised *Butlers Ship* at [140]-[141] of the Decision:

"140. In *Butlers Ship* the taxpayer had sought to challenge the FTT's conclusion that its powers under section 16(5) FA94 included the powers identified in section 16(4) FA94. The argument advanced was, as here, that the language of section 16(4) FA94 confined the powers of the Tribunal to those identified in that section, giving the Tribunal only a supervisory jurisdiction in relation to ancillary matters but that for other decisions the Tribunal also had a full appellate jurisdiction. HMRC contended, as here, that the decisions to which section 16(4) FA94 relate are management decisions involving some element of subjective assessment appropriately reviewed by the Tribunal pursuant to a limited supervisory jurisdiction. It was therefore inappropriate to extend such supervisory jurisdiction to other decisions which did not involve the exercise of a discretion. HMRC therefore contended that the provisions of section 16(4) FA could not be used in the context of a challenge to a decision that the person was liable to excise duty once a duty point had arisen; it was contended that to do so was, in effect, to judicially review the assessment by the back door.

141. The Upper Tribunal had determined the appeal against the taxpayer on other grounds but proceeded to consider the jurisdiction question. It concluded that there was no error of law in the analysis of the FTT as set out in paragraphs 123 – 139 of the FTT judgment ([2016] UKFTT 501 (TC)). In those paragraphs the FTT had narrated that it is a creature of statute with no inherent judicial review jurisdiction and thus no inherent power to review alleged procedural unfairness. It concluded that the full appellate jurisdiction under section 16(5) FA94 did not provide for an assessment of the reasonableness of HMRC's decision to assess. The FTT also went on to indicate that, on the evidence, there was nothing to justify a conclusion that HMRC had failed to assess to the best of their judgment or acted unreasonably or irrationally."

The FTT Decision

30. The FTT concluded at [152] that it had a full appellate jurisdiction on an appeal under section 16(5) Finance Act 1994 not only to evaluate whether the claim complied with the conditions of the EGDR or a public notice but also a supervisory jurisdiction to determine the reasonableness of HMRC's refusal to exercise its discretion under Regulation 7(1)(a) EGDR to "otherwise allow" or waive any of the conditions imposed by the Regulations.

31. It gave its reasons at [133]-[152]. These included at [137]-[139] and [142]-[145] distinguishing authorities relied upon by HMRC as follows:

"137. The first step in determining our jurisdiction is to interpret section 16(5) FA94. That section provides that in respect of an appeal such as this our powers "shall also include power to quash or vary any decision and power to substitute [our] own decision for any decision quashed on appeal".

138. The Appellant contends that the words "shall also include" are a reference to the powers granted to the Tribunal on an appeal in relation to an ancillary matter under section 16(4) FA94 which include the power to require HMRC to conduct a further review.

139. HMRC contend, by reference to the Upper Tribunal in *Butlers Ship Stores v HMRC* [2018] UKUT 58 (TCC) (*Butlers Ship*), that the powers under section 16(5) FA94 are standalone powers; the powers under section 16(4) FA94 providing a supervisory jurisdiction in respect of ancillary matters and an appellate jurisdiction as provided under16(5) FA94 in relation to other decisions.

…

142. Contrary to the submissions made by HMRC we do not consider that *Butlers Ship* determines the jurisdiction in this appeal.

143. In the first instance the comments of the Upper Tribunal are obiter dicta and not binding on us. Further, there is no evaluation of the statutory language adopted in sections 16(4) and (5) FA94. Finally, and in light of the Court of Appeal decision in *David Beadle v HMRC* [2020] EWCA Civ 562, (*Beadle*) and subsequent decisions of the Upper Tribunal, it is not clear that the decision is soundly reached.

144. In *Beadle* the Court of Appeal confirmed that the tax tribunals have no inherent judicial review jurisdiction but concluded that in the context of an enforcement decision (i.e. a decision to assess for tax or penalty) there is a presumption that a taxpayer will be able to challenge the decision on public law grounds save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme. In the context of enforcement action the question will be whether the statutory scheme in question excludes the ability to raise a public law defence in proceedings which are dependent on the validity of the underlying administrative act (see paragraph 44 in particular).

145. In the case of *The Executors of David Harrison (Deceased) and others v HMRC* [2021] UKUT 273 (TCC) (*Harrison*) the Upper Tribunal confirmed that in the context of an enforcement decision a challenge on public law grounds was permissible unless the statutory scheme precluded such a challenge. However, in the context of other (non-enforcement) decisions of HMRC clear words are required within the statutory language to permit the taxpayer to challenge the reasonableness of HMRC's decision on appeal. The UT considered that there was no strong presumption against the FTT having power to consider public law arguments in a non-enforcement appeal; rather it was a question of statutory construction (see paragraphs 34 – 36)."

32. The FTT came to its conclusion on its jurisdiction under s.16(5) FA 94 at [148]-[152]:

"148…we have determined to approach the question of statutory construction of sections 16(4) and (5) FA94 on the basis that a drawback claim is not an enforcement decision.

149. We note, in accordance with regulation 7(1) EGDR, drawback claims are subject to conditions imposed by EGDR and by notice published by HMRC but in each and every case those conditions apply "unless [HMRC] otherwise allow". There is therefore an inherent discretion as to the circumstances in which drawback will be permitted so as to achieve the collection of excise duty by reference to where excise goods are consumed.

150. We then turn to consider the provisions of section 16(5) FA94. It is a trite tenet of statutory construction that the language adopted by Parliament has been chosen for a reason and should be given meaning. The powers in section 16(5) FA94 "shall also include" the powers so stated. In our view it is plain that the provisions of section 16(5) FA94 are not standalone provisions, they are accretive or additional to something. It is, in our view, plain that they are additional to the powers in section 16(4) FA04. Those are the only powers mentioned in section 16. The provisions of section 16(4)(a) – (c) FA94 are expressed to be powers granted to the Tribunal in

the context of management decisions requiring HMRC to exercise their discretion. The Tribunal's jurisdiction in respect of administrative/management decisions is confined to the supervisory powers identified in section 16(4) FA94 and the Tribunal "also" has a full appellate jurisdiction in respect of other decisions.

151. Of course, it will not always be necessary or appropriate to exercise a supervisory jurisdiction on an appeal against an "other decision". Where there is no discretion exercised by HMRC and/or no management decision there is unlikely to a basis for reviewing the process and basis on which HMRC have reached a decision. But, as here, where the source of HMRC's power to determine whether a claim is payable is subject to conditions "save as [HMRC] may otherwise allow" we consider that the statutory framework is clear. We have a jurisdiction to consider the reasonableness of HMRC's decision and, where unreasonable, to require them to re-review the original decision with directions on that re-review.

152. In our view, properly interpreted section 16(5) FA94 permits us to evaluate not only whether the Appellant has met the conditions imposed by EGDR and/or the additional conditions imposed in EN 207 by way of our appellate jurisdiction, we are also entitled to evaluate whether the decision whether or not to exercise their discretion to "otherwise allow" claims which do not meet the prescribed conditions has been exercised reasonably."

HMRC's submissions

33. Ms McArdle submitted that the FTT fell into error, when it found that it had jurisdiction to consider a public law challenge to the reasonableness of HMRC's drawback decision pursuant to s16(5) FA 94 at [150]-[152]. She argued that in concluding that the jurisdiction and powers in s16(4) were incorporated in s16(5) by the words "shall also include", the FTT erred in law.

34. Her argument consisted of two parts: the FTT's lack of any general public law jurisdiction on appeal; and specific consideration of s.16(5) FA 94 itself.

The FTT's lack of a general public law jurisdiction

35. Ms McArdle noted that by virtue of s15 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), unlike the FTT, the Upper Tribunal ("UT") was expressly granted a judicial review jurisdiction by Parliament. There is no legislation which grants the FTT a similar jurisdiction to consider judicial review matters in an appeal.

36. She relied on two key cases emphasising the limits of the FTT's jurisdiction: *HMRC v Hok* [2013] STC 225 ('*Hok*'); and *HMRC v Noor* [2013] STC 998 ('*Noor*').

37. In *Hok* the UT decided that the FTT had no judicial review jurisdiction:

"41. There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction. That was made abundantly clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22. That case related to the Value Added Tax Tribunals rather than the First-tier Tribunal, but they too were a creature of statute with no inherent jurisdiction, and the relevant principles are identical. Lord Lane (with whom the majority agreed) said, in what remains the classic statement on the point:

> "Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out

nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."

38. Ms McArdle contended that the First-tier Tribunal having no judicial review function is, in addition, the only conclusion which can be drawn from the structure of the legislation which brought both that Tribunal and this into being. The 2007 Act conferred a judicial review function on the UT, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so; and it hedged the jurisdiction it did confer with some restrictions. It is plain, from perusal of the 2007 Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56), which points to a contrary conclusion.

39. She further relied on *Noor* which concerned an appeal pursuant to VATA section 83(1)(c) (concerning recoverability of input tax). Consistently with *Hok*, the UT concluded that the FTT had no judicial review jurisdiction. The absence of clear legislation giving the FTT such jurisdiction and the absence of procedural safeguards such as a permission stage, found in the High Court judicial review procedure were important reasons why (see e.g. *Noor* at [74]-[78]).

40. Notably she submitted that there is Court of Appeal authority in relation to public law arguments not being within the jurisdiction of the FTT: *Trustees of the BT Pension Scheme v HMRC* [2016] STC 66. The case concerned, among other issues, a legitimate expectation argument in the context of an extra-statutory concession relating to time limits. The Court of Appeal decided at [129] to [143]:

> " 129. Our own view is that HMRC's construction of ESC B41 is almost certainly correct and is conclusive of this issue. But the Upper Tribunal did not decide the point on this basis. It held that it had no jurisdiction to decide what amounted to a challenge to the lawfulness of the Revenue's refusal to extend to the Trustees the benefit of the extra-statutory concession because it amounted to a public law challenge which should be brought by way of an application for judicial review in the Administrative Court. In so doing, the Upper Tribunal refused to follow the decision of Sales J in *Oxfam v. HMRC* stating:
>
> > '401. Our reasons for saying that the Tribunal has no jurisdiction to give effect to the Extra-Statutory Concessions stems from the recent decision of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UK Upper Tribunal 363 (TCC) ("*Hok* ") a decision of Warren J and Judge Bishopp. Mr Vajda has relied on the decision of Sales J in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 ("*Oxfam*"), paragraphs 61 to 79 to demonstrate that the Tribunal does have jurisdiction. However, that decision turned on a construction of 83(1)(c) of the Value Added Tax Act 1994 which Sales J held gave jurisdiction to the VAT Tribunal to deal with legitimate expectation in the context of an appeal as to the amount of input tax. It lends no support at all to the view that the Tribunal has a general jurisdiction to deal with public law matters, whether in the context of direct tax or indirect tax, in particular to require, in the exercise of some sort of supervisory jurisdiction, HMRC to give effect to a concession. The suggestion that there is a jurisdiction in the context of direct tax is refuted by the decision in *Hok* .'
>
> …
>
> 141. We have heard no argument about s.83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section. But, in agreement with the Upper Tribunal, we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition and we reject the suggestion that the reasoning of Sales J

can or should be applied to the jurisdiction of the FTT and the Upper Tribunal to determine the appeals in this case.

142. The statutory jurisdiction conferred upon the FTT by s.3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.

143. We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s.231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT."

41. Ms McArdle argued that the FTT in the present case concluded, in stark contrast to the approach of the Court of Appeal, that a "reasonableness" jurisdiction could be imported into s16(5), despite the absence of clear wording to that effect.

42. She also relied on the more recent case of *Metropolitan International Schools Ltd v HMRC* [2019] 1 WLR 5473 ("*Metropolitan Schools*") where the Court of Appeal considered whether s.84(10) VATA permitted the taxpayer to argue a legitimate expectation claim in the Tribunal. The Court rejected the FTT holding a judicial review function, deciding:

"20…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.""

43. She sought to distinguish the UT's decision in *KSM Henryk Zeman Sp. z.o.o v HMRC* [2021] STC 1706 ("*Zeman*") in which the UT concluded that the FTT did have jurisdiction to consider a legitimate expectation argument. This was in relation to an appeal against a

best judgment assessment under s.83(1)(p) VATA. Its reasoning for doing so included "good policy reasons" (see [82]), such as avoiding the risks of duplication, delay and disputes as to which forum is appropriate.

44. Ms McArdle contended that the UT's view on jurisdiction in *Zeman* was (i) obiter dicta, (ii) per incuriam and (iii) that *Zeman* was wrongly decided in any event.

45. First, Ms McArdle submitted that [5] of *Zeman* is telling: the UT explicitly considered whether a legitimate expectation existed on the assumption it had jurisdiction. That claim failed on the facts (see [20]) so the jurisdiction question was necessarily obiter and thus not binding on this Tribunal. She argued that various tribunals had decided that the comments in *Zeman* were obiter in nature, as was (in her submission correctly) found by the FTT in *Caerdav Ltd (formerly Cardiff Aviation Ltd) v HMRC* [2022] UKFTT 00105 (TC) at [182], *Queenscourt Ltd v HMRC* [2024] UKFTT 460 (TC) at [142] and *Houldsworth v HMRC* [2024] UKFTT 224 (TC) at [68].

46. Second, she contended that *Zeman* was decided per incuriam because the *Metropolitan Schools* decision was not considered, including the following passage of it:

> "20…Were, however, his contentions as to the ambit of section 84(10) of the VATA well founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims. The jurisdiction would, moreover, have been conferred through a provision introduced in response to the *Corbitt* decision (viz section 84(10)) ("by the back door", as Miss Mitrophanous would say), rather than under section 83, the main appeals section. Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review: see CPR rr 54.4 and 54.5. It is highly improbable that Parliament intended this when it enacted what has now become section 84(10)."

47. Further, she submitted that the *Zeman* decision was per incuriam because it was reached without considering *Hok* or *BT Pension Scheme*, both being highly relevant. The following relevant passages at [76]-[77] of *Noor* on Sales, J.'s approach in *Oxfam v HMRC* [2010] STC 686 were similarly not considered:

> "76. That approach, in effect if not name, would have been to give to the VAT Tribunal a power of judicial review in relation to the matters covered by section 83(1). Although not exhaustive of all areas in which HMRC is amenable to judicial review in relation to VAT, it would have conferred a very extensive judicial review jurisdiction. It would have done so, moreover, 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.
>
> 77. In any case, we disagree with the suggestion concerning the plausibility of what Parliament can be supposed to have had in mind. There are several reasons for this, including these:
>
> > a. If Parliament had intended to confer this jurisdiction on the VAT Tribunal, we would have expected it to say so clearly. Even as late as the passing of VATA 1994, a fortiori when the VAT Tribunal was first set up and given a statutory appellate jurisdiction, it would have been exceptional for an inferior tribunal to have a judicial review jurisdiction or an appellate jurisdiction allowing it to adjudicate on public law issues other than in the course of its statutory jurisdiction. VATA 1994 does not use words which clearly confer such a jurisdiction, reliance instead having to be placed on the words "with respect to".

b. In cases where an inferior tribunal is intended to have a judicial review function, express provision has been made. See, for instance, the powers given to the newly-created (and now abolished) Charity Tribunal under section 8 Charities Act 2006.

c. We have referred to the structure of the tribunal system put in place by TCEA 2007 at paragraph 29 above. Parliament decided that the F-tT should not have a judicial review function; and although the Upper Tribunal does have a judicial review function, its jurisdiction usually comes into play on the transfer of a case commenced in the Administrative Court. It is only in a very limited class of case that a judicial review application can properly be commenced in and heard by the Upper Tribunal. It is well known that there was significant opposition even to these powers being conferred on the Upper Tribunal. It is simply inconceivable that Parliament would have contemplated conferring a similar power on the F-tT notwithstanding the two factors which Sales J identified and of which legislators were well aware.

d. Just as it was inconceivable that the F-tT should be given a judicial review jurisdiction, so to it was not plausible, in our view, that Parliament, when enacting section 83 VATA 1994, intended to confer a judicial review function on the VAT Tribunal.

e. We are bound to say that, if it was plausible in the way which Sales J suggests, it is very surprising that the point was not raised in litigation or otherwise many years before *Oxfam* came before the court. In fact, it was not raised as a plausible result before the VAT Tribunal even in *Oxfam* itself. As Sales J acknowledged, he was departing from a widely held view, a view which, on his approach, was entirely at odds with what Parliament is to be supposed to have wished to achieve. Although Sales J describes the view as widely held (and we do not know on what he based that description) we ourselves know of no contrary view being promoted as a correct view prior to the decision of Sales J himself.

f. Further, if Parliament's intention had been as Sales J suggests, we would have expected the same Parliament to have introduced secondary legislation in the form of suitable tribunal rules to govern the procedure (and in particular rules concerning permission to bring judicial review and time-limits) applicable to public law claims."

48. Ms McArdle submitted that for the purposes of this case, a s16(5) appeal against a refusal of a drawback claim, as addressed below, cannot properly be regarded as enforcement action, thus there must be express language importing a public law jurisdiction, rather than language excluding it: see the discussion of the exclusivity principle in the Court of Appeal's decision in *Beadle v HMRC* [2020] 1 WLR 3028 at §44 and similar commentary in *The Executors of David Harrison (Deceased) and others v HMRC* [2021] UKUT 273 (TCC) at [34]-[36]. No such importing language exists in s16(5).

49. Thus, drawing together the threads thus far on jurisdiction, she argued that the FTT ought to have found that it had no jurisdiction to consider a reasonableness (or any other public law) challenge under s16(5) FA 94:

a) Authorities such as *Hok, Noor and BT Pension Scheme* ought to be followed instead, and thus there is no judicial review jurisdiction in the FTT;

b) The legislation does not grant the FTT a judicial review jurisdiction. Had Parliament intended for this jurisdiction to exist, it would have explicitly legislated for that, as it has done for the UT;

c) Equivalent procedural safeguards and remedial powers set out in Rules 28 and 30 of The Tribunal Procedure (Upper Tribunal) Rules 2008 are absent for the FTT, a

powerful indicator that Parliament did not grant it a judicial review jurisdiction (save where it explicitly provides for one);

d) The UT in *Zeman* fell further into error, by interpreting legislation so as to achieve particular procedural results, an impermissible approach, citing "good policy reasons" for the outcome (§82): see for instance *Hoey v HMRC* [2022] 1 WLR 4113 at §132; and

e) The obiter jurisdiction position in *Zeman* is wrong in law.

Specific considerations applicable to s16(5) FA 94

50. Ms McArdle then addressed the construction of s.16(5) FA 94. First, as touched on above, she submitted that the starting point for interpreting s16(5) as it applies to drawback claims, is that language expressly importing a public law jurisdiction must be present before such a jurisdiction may be engaged. Drawback claims do not constitute any enforcement action (rather the taxpayer bringing a drawback claim is doing the opposite, seeking payment from the Respondents).

51. In finding that the jurisdiction to consider a reasonableness challenge was available to it, the FTT particularly focussed on the words "shall also include" in s16(5), starting at [134]. The words "shall also include" ought to have been interpreted not as importing the s16(4) jurisdiction into s16(5), but as indicating that the other powers, such as for instance wide case management powers, powers to allow or dismiss appeals, or powers to review its own decision under Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, were additional to the powers explicitly set out in s16(5).

52. Far from there being language in s16(5) FA 94 which expressly imports a reasonableness (or any other) public law jurisdiction, she contended that the provision says nothing of the sort. Instead, it adds to the FTT's powers, not the scope of what it can determine. If Parliament had intended for s16(5) to permit the FTT to consider a reasonableness or other public law challenge, it would have expressly stated so, as it has in other provisions.

53. She contended that, on an appeal of a drawback claim refusal in the FTT, s16(5), read with s13A(2)(e) FA 94, provides that the jurisdiction extends only to consideration of whether or not a taxpayer is "entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled" (s13A(2)(e)). In other words, the question of whether the legislative requirements have been met ("entitled…by virtue of regulations") is before the FTT, not any question of whether the Respondents acted reasonably in declining to waive a time limit, or any other condition.

54. That statutory language in s.13A(2)(e) FA 94 is to be contrasted with ancillary decisions which s16(4) FA 94 applies or applied to, for instance section 18(5) of the Alcoholic Liquor Duties Act 1979, as now repealed:

> "s18… (5) The Commissioners may refuse to grant any person a licence as a rectifier in respect of any premises on which, from their situation with respect to a distillery, they think it inexpedient to allow the keeping of a still for rectifying or compounding spirits."

55. She submitted that s16(4) FA 94 explicitly permits reasonableness challenges, in the light of the underlying ancillary decisions defined as involving exercises of discretion, in stark contrast to how drawback claims are defined in s13A(2)(e). It is also of assistance to consider the content of Schedule 5 to the FA 94. Paragraphs 1(d) and 1(k), for example, do provide that certain types of waiver are subject to appeal rights, but notably Parliament chose not to include the waiver of drawback conditions as appealable decisions. That, she contended, is no accident and illustrates that there is no FTT appeal jurisdiction on such points.

56. Similarly, Reg. 7(3) of the EGDR provides that: "Sections 14 to 16 of the Finance Act 1994 shall have effect in relation to any decision of the Commissioners to impose additional conditions under paragraph (2) above as if that decision were a decision of a description specified in Schedule 5 to that Act." Again, Parliament has been highly prescriptive as to the decisions in relation to which an appeal lies in the FTT, and has not sought to legislate for decisions on the waiver of drawback conditions to give rise to an appeal.

57. Consequently, she argued, the FTT erred in law in considering that it had jurisdiction to determine the reasonableness of the exercise of public law powers in relation to the refusal to waive time limits and all other conditions.

The Appellant's submissions

58. Mr Thornton submitted that the FTT made no error of law in the Decision and came to the right conclusion for the reasons it gave.

Discussion and Analysis

Construing s.16(5) FA 1994

59. For the reasons set out below, we are satisfied that the FTT did not err in law in deciding that the jurisdiction of the tribunal in appeal under s. 16(5) FA 94 consists of: a) a full appellate jurisdiction to determine as a matter of fact and law whether HMRC's decision under s.13A(2)(e) FA 94 (that a person is not entitled to excise duty drawback because their claim does not comply with conditions imposed by the EGDR or HMRC) is correct; and b) a supervisory jurisdiction to determine whether HMRC's discretion not to otherwise allow or waive any conditions is one that could reasonably have been arrived at. In short, the jurisdiction of the FTT in determining an appeal pursuant to s. 16(5) FA 94 in relation to an 'other decision' includes the jurisdiction to consider the reasonableness of any discretionary element of the decision challenged, as it would for an ancillary decision appealed pursuant to s. 16(4) FA 94.

60. Therefore, the FTT was right to conclude at [152] that it had jurisdiction to determine whether HMRC's decision not to exercise its discretion to waive compliance with conditions or otherwise allow claims pursuant to Reg. 7(1)(a) EGDR was reasonable. This jurisdiction is additional to the tribunal's 'full merits' jurisdiction to determine whether the EGDR conditions for drawback had been satisfied.

61. Deciding whether the FTT has any 'public law', 'reasonableness' or 'supervisory' jurisdiction in relation to HMRC's decisions in appeals pursuant to s.16(5) FA 94 is a matter of statutory construction. It does not require any extensive consideration of the

tribunal's general jurisdiction to consider public law arguments. We explain this in more detail below.

62. Construing s.16(5) requires setting it in the context of the scheme of appeal provisions within the FA 94. The relevant parts of the review and appeals provisions in sections 13-16 FA 94 are as follows:
    a. The relevant decisions which may be appealed are defined by s.13A FA 94. Subsection 13A(2)(e) in particular provides that the relevant decision which may be appealed includes *"any decision by HMRC as to whether or not any person is entitled to any drawback of excise duty …or the amount of the drawback to which any person is so entitled"*.
    b. Relevant decisions are directly appealable to the FTT pursuant to s16(1B) FA 94 and reviews of such decisions, conducted pursuant to section 15C, under s.16(1C).
    c. In simple terms in drawback cases, the appeal will be against HMRC's refusal to allow a claim of drawback at all, or review thereof, or it will relate to an appeal against a decision to allow a lesser amount of drawback than the claimant considers is due. In either case, both parties accept that the FTT's jurisdiction under s.16(5) will include the correctness of any full or partial refusal by HMRC of a claim. In other words, s.16(5) provides the FTT with a 'full merits' jurisdiction to consider and determine the factual and legal basis for any refusal or partial refusal of drawback.

63. We next consider s.16(5) FA 94, headed 'appeals to a tribunal', within the context of the section as a whole. The structure of s.16 is as follows:
    a. Subsections 16(1) to 16(1G) provide for the type of decisions which may be appealed to the FTT, including appeals against relevant decisions and reviews of those decisions, and the time limits by which appeals should be brought.
    b. Subsections 16(2) to (3A) address the pre-conditions to beginning appeal proceedings or the FTT 'entertaining' the appeal. These includes the gateways for who may appeal to the FTT.
    c. Subsection 16(3B) provides for the power of the parties to reach a settlement and end the appeal once it has begun.
    d. Subsections 16(4) and 16(5) provide for the powers of the FTT to determine an appeal and grant remedies including when it has allowed the appeal. We return to these subsections in more detail below.
    e. Subsection 16(6) provides for the burden of proof for appealable decisions. It is generally upon the taxpayer unless it is one of the specified types of decision.
    f. Subsection 16(7) confirms the limit on the FTT's powers in mitigating the amount of any penalty imposed by Chapter 2 of the FA 1994.
    g. Subsections 16(8) and 16(9) provide definitions of decisions in relation to ancillary matters.
    h. Subsection 16(10) confirms the limit on the FTT's power to vary any amount of interest specified in an assessment.

64. In general terms, the sequence of subsections within section 16 addresses matters before, during and after the bringing of an appeal. The exceptions to that sequence are the burden of proof provisions in s16(6) and the definitions of ancillary matters in s16(8) and (9) each following after s16(4).

65. There are two elements to subsection 16(4) which are important not to conflate.

66. First, there is the scope of the jurisdiction – namely what decisions, or what elements of decisions are appealable to the tribunal and on what basis. Second, there is the question of remedy – what powers the tribunal holds in relation to those decisions or elements of them that are within its jurisdiction to adjudicate upon. Subsection 16(4) provides for: the scope of the FTT's jurisdiction – appeals regarding decisions on ancillary matters in which the tribunal is to determine whether the decision is reasonably arrived at; and the powers or remedies – the tribunal's powers on allowing an appeal are confined to the specific subset of remedies in subsections 16(4)(a)-(c), such as remittal to the decision-maker with directions.

67. Subsection 16(4) is a provision which expresses the powers contained in it in terms which are undoubtedly limited. When adjudicating on ancillary decisions the FTT's powers are explicitly "confined to" the specified subset of remedies which are only to be exercised where the FTT considers HMRC's decisions to have been unreasonably arrived at.

68. It is worth noting that in circumstances where powers are "*confined to*" a limited subset of powers, there is an inference that there exists a larger pool of powers which includes that subset. That larger pool of powers, including to set aside or quash, remake or vary or substitute the tribunal's own decision is set out in subsection 16(5). Thus the two provisions are related – the extent or 'pool' of remedies available to the FTT in FA 94 appeals are set out in subsections s16(4)(a)-(c) and (5).

69. The proper interpretation of the FTT's jurisdiction in s.16(5) begins with the plain language that the powers in relation to other decisions 'shall also include' the wider powers. The phrase naturally refers directly back to the previous and immediately preceding subsection, s.16(4) which provides for the powers in relation to ancillary decisions as set out in 16(4)(a)-(c) – which powers are only engaged if the unreasonableness threshold is met. As set out above, subsection 16(5) provides for the jurisdiction – full merits appeals in relation to all "other decisions" i.e. not ancillary decisions – and provides for the remedies where the full range of powers is available.

70. The words used by Parliament must mean something. Ms McArdle argued that the inclusive term "*shall also include*" in subsection 16(5) is simply a reference to the wide range of additional case management powers the FTT enjoys. Paying due respect to the submission, such a construction is highly unlikely. Such an interpretation would mean that the tribunal did not have those case management powers when dealing with appeals on ancillary decisions under subsection 16(4) because it was confined to only the listed powers in 16(4)(a)-(c). That would be absurd. It also involves guessing what other or additional powers subsection 16(5) is referring to if not those in the preceding subsection, namely s.16(4).

71. Subsection 16(5) explicitly contains the reference that the powers *"shall also include"* the additional remedies such as the tribunal substituting its own decision for that of HMRC by confirming or varying the decision. The powers given to the FTT in s.16(5) are greater on allowing an appeal - to vary or quash or substitute the tribunal's own decision. As a matter of logic, it is consistent that s.16(5) would subsume the lesser powers available to the FTT under s.16(4)(a)-(c) of remittal to the decision maker – and

the threshold / jurisdiction of reasonableness that engage them. The two subsections complement each other.

72. Parliament has confirmed that in relation to all non-ancillary, or 'other' decisions the powers of the tribunal also include the power to quash or vary the decisions under appeal or substitute its own decision. Read together, the meaning of the two subsections is clear. Subsection 16(4) provides for only a part of the FTT's jurisdiction and powers in relation to relevant decisions whilst s16(5) provides for the full range of jurisdiction and powers.

73. Thus subsection 16(5) imports both all the powers of the FTT in s.16(4)(a)-(c) and the threshold for exercising those powers, namely a 'reasonableness' jurisdiction.

74. We note of course that there is authority that supports Ms McArdle's construction of s.16(5). She submits that the FTT ought to have followed the UT in *Butlers Ship* at [145]-[151]. We naturally pay respect to the decision in *Butlers Ship*. It is a decision of the UT, a superior court of record and a judgment of a tribunal of coordinate jurisdiction. The starting point is that it is persuasive. We would not depart from it unless it was obiter, plainly wrong, per incuriam or it could be distinguished.

75. Nonetheless, we are satisfied that the FTT did not err at [142]-[143] in deciding that the decision of the UT on jurisdiction in *Butlers Ship* at [150]-[151] was obiter, had not been fully argued and ought not to be followed. Likewise, we are not required to follow the UT's decision on jurisdiction in *Butlers Ship* when it was obiter. We bear in mind that the UT did not record that it had received the benefit of argument on the meaning of the phrase 'shall also include' in section 16(5) and did not address it in its reasoning. While the decision is carefully reasoned, we are not persuaded that the UT came to the right conclusion. We have decided to depart from it based on the statutory construction we have set out above.

76. Ms McArdle also relied on the decision of the Court of Appeal in *CC&C Ltd* v *HMRC* [2014] EWCA Civ 1653, but this is of no assistance. The underlying appeal in that case concerned an ancillary decision and the reference at [16] to careful calibration does not consider any limitation of powers under s16(5), it was about the careful limitation of power under s16(4). There is no dispute that those powers are properly limited.

77. Ms McArdle further relied on the terms of Reg. 7(3) EGDR. Regulation 7(3) provides that where HMRC notify additional conditions pursuant to Reg. 7(2) to be complied with on making a drawback claim, that is to be considered an ancillary decision for the purposes of s.16 FA 1994. Regulation 7(3) therefore stipulates the powers on appeal against HMRC's discretion to be those under s.16(4)(a)-(c) FA 94.

78. She submitted that Reg. 7(3) demonstrates that Parliament did not intend the FTT to have jurisdiction to decide whether the discretion to waive compliance with conditions under Reg. 7(1)(a) was reasonably arrived at because Reg. 7(3) specifically excludes the latter discretion from being an ancillary matter.

79. We consider that, if anything, Reg. 7(3) EGDR supports the FTT's and our construction of s.16(5) FA 94. While little assistance can necessarily be gained in interpreting s.16(5) FA 94 by reference to a different provision in a different set of regulations, Reg. 7(3)

EGDR specifically anticipates that discretionary decisions of HMRC in relation to a drawback claim will be subject to the reasonableness jurisdiction under s.16(4).

80. Regulation 7(3) provides a standalone right of appeal against the imposition of an additional condition on a drawback claim by HMRC. In promulgating the regulation, the executive has decided that in determining an appeal against an additional condition, the FTT should exercise the jurisdiction and powers under s16(4)(a)-(c) FA 94. These are limited: the tribunal cannot substitute its own view but only consider the reasonableness of HMRC's decision.

81. The decisions by HMRC to use their discretion to impose an additional condition under Reg. 7(2) or to waive a condition imposed by the EGDR or public notice and otherwise allow a claim under Reg. 7(1)(a) are related. The exercise of HMRC's discretion in each situation may be considered on appeal on a supervisory (reasonableness) basis but there is also a full merits appeal as to whether conditions have been complied with. There is a consistent implication that the FTT has jurisdiction to consider the reasonableness of HMRC's discretion but not to remake their discretionary decisions.

82. Furthermore, to exclude the reasonableness of HMRC's discretion to waive a condition under Reg. 7(1)(a) from the scope or jurisdiction of an appeal under section 16(5) FA 94, which provides for a full merits appeal, would be unlikely. It would allow the FTT to assess as a matter of fact and law whether some elements of HMRC decision under appeal were lawful (whether a condition under the regulations had been complied with) but not whether the discretion to waive conditions was reasonable (and therefore lawful). This would be even more remarkable where the FTT would have the power to consider the reasonableness of conditions if imposed specifically on the taxpayer by HMRC by virtue of Regs. 7(2)-(3).

83. We also bear in mind that HMRC's interpretation of s.16(5) would also give rise to impractical results. HMRC's interpretation of s.16(5) FA 94 would create two different routes of challenge to the related parts of any decision by HMRC to refuse drawback under Regulation 7(1)(a) for non-compliance with a condition that they had decided not to waive. If there were no jurisdiction to consider HMRC's exercise of discretion to waive compliance with a condition under Reg 7(1)(a), a taxpayer would be required to judicially review the discretionary part of any decision made. Yet the taxpayer would be permitted to appeal to the tribunal any related part of HMRC's decision that a condition for drawback had not been complied with.

84. Ms McArdle made two more persuasive submissions on this ground.

85. The first was that the FTT's jurisdiction is limited because a taxpayer's appeal is against HMRC's decision as to whether they are 'entitled' to drawback of excise duty under section 13A(2)(e) FA 94 rather than any discretionary waiver of the conditions of entitlement.

86. However, we are not satisfied that the wording of s.13A(2)(e) FA 94, focusing on the entitlement to drawback, requires us to construe section 16(5) FA 94 as prohibiting the tribunal from examining the reasonableness of HMRC's discretionary decision to waive conditions.

87. An appeal is brought against any decision as to whether a person is entitled to any drawback at all, or as to what proportion of their claim they are entitled to receive. It is axiomatic that if a person complies with all conditions, they are entitled to the whole of their claim. In this regime, HMRC has the discretion to waive all conditions imposed by the EGDR by virtue of Reg. 7(1)(a), so long as the person making the claim is an eligible claimant. If any condition has been waived, and all other conditions which have not been waived have been met, a claimant is then entitled to drawback. Likewise, if HMRC have unlawfully, i.e. unreasonably, refused to waive a condition, the claimant might still be entitled to drawback.

88. Therefore, a person's entitlement to the drawback of excise duty, as decided by HMRC, includes a decision whether a person is entitled to drawback because the requirement for compliance with a condition imposed by the EGDR or public notice is waived under Reg 7(1)(a). If compliance with all conditions is waived by HMRC then a person is so entitled to drawback (subject to the proviso in Reg. 7(1)(a) that they are an eligible claimant pursuant to Reg. 6). In this case there is no doubt that the Appellant was eligible and so were the goods. The decision by HMRC not to waive compliance with conditions was nonetheless a decision as to the Appellant's entitlement to the drawback of excise duty and not a separate question falling outside of the tribunal's jurisdiction under section 13A(2)(e) FA 94.

89. The second point made by Ms McArdle was that Parliament had provided two very different schemes for different types of decisions under subsections 16(4) & (5) FA 94 and there is good reason that they should remain distinct such that the latter should not incorporate the former. She submitted that decisions on ancillary matters concern discretionary decisions of HMRC such that only s.16(4) permits the reasonableness to be considered by the FTT. In contrast, other decisions appealable under s. 16(5) concern the binary question of satisfaction of identifiable or strict conditions or criteria - such as entitlement to drawback in this case. These admit of only a yes or no answer. These types of decisions may be examined by the FTT on appeal on a full merits basis - determining whether HMRC's decision was correct in fact or law - but because they do not involve the exercise of HMRC's discretion do not require a review of the reasonableness of the decision.

90. She supplied a schedule of sample 'ancillary' and 'other' decisions in post hearing submissions dated 9 July 2025. Mr Thornton provided annotations in an additional column on 21 July 2025. The schedule is based upon extracts from Schedule 5 FA 94 which specifies the types of HMRC's decisions which are decisions on 'ancillary matters'.

91. Subsection 16(4) is designed to convey the appropriate jurisdiction and powers for appeals against decisions on ancillary matters - there being around a hundred different decisions which HMRC may make as specified in Schedule 5 FA 94 (which largely defines ancillary decisions). Most ancillary decisions involve or require the use of HMRC's discretion and all of which deal with matters which HMRC are normally considered uniquely qualified to address.

92. We accept the general point that the schedule of ancillary decisions provides a sample of decisions which can be made by HMRC which are largely, although not exclusively, discretionary. From a purposive perspective, ancillary decisions will ordinarily be

discretionary matters or matters of judgement that Parliament has directed the Commissioners to decide upon. Therefore, the powers of the FTT ought ordinarily to be limited to supervising those decisions to ensure they were taken reasonably – and hence lawfully.

93. In contrast the sample of 'other' decisions largely, but not exclusively, includes binary decisions HMRC may make as to whether statutory provisions are satisfied. Most 'other' decisions which are made by HMRC are binary and involve no discretion being exercised – and over which the FTT has a full merits appeal of fact and law under section 16(5) in contrast to ancillary decisions where HMRC are only exercising a discretion.

94. Nonetheless, having perused the sample schedule, including comments of the Appellant, we are not satisfied that it provides convincing support for Ms McArdle's interpretation of s.16(5) FA 94. There are a number of exceptions to the general rule that ancillary decisions are discretionary in nature and other decisions are binary within the sample provided. For example, decisions under paragraph 3(1)(f) of Schedule 5 FA 94 relating to the approval requirements for producers of alcohol products under s.82 Finance (No.2) Act 2023 are defined to be ancillary decisions but include questions which are binary as to whether the producer has fulfilled statutory criteria. Decisions as to the amount of a person's liability to a penalty under s.13A(2)(gb) FA 94 and s.8P Tobacco Product Duty Act 1979 are defined to be other decisions but include questions which are discretionary, such as the application of special circumstances. This somewhat undermines the argument that two different powers are available to the FTT in relation to two different types of decisions. It is not clear from this sample schedule of decisions that such a bright line distinction can be drawn between the two types of decisions and appeal jurisdictions.

95. Therefore, we do not find the purposive argument so convincing as to require us to depart from our construction of the plain language of s.16(5) FA 94.

96. Further and in any event, even if the appeal gateway is nominally binary such as in this appeal under s.13A(2)(e) FA 94 – whether a claimant is entitled to drawback - it may not be in reality. For the reasons we have explained, in this appeal, entitlement to excise duty drawback relies not just upon the terms of the statutory appeal gateway in section 13A alone but consideration of the EGDR - the underlying regulations. Regulation 7 (1)(a) and (2) EGDR import HMRC's discretions into decisions on entitlement consistent with s.16(5) FA 94 importing a reasonableness / supervisory jurisdiction from s.16(4). One must look beyond the plain definitions of 'ancillary' and 'other' decisions to understand what type of decision HMRC may be making.

97. Therefore the FTT did not err at [150]-[152] of the Decision in concluding: a) that it had the jurisdiction and powers under s.16(5) FA 94 to consider whether, on a full merits basis, the Appellant had complied with the conditions for drawback as a matter of fact and law; but also b) whether, on a supervisory basis, HMRC had acted reasonably in deciding that it would not otherwise allow the claim when the conditions under the EGDR and public notice EN207 had not been complied with.

98. We are satisfied that the FTT did not err in its construction of s.16(5) FA 94 at [148]-[152] of the Decision for the reasons it gave. It went on to correctly summarise the FTT's reasonableness jurisdiction in the appeal at [153]:

"153. When undertaking the latter exercise, and following the guidance of the Court of Appeal in *GB Housley Limited v HMRC* [2016] EWCA Civ 1299, we consider that the approach we should adopt is as follows:

(1) Evaluate the evidence and material available at the time of the Review (whether it had been provided to HMRC or not) and determine whether HMRC have reasonably concluded that the drawback claim should be refused.

(2) If we conclude that no reasonable body of commissioners could have come to any conclusion other than to allow the drawback claim (or a relevant part of it) we may allow the appeal in that regard.

(3) If we conclude that HMRC have acted unreasonably we may still refuse the Appellant's appeal if we are satisfied that HMRC would inevitably have rejected the claim (or part of it) had they not acted unreasonably.

(4) When considering whether HMRC have acted unreasonably we must consider whether they have taken account of all relevant factors and no irrelevant factors. If they have considered all relevant factors it is a matter for them how those factors are weighed in reaching their decision. We may disagree with the decision, but disagreeing with the decision does not mean that it was an unreasonable decision.

(5) If HMRC have acted unreasonably and neither (2) nor (3) above applies we do not have the power to retake HMRC's decision and should allow the appeal exercising our power under section 16(4)(b) FA94 to require HMRC to re-review the decision to refuse the claim with such directions as we consider appropriate."

The public law jurisdiction of the FTT

99. We should briefly explain why we do not need consider Ms McArdle's submissions on the extent of the FTT's public law jurisdiction at any length. It is our construction of s.13A(2)(e) and 16(5) FA 94 which has determined the nature of the FTT's jurisdiction in this appeal: an appeal against HMRC's decision as to whether the prescribed conditions for a drawback claim have been met and the amount of such drawback or alternatively against HMRC's exercise of discretion not to waive conditions of entitlement.

100. As set out above, the proper approach is to consider the FTT's jurisdiction by reference to the statutory context of appeals under s.16 FA 94. This approach is consistent with the principles explained by the Upper Tribunal as to the extent of the FTT's jurisdiction in *R & J Birkett v HMRC* [2017] UKUT 89 (TCC) at [30] to [33]:

"[30] The principles that we understand to be derived from these authorities are as follows:

(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985]

AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

[31] Some cases are relatively straightforward. *Hok* is a good example. The appeal to the FTT was against fixed penalties of £100 per month. The FTT's jurisdiction was given by s. 100B TMA (set out above at paragraph [27]). That only entitled it to determine if the penalties had been incurred and if the amounts were correct. The issue which was sought to be raised (was it unfair of HMRC to levy the penalties because of delay?) did not go to either issue. Hence the FTT had no jurisdiction to consider it.

[32] In other cases the Court may have to construe the statutory provision conferring jurisdiction on the FTT to decide the scope of it. An example is *BT Trustees*. Here the appeals were against closure notices. The FTT's jurisdiction was given by para 9(7) of sch 1A TMA (set out above at paragraph [29]). That entitled the FTT to determine if the claims for tax credits "should have been allowed". The Court of Appeal held that that was limited to the question whether the claims should have been allowed as a matter of tax law, and as not extending to the question whether the taxpayers should have been allowed the benefit of the extra statutory concession. That must on analysis have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 135 (TC).

[33] However we do not read the Court of Appeal in *BT Trustees* as having laid down any general rule as to the FTT's jurisdiction applicable in all cases. It is noticeable that in relation to Sales J's judgment in *Oxfam* they said (at [141]):

> 'We have heard no argument about s. 83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section.'

That confirms that they viewed the question whether Sales J was correct on s. 83(1) VATA as a question of interpretation of that section. His view that s. 83(1) was wide enough to include the question of public law argued before him (had HMRC acted in breach of a legitimate expectation?) is to be contrasted with the view of the UT in *Noor* that the jurisdiction of the FTT under s. 83(1) was limited to the amount of input tax as a matter of the VAT legislation. Like the Court of Appeal in *BT Trustees* we do not propose to express a view on the jurisdiction of the FTT under s. 83(1), which does not arise in the present appeal; but it can be seen that what is in issue is the correct interpretation of that provision."

101. In *Caerdav v HMRC* [2023] UKUT 179 (TCC) the Upper Tribunal considered the line of authority relied upon by Ms McArdle held that there was no discretion involved in respect of a decision relating to the "importation of goods" element of section 83(1)(b)

VATA. The Upper Tribunal therefore found there to be no jurisdiction for the FTT to consider legitimate expectation arguments in that case but stated as follows at [152] to [155]:

> "[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* [*Zeman*] 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 [Zeman]*:
>
> > '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 [Zeman]* 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."

102. Even though Ms McArdle is right in submitting that the FTT holds no inherent or general public law jurisdiction when considering or determining appeals, all *Zeman* states is that the FTT's jurisdiction is defined by the terms of the statutory provision which is the gateway to the appeal or review. This is not to confer upon the FTT a general public law jurisdiction.

103. As a matter of simple statutory construction we have found that s.16(5) FA 94 incorporates s.16(4) and does confer upon the FTT the jurisdiction and power to consider the reasonableness of HMRC's discretionary decisions on waiving conditions as part of an appeal against a drawback entitlement decision under section 13A(2)(e) FA 94. That does not require us to find that the FTT has jurisdiction to consider legitimate expectation arguments or other public law grounds such as abuse of power etc. The FTT did not decide as much as part of the Decision.

104. It is not necessary therefore to analyse all the antecedent caselaw on the extent or otherwise of the FTT's public law jurisdiction. Subsection 16(5) FA 94 entitled the FTT to consider both whether the drawback conditions under the EGDR, incorporating EN207, were satisfied as a matter of fact and law but also whether HMRC's exercise of discretion to refuse to waive those conditions under Regulation 7(1)(a) was reasonable.

105. This ground of the cross appeal is dismissed.

Ground 2 – Waiver of time limit for drawback claim (see [6] above).

The Law

106. As set out above, Regulation 7(1)(a) & (6) of the EGDR make relevant provision in relation to claims for excise duty drawback. Regulation 7(1)(a) provides HMRC with the ability to waive or otherwise allow claims despite non-compliance with conditions imposed by the Regulations. Regulation 7(6) provides that, "(6) No claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid."

HMRC's original and review decisions

107. HMRC's original decision dated 2 September 2021 was made by Officer O'Rourke. It addressed the time limit refusing the claim for drawback as it was made outside of the Regulation 7(6) three-year time limit and there was a failure to satisfy other EGDR conditions. The officer did not consider there was a good reason to waive the time limit condition pursuant to Reg. 7(1)(a) for the reasons he explained:

> "Time limits to Claiming Drawback
> HMRC do have discretion set by Regulation 7(1)a of Excise Goods (Drawback) Regulations 1995, to exceptionally waive the above Regulation 7(6) of the Excise Goods (Drawback) Regulations 1995
>
> > 6. No claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid
>
> For discretion to be met, an explanation as to why the event did not occur before the three years limit was reached would have to be submitted. You have not supplied details of any circumstances that may have prevented a claim being made within the three years of UK duty being paid. When asked as to why the goods were not dispatched/moved or sold you referred me to your letter of 15 November 2019.
>
> In your letter you have said that from the end of May 2014, the claimant liaised with HMRC via its representative Alan Powell to seek options to recover the excise duty. These options included a repayment of the duty as overpaid or drawback via destruction. Eventually this matter was taken to the First Tier Tax Tribunal and was subject to a number of extensions and delays, including on request of HMRC. This appeal was withdrawn in August 2019.
>
> I do not consider that circumstance would have led to such a delay. In their letter dated 8 May 2014 from the claimant, Drinks & Foods UK Ltd (DFUK) to HMRC, they stated that their intention was to sell some of the goods in the UK, with the remaining stock returned to Germany. Officer Lucy Fisher in her letter dated 6 May 2016, did clearly inform the claimant that there was there is no basis for repayment of any of the duty accounted for by the excise assessment issued on 01 May 2014. Also provided HMRCs view that regulation 7(1)(a) of the Excise Goods (Drawback) Regulations 1995 does not give the Commissioners a discretion to dispense with any of the eligibility requirements and as a result, a claim to drawback on planned destruction may only be considered if the eligibility criteria are met.
>
> In your letter of 15 November 2019, you confirmed that a portion of the goods have been sold. It is my view that the reason that the goods were still in the UK up to being dispatched/exported is a commercial decision.

DFUK did not dispatch the goods as stated in their letter dated 8 May 2014 neither were all the goods sold. It is my view that DFUK's decision to keep the goods in the UK a purely commercial decision. DFUK then decided to dispatch their stock to Holland starting December 2020, again another commercial decision.

Conclusion:
I refer now to the email dated 27 December 2019 from the National Drawback Centre advising you that all other drawback conditions and requirements must be fully met to the Commissioner's satisfaction:

Excise notice 207, para 14.2: The circumstances when we will reject your claim:

• You have not complied with all of the conditions or procedures set out in this notice or notified by us in writing - this includes not complying with the relevant period of notice.

After reviewing your claim, as I have detailed in my letter, I conclude that you have not complied with all of the conditions or procedures set out in notice 207.

The claim also fails Regulation 7(6) of the Excise Goods (Drawback) Regulations 1995

6. No claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid.

As the claim fails to meet the above regulation and fails to meet all the conditions or procedures set out in excise notice 207, the claim is rejected on these grounds.,,"

108. HMRC's review decision was made by Officer Ramsay and dated 24 November 2021. It addressed the Appellant's claim being made outside the three-year time limit and considered the correspondence of Officer McKirdy dated 27 December 2019 as follows:

"…
As regulation 7(6) is a condition of the EGDR 1995, discretion by virtue of regulation 7(1) can be applied. This permits HMRC, if they wish to do so, to waive conditions in exceptional cases, however before applying this discretion, HMRC must be satisfied that the goods and claimant are eligible to drawback.

Officer McKirdy contacted Mr Thornton on 27 December 2019, advising that no drawback claim can be made if the event (giving rise to the claim) was more than 3 years after the duty was paid. which in this case was paid on 5 June 2014. However, the reply went on to say, if Drinks and Food UK Ltd were able to show that the goods detailed in the drawback claim were the same goods as those listed in the assessment and all other conditions were met to HMRC's satisfaction, then a claim can be considered.

A drawback claim DR1444520 for £385,165.31, was submitted on 13 May 2020.

For HMRC to exercise their discretion, they must be satisfied that all the remaining drawback conditions have been met and, in this case, satisfied that: -

…

Other factors

…

Both of these factors [the failure to notify a change in date for some of the goods exported and failure to comply with the DSR in relation to the duty stamp obliteration] add further weight to rejecting the claim, as all the drawback conditions must be met for the claim to be successful. After considering the information above, I do not believe the company have met these conditions to HMRC's satisfaction.

In addition to failing to meet the required conditions, the company have not supplied any information why the goods were not despatched, sold or removed within the 3-year time limit. When questioned on this matter, Mr Thornton directed Officer O'Rourke to his letter of 15 November 2019, this letter does not provide any specific details for the delay. It simply states that a portion of the goods has been sold. I have also noted that previous correspondence from the company, indicated the remaining goods were to be return[ed] to Germany.

I am in agreement with Officer O'Rourke for HMRC to exercise discretion, there must be exceptional circumstances. As explained above the company did not meet the conditions to HMRC satisfaction nor did they provide any details why the goods remained in the UK for 6 years. The legislation and guidance state, a drawback claim must take place within 3 years of the UK excise duty being paid, evidence to support the claim provided and all conditions are met.

After considering Mr Thornton ground for dispute, I am satisfied the company were advised in December 2019. what steps they needed to take to ensure the drawback claim was successful. I have also considered Officer O'Rourke's letter of 2 September 2021, which gives his reasoning for refusing the claim, I have nothing further to add to it nor have I found any evidence that he has not followed HMRC's guidance and processes.

In accordance with legislation and paragraph 14.2 of Excise Notice 207, the company have failed to comply with all the conditions and the claim has been rejected.

My conclusion

Regulation 7(6) of EGDR 1995 is very clear on its requirements, no claim for drawback shall be made if the event giving rise to the claim occurred more than three years after the duty on the goods in question was paid.

HMRC can by virtue of regulation 7(1) of EGDR 1995, can if they wish to do so, exercise discretion. This allows them to waive conditions in exceptional cases, however before applying this discretion, HMRC must be satisfied that the goods and claimant are eligible to drawback.

Drinks and Foods UK Ltd were advised in November 2019, that a drawback claim would be considered if all the other remaining conditions were met. The company failed to provide the required evidence and by doing so failed to comply with the conditions. Therefore, it is not appropriate for HMRC to exercise their discretion in this case.

The decision issued by Officer O'Rourke on 2 September 2021 refusing the drawback claim DR-144520 in the amount of £385,165.31 is upheld."

The FTT Decision

109. As we have noted at the outset the Appellant's claim for drawback was not made until April 2021, having been notified in 2020, yet the excise duty on the goods was paid some seven years earlier in 2014. Nonetheless the Appellant relied on the nature of the correspondence it had had with HMRC in 2019 as to whether the three-year time limit in Reg. 7(6) EGDR might have been waived. The FTT first considered the nature of the correspondence in dispute at [24]-[26]:

"24. In late 2019, he wrote to HMRC. The letter stated:

"Pre-notification of drawback claim and advance request for waiver of condition

We write in relation to an intended forthcoming claim on behalf …[DFUK]. In order to process this claim, DFUK will need the advance confirmation from the Commissioners that the [time-limit] condition imposed by Regulation 7(6) of the [EGDR] be waived. …

[a full background to the history is then set out together with relevant law]

We do not ask the Commissioners to decide the claim itself in advance or to comment on or decide the applicability of the other conditions. DFUK otherwise expects to be able to meet all domestic and EU conditions governing drawback, therefore this request is limited in scope and reasonable in the circumstances".

25. The letter was sent under a covering email which stated:

'… As per the attached, I am trying to help a company to deal with a large amount of goods that has [sic] been stuck in the UK for some years and the only issue is the condition relation to the amount of time that has passed since the duty was paid. If that condition can be waived, we can proceed to assist with the normal drawback procedure.'

26. After a nudge from Mr Thornton HMRC responded, on 27 December 2019, in the following terms:

'I have received a response from the Drawback policy team. They have said that the Drawback Centre can consider a Drawback claim in this situation even though the condition stated in [EGDR] regulation [7](6) … has not been met.

However, the claimant would have to show that the goods subject to the drawback claim are the same ones that were subject to the assessment on 1/5/14 (paid 5/6/14)

Also all other drawback conditions and requirements must be fully met to the Commissioners' satisfaction…'"

110. The FTT then decided at [27]-[30] that HMRC's email dated 27 December 2019 assured the Appellant they had agreed to waive the three-year time limit in Reg. 7(6):

"27. Mr Thornton considered that the email of 27 December 2019 amounted to a waiver of the time limit condition in regulation 7(6) EGDR. Before us HMRC contended that it was not a waiver and that the time limit condition would be waived only were the Appellant to meet the other conditions for drawback.

28. There is a degree to which the difference between the parties in this regard is semantic as, in order for there to be a valid claim for drawback, the EGDR conditions (including those prescribed in a notice) must be complied with unless "otherwise allowed" by HMRC even if the time limit has been waived.

29. We did not have the benefit of any evidence from the author of the 27 December 2019 email but, in any event, we considered whether there was or was not a waiver of the time limit as a matter of construction of the email in context.

30. In that regard, and as communicated during the hearing, we consider that the only reasonable construction of the 27 December 2019 email is that there was a waiver of the regulation 7(6) time limit i.e. that HMRC would not refuse an otherwise compliant claim solely on the basis that it had been made outside the three-year time limit. We reach this view for the following reasons:

(1) Without waiver of the time limit there was no basis for a drawback claim at all as the excise duty which was the subject of the claim had been paid more than three years prior to the export event giving rise to a potential drawback claim.

(2) Mr Thornton's letter was clear that in order to begin the process of formulating and making the claim a waiver of the time limit was required.

(3) Full facts were explained to justify a waiver. The letter was clear that it was focused only on a request for waiver of the time limit. Mr Thornton considered, at that time, that all other conditions would be met at the point a claim was submitted.

(4) HMRC's response said the relevant decision maker "can consider a drawback

claim even though the condition stated in [EGDR] regulation (6) … has not been met".

(5) In light of Mr Thornton's indication that he was not seeking waiver of any other condition HMRC reiterated that the claim must otherwise meet the conditions and requirements for drawback."

111. The FTT relied on its conclusion at [30] that "HMRC would not refuse an otherwise compliant claim solely on the basis" of the time limit to allow the appeal in part in respect of duty on goods where the other drawback conditions were satisfied at [71]- [74]:

"71. There can be no question that the three-year time limit is a condition which restricts the right of a claimant unless waived by HMRC.

72. However, as set out in paragraph 30. we have found that there was a waiver of the time limit condition.

73. We consider that it is plain from the terms of EN 207 (in both versions) that HMRC have the power to reject or reduce a claim. The power to reduce a claim arises, as set out in EN 207 where "… the conditions and requirements of this notice and EGDR for some, and not all, of the goods declared on the NOI and drawback claim form". Where the conditions and requirements are all met for part of the claim HMRC indicate that the compliant part of the claim will be met. To do so, in our view, meets the UK's obligations under Article 33(6) Council Directive 2008/118/EC.

74. Accordingly, we find that the Appellant's drawback claim was valid as regards £9,695.27 and HMRC were wrong to reject that part of the claim. We therefore allow the appeal in respect of this sum."

112. The FTT also concluded that HMRC had acted unreasonably in relying on the failure to comply with the three-year time limit when refusing the drawback claim in its entirety because the conditions had otherwise been complied with in relation to part of the claim. The FTT held at [154]-[157]:

"155. The Appellant contends that the claim was refused because HMRC considered the event giving rise to the Claim occurred more than three years after the date of payment of the relevant duty. It contends, in view of the terms of the email dated 27 December 2019, it was unreasonable to reject the claim on that basis.

156. HMRC contend that the claim was rejected because various conditions had not been met and that the terms of the 27 December 2019 email required those conditions to be met before the time limit would be waived.

157. On the basis that we have found that there was a waiver of the time limit condition we consider that rejection of the claim in its entirety is unreasonable. Exercising our full appellate jurisdiction we have already allowed the appeal in respect of those parts of the claim which are unaffected by the Appellant's failure to ensure that the duty stamps were obliterated in accordance with the DSR and the failure to provide evidence of export."

HMRC's submissions

113. Ms McArdle submitted that the FTT erred in law in finding or interpreting HMRC's email dated 27 December 2019 to constitute a promise or agreement to waive the three-year time limit. The correspondence neither provided an unconditional waiver nor a conditional one – that the time limit would be waived so long as the other conditions of entitlement to drawback were met.

114. Therefore, in either event, she contended that the FTT erred in deciding it was unreasonable for HMRC to rely on the claim being made outside the three year time-limit as a reason for refusing it. Even if HMRC had stated that they would waive the time limit so long as the other conditions for drawback were met, the Appellant had not met them so the waiver could not apply.

115. Ms McArdle relied upon the fact that the Appellant's argument is and was framed, as HMRC acting unreasonably by relying upon the time limit in isolation rather than in breach of any legitimate expectation. The Appellant did not argue before the FTT (although it had on requesting a review) that HMRC's email of 27 December 2019 gave rise to a legitimate expectation that the drawback claim would not be refused on the basis of the time limit. Rather the Appellant argued it rendered the refusal of the drawback claim unreasonable, or an unreasonable exercise of discretion.

116. Nonetheless, she argued that the same test in law would apply as to whether HMRC had made a plain and unambiguous promise or statement - "it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification" (p1559, *R v Inland Revenue Commissioners Ex parte MFK Ltd* [1990] 1 WLR 1545). While that test was laid down in the legitimate expectation context, equally it would be unreasonable for the purposes of s.16(4) FA 94 for HMRC to act contrary to a clear and unambiguous written statement or promise given to a taxpayer (whether or not relied upon by the taxpayer to their detriment). There does not appear to have been any dispute before the FTT that the Appellant did rely upon the correspondence from HMRC and did subjectively believe that an assurance had been given that the time limit had been waived if the other EGDR conditions had been met.

117. She argued that the email cannot be read as giving any positive or unambiguous assurance that HMRC would not refuse the drawback solely on the basis of the time limit. The FTT erred in its interpretation or construction of the correspondence and the meaning of HMRC's email. Alternatively, she submitted that such a finding or interpretation was not open to the FTT - it was a conclusion not properly open to a decision-maker on these facts. On any reasonable reading of the email of 27 December 2019 the FTT erred in finding or construing the correspondence as HMRC giving an assurance that they would not rely on the time limit to refuse a claim.

118. Ms McArdle argued the officer's email did not give a plain and unambiguous assurance to the Appellant that the time limit was waived nor that the drawback claim would be granted so long as the conditions for the claim were met. The relevant parts of the email stated:

> "…[HMRC's] Drawback Centre can consider a Drawback claim in this situation even though the condition stated in regulation [7](6) [the three year time limit] has not been met.
>
> However, the claimant would have to show that the goods subject to the drawback claim are the same ones that were subject to the assessment on 1/5/14 (paid 5/6/14)
>
> Also all other drawback conditions and requirements must be fully met to the Commissioners' satisfaction"

119. She submitted that the FTT's interpretation did not accord with the clear or unambiguous meaning of the email's words. The natural or ordinary meaning of the phrase stating that HMRC "can consider…in this situation" cannot properly be construed as being a promise "to allow" or "grant" the drawback claim or the waive the time limit,

if the goods could be shown to be the same ones and other conditions of drawback had been met. The wording provides a statement, assurance or promise that HMRC 'can consider' an out of time claim if these other conditions were met. There is nothing else in the context of the other paragraphs of the email or other correspondence between the Appellant and HMRC which would render a different interpretation to the email of 27 December 2019 than the ordinary words. The fact that the later paragraphs of the email went on to specify that other conditions needed to be met did not imply that HMRC was promising to waive the time limit if they were met, only that they were promising to 'consider' waiver of the time limit in those circumstances.

120. Ms McArdle contended that on an ordinary, natural and reasonable reading of the terms of the email, it was an assurance that HMRC 'can consider', (i.e it would be open for HMRC to consider) a drawback claim made out of time either unilaterally or if other conditions were met (and proof of the same goods being the subject of the claim as those upon duty was paid). This would accord with the discretion in Reg. 7(1)(a) for HMRC to otherwise allow or waive a condition in the regulations being applied such as the three-year time limit in Reg. 7(6).

121. She rejected Mr Thornton's argument that HMRC's interpretation means that the communication did no more than state the law and thus it was useless to the Appellant as it was already aware of the law. It is true that the email reaffirmed the existence of the discretion to waive the time limit but HMRC are not required to do more and give advance or binding advance indications or advice as to the future decisions they will make. The terms of the email did not permit the FTT, directing itself properly, to consider that there was an unequivocal waiver pursuant to Reg. 7(1)(a) of the time limit condition in Reg. 7(6) so long as the other conditions were complied with.

122. Ms McArdle noted that the FTT relied on five reasons at [30] for its interpretation and it is right to note that the Appellant was seeking as part of its correspondence a specific assurance that the time limit condition would be waived. However, the terms and purpose of the Appellant's request to HMRC and the overall context of the correspondence does not alter or change the plain and ordinary meaning of HMRC's reply.

123. HMRC throughout retained the power under Reg. 7(1)(a) to waive non-compliance with any and all conditions of a drawback claim. Therefore, the Appellant's alternative interpretation of the words, as constituting a promise to grant or allow a drawback claim if EGDR conditions other than the time limit were met, would equally cause the unlawful fettering of HMRC's discretion. To make such a promise would bind the future decision-maker, who would have all the information and evidence in support of the claim, in considering the claim whereas the initial team offering such a 'promise' could not be aware of the full circumstances of the case. It would therefore be surprising if HMRC would do so.

124. Thus, on the proper interpretation of the correspondence of 27 December 2019, HMRC's assurance would have allowed HMRC to consider the Appellant's claim out of time but decide, as it did in the original and review decisions, that the claim should not be granted as no good reason had been provided for making such a late claim. Further and in any event, even if a conditional waiver had been granted by HMRC the Appellant had failed to comply with the other conditions of making the claim so it would not be unreasonable for HMRC to rely on the time limit for refusing the claim. Of course, HMRC's discretion to refuse to waive the time limit condition would have to be exercised

rationally but the original and review decisions included rational reasons for the refusal – the lack of good reason for the lateness of the claim.

125. She also rejected Mr Thornton's suggestion that the FTT erred and that HMRC was required to call evidence from the author of the email of 27 December 2019 as to its meaning. The law requires an objective reading of the correspondence as to its natural meaning and not evidence as to the subjective intentions or understandings of the parties engaging in the correspondence. Documents of this nature are to be interpreted objectively, considering their ordinary English meaning and how a reasonable person would understand the words used (see for instance the case law on legitimate expectation).

126. What the email's author might have had in mind has no bearing on the outcome. Even if the FTT had jurisdiction to consider a reasonableness challenge on appeal, the only evidence that would be relevant would be that from the original and review decision makers. The approach of HMRC's decision makers Officers O'Rourke and Ramsay was in issue in the light of the email's content, not the subjective views of Officer McKirdy, the email's author. Both officers properly considered the terms of the email. As HMRC made clear before the FTT at [57], Officer McKirdy was not approached to give evidence given her subjective opinion's lack of relevance. There was no scope for an adverse inference as there was a perfectly normal explanation for her absence as a witness. See *Wisniewski v Central Manchester HA* [1998] PIQR p324, at p.340: "(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified".

127. Further, there is no dispute of fact as to the content of the email which the officer could add to, or the communications preceding it. If, as a matter of fact, the words printed amount to a waiver without caveat, it does not matter if the author did not intend that, and if she intended no caveat, but the words include one, her intention is irrelevant and the caveat applies. Officer McKirdy's decision making was not challenged in the FTT and there would be no right of appeal from it.

128. Ms McArdle therefore submitted that the FTT erred in finding or interpreting the meaning of the correspondence as HMRC unambiguously waiving the time limit or conditionally promising that it would waive the time limit if the other conditions were met.

Discussion and Analysis

129. As we have explained above, the FTT was entitled to consider the reasonableness of HMRC's original and review decisions that the drawback claim should be refused.

130. The Appellant's drawback claim was made in 2021, seven years after it had paid the excise duty on the goods in 2014 and four years after the three-year time limit in Reg. 7(6) EGDR expired. In both decisions, HMRC's primary basis for refusal was that the claim was made outside the three-year time limit which it would not waive. In their original and review decisions HMRC relied upon the Appellant's lack of good explanation for its late drawback claim in exercising the discretion not 'to otherwise allow' the claim. The lateness of the claim was an independent ground for refusal additional to reliance on the Appellant's non-compliance with other EGDR conditions.

131. The FTT decided that HMRC had agreed to waive the three-year time limit by virtue of the contents of Officer McKirdy's email of 27 December 2019 - see [30]: "that HMRC would not refuse an otherwise compliant claim solely on the basis that it had been made outside the three-year time limit". In respect of that part of its claim where the other EGDR conditions had been satisfied, the FTT decided that the Appellant was entitled to the drawback of excise duty (see [71]-[74]).

132. Further, the FTT decided HMRC had acted unreasonably in relying upon the time limit in isolation or as an additional ground on which to refuse the total claim in its original and review decisions (see [155]-[158]).

133. We agree with Mr Thornton, for DFUK, that the FTT did not err in finding or construing the terms of the 2019 correspondence to constitute a waiver by HMRC of the three-year time limit for making a claim. It was both within the range of findings open to the FTT to make and a proper interpretation of the correspondence in context. The FTT was not required to apply the test pertaining to legitimate expectation nor find that the email made a clear and unambiguous statement or promise. The FTT was simply required to find or construe the ordinary and natural meaning of the email and then determine if HMRC's decision to refuse the claim was unreasonable in light of this meaning.

134. When construing the meaning of HMRC's email, the FTT rightly took into account the whole context of the correspondence, including the findings of fact it laid out from [23] to [26] of the Decision**.** The parties' competing views were set out at [27] and the lack of any evidence from the author of the email as to its meaning was acknowledged at [29]. The FTT confirmed at [29] that it considered the email of 27 December 2019 in its context. The FTT found at [30] that the email from HMRC's officer confirmed that an otherwise compliant claim would not be rejected solely on the basis of the failure to satisfy the Reg. 7(6) time limit condition i.e. that the time limit condition had been waived.

135. Ms McArdle's best point is that the email only states that HMRC 'can consider the Drawback claim in this situation' rather than 'will grant' or 'allow' the claim. However, the proper interpretation cannot hang on the choice of the word 'consider' alone. The email should not be read as if it were a statute. We are satisfied that the word 'consider' had the natural meaning the FTT found in the context. The use of the word 'consider' did not mean that HMRC would only consider whether to waive the time limit, it meant it would consider the claim notwithstanding it being made out of time. HMRC could not promise to 'grant' or 'allow' the claim in advance because it would not know if the other conditions had been met until it had been submitted, together with any supporting evidence.

136. The words "can consider" must be read in the context of the whole sentence, complete email and correspondence as a whole. First, the whole sentence accepted the premise that the time limit had not been complied with but HMRC had considered the specific facts of the case, "this situation", and were prepared to consider it: "… the Drawback Centre can consider a Drawback claim in this situation even though the condition stated in [EGDR] regulation [7](6) … has not been met."

137. Second, the later paragraphs of the email went on to specify that other conditions needed to be met, "However the claimant would have to show…". This reasonably implied that HMRC was promising to waive the time limit even though the claim was made late.

138. Third, the correspondence as a whole was premised on the basis that the Appellant was requesting that the time limit be waived so as to avoid any more work being done on the claim it would fall at the first hurdle. That was the very question Mr Thornton had asked of HMRC in his covering email and letter. An assurance that HMRC could consider the out of time claim but nothing more would do no more than restate the discretion afforded to HMRC by virtue of Regulation 7(1)(a), be of no value and not answer the question posed.

139. In light of the correspondence read as a whole, we find no error in the FTT's interpretation of the email dated 27 December 2019: that HMRC did waive the time limit. HMRC said they could "consider the claim…in this situation", even though the three year time limit was not met. HMRC could not say they would accept or grant the claim, as the claim had not yet been submitted and had to be made good; hence the use of the word "consider". This does not mean that HMRC would "consider whether to waive the three year time limit". Instead, the preferable interpretation is that HMRC were stating that they would consider the claim notwithstanding the fact it was made outside the three-year time limit provided by Reg. 7(6).

140. Furthermore, the reference in the email to the other conditions for drawback needing to be met was not placing any condition upon the waiver of the time limit that meant the time limit would only be waived if the other drawback conditions were satisfied. Interpreting the email as a conditional waiver would result in the fettering of HMRC's discretion: only to waive the time limit based on the satisfaction of other conditions. It would not accord with the law - HMRC always retain a general discretion to waive the time limit independently of other conditions by virtue of Reg. 7(1)(a) - just as HMRC have the power to waive each of the other conditions upon independent consideration. Purporting only to grant a conditional waiver would have bound the hands of a future decision maker who would have been in receipt of the full claim and evidence in support. For HMRC to state that they would only 'consider' as opposed to 'grant' the claim made outside of the time limit only so long as the other conditions were met might have restricted the wide or general discretion given to HMRC in Reg. 7(1)(a) which would permit HMRC to waive any and all conditions.

141. The preferable interpretation of the statement in the email that other conditions needed to be met is simply that HMRC were acknowledging the fact that the Appellant had specifically not asked HMRC to waive any of the other conditions. HMRC were not being asked to 'otherwise allow' the claim despite those conditions not being met. Mr Thornton had said that the Appellant would be able to comply with the other conditions. Thus, HMRC were simply reminding the Appellant that other conditions needed to be met, no waiver having been sought.

142. HMRC would have had the power to impose other conditions in writing directly to DFUK or to all taxpayers by way of public notice under Regs. 7(1)(b) or 7(2). However, these would not enable a conditional waiver: the power to impose conditions as to when a waiver would be exercised. These regulations would enable a power to impose new standalone conditions that would also have to be met in order for a claim to be allowed. However, the powers could not be exercised to define the circumstances which must be met in order to waive a different condition or that would likewise fetter HMRC's discretion.

143. The FTT gave good reasons in support of its interpretation of the correspondence at sub-paragraphs to [30]. Each of these recognised the central importance of the time limit condition imposed by Reg. 7(6) EGDR:

a. Without it there could be no claim at all.

b. Before further work would be conducted, the taxpayer needed the certainty of knowing the time limit had been waived.

c. The Appellant's letter set out everything that was required to address the time limit waiver itself and all other conditions were expected to be met at that time.

d. Although there could be no potentially valid claim at all without a waiver, HMRC confirmed that a drawback claim could be considered 'in this situation'.

e. Due to the fact that no other waiver had been sought, the reference to other conditions was not making the waiver subject to the fulfilment of other conditions but simply a reminder that they should be met.

144. Taken together in the context of the whole correspondence, the FTT was right to form the view set out at [31], which is the one that the Appellant had understood from the correspondence. The email of 27 December 2019 was a statement or promise that the Appellant's non-compliance with the time limit would not form the basis on which the claim would be refused. This was the rational and preferable interpretation. Without it, HMRC's response might have been considered to be misleading or unclear. DFUK already knew that the time limit could be waived. That much is apparent from the Reg. 7(1)(a) EGDR. DFUK needed to know that its further work in preparing the claim could be justified and accordingly needed to know that the time limit was waived.

145. We therefore reject HMRC's potential interpretations of the email as either being no waiver of the time limit condition or only a conditional waiver.

146. We also note that in HMRC's original and review decisions both Officers refused to waive the time limit because the Appellant had not established exceptional circumstances or reasons for the late claim. Mr Thornton objected to this. The test of exceptionality before a condition for drawback might be waived is not to be found in statute nor the EGDR nor any public notice nor HMRC's guidance. However, nothing turns on it in this case, because the decision-making officers considered the explanation given by the Appellant for the delay and gave full reasons for deciding that the explanation was not good. Therefore, the full facts were considered and HMRC did not unnecessarily restrict the exercise of its discretion to a case where exceptional circumstances were established. Nonetheless, the FTT was entitled to find that reliance on the claim being made out of time was unreasonable in light of the email of 27 December 2019 whereby it had given advance indication that it would consider the claim even though it was late.

147. We agree with Mr Thornton that the FTT correctly interpreted the email according to its proper meaning in context, and that the conclusion reached is one that the FTT was open to find on the evidence. We recognise that the FTT did not have the benefit of any evidence from the author of the email, Officer McKirdy. HMRC chose not to call her on the basis that the challenge was to the original and review decisions refusing the claim which were made respectively by Officers O'Rourke and Ramsay.

148. We also recognise that HMRC's decision-making officers appear to have interpreted the email differently when addressing it in their decision letters. Officers O'Rourke and

Ramsay do not appear to have considered the email to prevent them from relying on the time limit as a basis on which to refuse the claim. However, the decision letters do imply that the officer accepted there that there was such a waiver but it was conditional on the Appellant satisfying the other conditions for drawback. For instance, the review decision states relevantly:

> "…However, the reply [email of 27 December 2019] went on to say, if Drinks and Food UK Ltd were able to show that the goods detailed in the drawback claim were the same goods as those listed in the assessment and all other conditions were met to HMRC's satisfaction, then a claim can be considered. …For HMRC to exercise their discretion, they must be satisfied that all the remaining drawback conditions have been met…"

149. In the event, in the appeal before the FTT HMRC relied on a statement from Officer O'Rourke, which was read as agreed, but not Officer Ramsay who made the review decision. Further, it is recorded by the FTT that, for the purposes of the appeal, HMRC had accepted there was a waiver of the time limit but argued it was conditional on the Appellant satisfying the other conditions for drawback.

150. However, evidence as to how the email was meant or understood by the officers is not determinative in any way because the meaning of the correspondence is to be interpreted on an objective basis rather than by reference to the subjective understanding of either party.

151. The FTT made no error of law in deciding that HMRC had given an assurance that they would not rely on the non-compliance with the time limit as a reason to refuse the claim. The FTT therefore made no error in finding that the HMRC acted unreasonably in relying on the lateness of the claim, and lack of good reason for the delay, as a material ground on which to refuse it.

152. This ground of the cross-appeal is dismissed.

Ground 1 – Procedural irregularity (see [6] above).

HMRC's submissions

153. Ms McArdle submitted that the FTT erred in law, committing a serious procedural irregularity, by deciding that HMRC had waived the time limit for the Appellant to make the drawback claim without first receiving oral submissions from HMRC during the hearing. She argued that during the hearing, following the Appellant making oral submissions on the issue as to whether the email of 27 December 2019 amounted to a waiver of the time limit condition, the FTT Judge stated from the bench to the Appellant's representative: "You have won on that, you have won on the facts of that."

154. She argued that the Judge announced in clear language that the email did consist of a waiver of the time limit. This was notwithstanding the fact that this determination had been made before HMRC had an opportunity to make any oral submissions on the issue. The point as to whether there was a waiver was strongly disputed. She submitted that this was a clear case of an issue being decided against a party before it was given the opportunity to be heard on it. Thus, there was a serious procedural irregularity. She contended that the Decision acknowledged that this pre-determination occurred, as it includes the following passage at [30]:

> "In that regard, and as communicated during the hearing, we consider that ..."

155. Ms McArdle also submitted that the FTT's refusal of permission on this Ground of Cross-Appeal also accepts that this occurred at [8]:

> "It is correct that Ms Gable and I determined how, factually, the email of 27 December 2019 should be interpreted. We did so in the hearing, and after consideration of its terms…We carefully considered the correct interpretation of it and gave an ex-tempore decision of our factual finding, thus framing the basis for submissions on the effect of our finding."

156. She contended that the FTT had not taken issue with the factual premise of this ground, and it was supported by the contemporaneous notes of HMRC: the matter was determined before the oral submissions of HMRC were made.

157. Ms McArdle argued that there is no good argument in defence of there being a procedural irregularity. The fact that HMRC had filed a skeleton argument could not cure the error. The FTT opted for an oral hearing, began hearing the Appellant's submissions, and pre-decided the issue without giving HMRC the opportunity to be heard. At no time did HMRC "recommend" or otherwise endorse the FTT making a decision on any issue before hearing their oral submissions on the point.

158. She rejected the Appellant's argument that there was no unlawfulness because HMRC had not objected during the course of the hearing. She accepted that an advocate should object when a Judge "is proposing to take an inappropriate course". However, the FTT in this case gave no forewarning that it was planning to pre-determine the issue. The determination was simply announced, without any warning, during the hearing. She suggested that HMRC cannot possibly be expected to have anticipated that a breach of natural justice was about to occur and to have objected in advance. Had they known it was planned, they would have strenuously objected. In any event she did seek to change the mind of the Judge in submissions to no avail. The decision had already been made, before HMRC were heard on the matter orally.

159. Ms McArdle contended that, given this serious procedural irregularity, the decision on waiver of time limits should be set aside and re-made by the UT or remitted to a freshly constituted FTT.

Discussion and Analysis

160. There is no need for us to record the Appellant's submissions on this ground nor make any determination upon it in light of our conclusion on Ground 2 above. It is not necessary to decide whether there was a procedural error in circumstances where we have been able to consider and decide the substantive issue for ourselves following full argument from both sides.

161. We should only note this. HMRC's submissions to the FTT recorded in the Decision are more limited than those made before us on the cross-appeal. Nonetheless, it does not seem to be in dispute that HMRC did not make any oral submissions to the FTT on the issue of waiver, whether on an unconditional or conditional basis.

162. On the cross-appeal HMRC have submitted that there was no waiver at all, but if there had been, it was only on a conditional basis. They have had permission to argue this ground before us and there could be no objection to them doing so. We have dealt with it above.

163. We now turn to consider the appeal.

THE APPEAL

Ground 1 – Compliance with de-stamping obligations (see [5] above).

HMRC's decisions refusing the drawback claim

164. The FTT was considering an appeal against HMRC's decisions to reject the Appellant's claim for drawback on the basis of a number of reasons. HMRC's original decision included a reason that the Appellant had failed to provide evidence that the duty stamps were obliterated in accordance with the DSR and also failed to show that appropriate notice of obliteration had been given. HMRC's review decision on this topic only referred to a failure to provide confirmation that the obliteration had been carried out in line with guidance.

The Law

165. Regulation 7(1)(b) of The Excise Goods (Drawback Regulations) 1995 ("EGDR"), provides relevantly in relation to claims for Excise Duty drawback that claimants must comply with conditions set out in public notices:

> "7.— (1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the Act, every eligible claimant shall—
>
> (a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and
>
> (b) in addition to those conditions, comply with such other conditions as the Commissioners see fit to impose in a notice published by them and not withdrawn by a further notice.
>
> … ."

166. There is no dispute that EN207 is a public notice for the purpose of Regulation 7(1)(b) of the EGDR (in this appeal there is no material difference between the 2019 and 2021 editions of the notice which variously applied). Consequently, the question arises as to whether any condition in EN207, as prescribed by Parliament, is required to be complied with for entitlement to excise duty drawback. Paragraph 4.5 of EN 207 provides (and provided at all material times):

> "4.5 Actions required if goods carry fiscal marks or duty stamps
>
> …
>
> Before you can claim drawback on spirits bearing duty stamps you must first obliterate the duty stamps in accordance with the Duty Stamps Regulations… Note that at least 2 clear business days' notice is required before you obliterate the stamps. You can find out more information about duty stamps in Notice DS5…"

167. The Duty Stamp Regulations 2006 ("DSR") as referred to in paragraph 4.5 of EN 207 make relevant provision as to the manner of obliteration in Regulation 2(3) and other requirements for notification and recording of the obliteration in Regulation 24.

168. Regulation 2(3) defines obliteration of a duty stamp as requiring that the words "for the UK market" be completely removed, obscured (by an indelible dye or ink) or covered by a label that cannot be removed without destroying the stamp. Regulation 2(3) states:

"(3) For the purposes of these Regulations, a retail container of alcoholic liquor is to be treated as unstamped if it bears a duty stamp that has been obliterated.

A duty stamp has been obliterated if, but only if—

(a) the words "For the UK market" have been completely removed from it,

(b) it has been completely obscured by an indelible dye or ink, or

(c) it has been completely covered by a label using an adhesive that prevents that label from being removed without also destroying the stamp."

169. Part 4 DSR provides detailed rules for the affixing and obliteration of duty stamps. Regulation 24 is headed "Notification and attendance of officers" and Regulation 24(1) provides that a person must permit an HMRC officer to be present when duty stamps are affixed to retail containers.

170. Regulation 24(2)(a) requires that where stamps are to be obliterated two clear days' notice is given to HMRC of the proposed obliteration. Regulation 24(2)(b) provides that, in addition, in the case of what is known as a Type A duty stamp (the type affixed to the goods in this appeal) the person authorised to obliterate the stamps is required to make a record of the unique reference number ("URNo") of the duty stamp obliterated in his ordinary business records. Regulation 24(4) requires preservation of the records for a period of three years. Regulations 24(2)-(4) state:

> "(2) Except where regulation 22 applies, a person must not deliberately obliterate or remove a duty stamp or destroy a retail container of alcoholic liquor that bears a duty stamp unless—
>
> (a) by means of an electronic communication, he has given the Commissioners not less than two clear business days' notice of the date and time when, and the address of the place at which, he intends to obliterate or remove that stamp or destroy that container, and
>
> (b) in the case of a type A stamp, he makes a record of the unique reference number of that stamp in his ordinary business records.
>
> (3) A person must not export a retail container of alcoholic liquor from which a duty stamp has been removed, or that bears an obliterated duty stamp, unless by means of an electronic communication he has given the Commissioners not less than two clear business days' notice of his intention to export that container.
>
> (4) Any record made for the purposes of this regulation must be preserved for a period of three years, starting on the day the record was made."

The FTT Decision

171. At [63]-[68] the FTT considered the parties' arguments as to whether everything identified in EN207 as a condition, requirement or directions were conditions which had to be adhered to for a drawback claim to be successful. It concluded at [68] that conditions in EN207 must be met so long as they are clear and precise and not impossible or excessively difficult to meet:

> "65. The Appellant's position is more nuanced but not entirely at odds with that adopted by HMRC. The Appellant accepts that any condition or requirement which is noted as having force of law in the 2021 version of EN 207 is a condition required to be met. The Appellant accepts that the equivalent (and largely identical) provisions in the 2019 version also have force of law despite no express wording to that effect.

66. However, the Appellant does not accept that every direction given by HMRC in EN 207, in particular by reference to the use of "you must" or "you shall", is a condition having force of law such that a failure to comply represents a basis on which a claim for drawback may be refused. The Appellant contends that the following principles can be discerned from the case law on how and when it is appropriate to interpret the provisions of a notice as having force of law:

> (1) Public notices generally do not have force of law and directions in terms of what taxpayers should and should not do are not sufficient to create a legal obligation to act in a certain way (*HMRC v KE Entertainments Ltd* [2018] CSIH 78);
>
> (2) Where HMRC are empowered to make conditions through a notice, any provision of the notice which states it has force of law must be taken to have force of law (*ABC Ltd, X Ltd, Y Ltd v HMRC* [2017] EWCA Civ 596);
>
> (3) In the context of a notice which states that it has force of law it may not be necessary for the individual provisions to expressly state that they have force of law provided that the language used makes the imposition of a condition by way of tertiary legislation clear and unambiguous (*Corbelli Wines v HMRC* [2017] UKFTT 615 (TC) and *Safe Cellars Ltd v HMRC* [2017] UKFTT 78 (TC)).

67. By reference to those principles it was submitted by the Appellant that careful consideration is required as to whether the contents of each and every section of EN 207 represents a condition as stated in EGDR or conveys with sufficient legal certainty that it is a condition imposed pursuant to the provisions of regulation 7(1)(b) EGDR and which must be met in order for there to be a valid drawback claim. Any lack of clarity or ambiguity as to whether the section represents a condition is, in the Appellant's submission, to be resolved in its favour.

68. We consider that the correct approach to interpreting EN 207 is broadly that advanced by the Appellant. Parliament saw fit to specify in EGDR certain conditions to be met in making a drawback claim but also bestowed on HMRC the power to impose additional conditions as they see fit in a notice. However, in order to represent a condition which must be met, thereby restricting the basis on which a claim may be made, the conditions must be clear and precise and not impossible or excessively difficult to meet. To conclude otherwise would unnecessarily limit what is a broad right to recover duty paid where excise goods are not then consumed in the UK. This conclusion is also consistent with the broad discretion granted to HMRC to waive all and any conditions as HMRC may allow. We do not go as far as to say that any lack of clarity or ambiguity must be resolved in the Appellant's favour; rather, a sensible and pragmatic interpretation must be applied to the terms of the notice by reference to the purpose of ensuring that drawback is appropriately repaid, and excise revenue protected from fraud."

172. At [112]-[129] of the Decision the FTT addressed HMRC's contention that the Appellant was in breach of the condition (imposed by paragraph 4.5 EN207 and Reg 24(2)(b) DSR) requiring it to ensure that a record was made and maintained of each Unique Reference Number ("URNo") of each duty stamp obliterated.

173. The FTT first decided that the obligation remained upon the Appellant personally to ensure that its agent, BWA, maintained the relevant record of the de-stamping. At [120] it found:

> "120. Paragraph 4.5 provides that before claiming drawback "you must first obliterate the duty stamps in accordance with the [DSR]" and reference is made to the provisions of DS5. The use of "you" is curious in the context of a duty drawback claimant which is not, and cannot be, authorised to obliterate duty stamps. The language of paragraph 4.5 would therefore appear to require that a person in the position of the Appellant ensures that the duty stamps were obliterated prior to dispatch/export and that such obliteration was carried out in accordance with the DSR and DS5."

174. At [121]-[125] the FTT found that the Appellant had breached the condition in paragraph 4.5 of EN207 to obliterate the duty stamps in accordance with Reg. 24 of the DSR:

> "121. The question arises as to whether that represents a condition, breach of which permits HMRC to refuse the claim in whole, or in respect of the part of the claim that relates to stamped goods.
>
> … 123. However, on balance, we consider that it is a condition of drawback that the goods are, as a matter of fact, obliterated in accordance with the DSR . There is a significant fiscal risk arising to the exchequer if drawback is claimed and paid but the obliteration is not carried out fully in accordance with the requirements of DSR , such that it is reasonable and proportionate to expect that the claimant satisfy itself that the provisions of the DSR have been complied with. In this case the Appellant was provided with a record of de-stamping but did not apparently verify that BWA had fully complied with the obligations on them regarding the records what needed to be maintained, including a record of URNo.
>
> 124. In reaching that conclusion we have undertaken the evaluative exercise advanced by the Appellant in determining what is and what is not a condition. We note that there is no statutory requirement that the Appellant maintain a record of the URNo. The 2021 notice does not identify the provisions of paragraph 4.5 as having force of law. However, its terms are clear that prior to export the duty stamps must have been obliterated in accordance with the DSR. There is a rational basis for the requirement, and it is not a condition which is disproportionately onerous on a claimant who simply needs to obtain the necessary confirmation and supporting records of compliant obliteration and retain those in its own records thereby evidencing compliance.
>
> 125. HMRC reference the failure to obliterate "in accordance with the DSR " in the original decision to refuse and the Review confirms that the Appellant had not produced evidence which demonstrated compliance with the condition in paragraph 4.5. We agree with HMRC that there has been a breach of a condition..."

175. The FTT went on find that the breach of the duty stamp records condition permitted HMRC to refuse the excise duty drawback claim as it was not a de minimis failure (see [129]):

> "129. Finally, and with regard to the Appellant's contention that if we were to find there was a condition regarding de-stamping there was no failure justifying a rejection of or reduction in the claim as the failure was de minimis. We note that Lord Simon in *CEC v JH Corbitt (Numismatists) Ltd* [1980] STC 231 (*Corbitt*) indicated that a de minimis incidence of non-compliance with conditions imposed by HMRC represented a basis on which to challenge, in that case, a VAT assessment. However, we consider that a failure to ensure that URNos had been obliterated (and then provide the record) is not de minimis. We do so for the reasons identified in paragraph 124. The management of the unique duty stamp numbers is a key contributor to the prevention of excise fraud. It is reasonable for HMRC to need to know not only the product from which stamps have been obliterated but also which stamps have been so obliterated."

176. At [159]-[164] the FTT considered the reasonableness of HMRC's decision to refuse the drawback claim on the duty stamp ground (ie. not to waive the condition) and concluded that it was not unreasonable at [165]-[166]:

> "165. Having considered all the evidence available to us we consider that HMRC did not act unreasonably in rejecting that part of the claim affected by the failure to remove the duty stamps in accordance with the DSR. If we were wrong in that conclusion we would consider that HMRC's decision to refuse the claim was inevitable. There is insufficient evidence that the Appellant did enough to ensure compliance with this critical requirement. It selected the

cheapest provider and did not, it seems, seek confirmation that the obliteration had been carried out compliantly.

166. We therefore refuse the Appellant's appeal as regards that part of the claim which fails to meet the condition of ensuring that the duty stamps were obliterated in accordance with the DSR. By reference to Mr Thornton's evidence this issue affected £272,980.74."

The Appellant's submissions

177. Mr Thornton, for the Appellant, submitted that the first ground of appeal is formed of three sub-grounds which relate to: (i) limiting requirements to physical obliteration; (ii) a lack of clarity of the condition overall; and (iii) whether positive steps before or after the event are a relevant element of the condition.

178. In relation to (i), he submitted that the condition in paragraph 4.5 of EN207 of obliteration of duty stamps in accordance with the DSR is to be narrowly construed as relating to the act of obliteration itself. Whether a duty stamp has been "obliterated" is a defined term within the Duty Stamps Regulations 2006 ("DSR") defined by Reg. 2(3) which addresses the physical steps. Accordingly, a stamp has been obliterated in accordance with the DSR, if and only if one of the three listed methods of obliteration has been applied. If it has, then the definition is met and the stamps in question were obliterated in accordance with the DSR.

179. Mr Thornton contended that in addition to defining the permitted methods of obliteration, the DSR also imposed record keeping requirements on BWA and all persons approved to obliterate stamps. Regulation 24(2) required two actions before obliterating the stamps: (a) notifying HMRC in advance; and (b) recording the stamp numbers if they were type A stamps. HMRC chose to mention only the Reg 24(2)(a) condition in para 4.5 of EN207 and in language that appeared to make it separate to the conditions of the act of obliteration.

180. He also argued that it is not disputed that the required notice was given to HMRC, and it is not disputed that the stamps in question were type A stamps. Accordingly, BWA did obliterate duty stamps in accordance with the method prescribed by the DSR, and the duty stamps in question were obliterated in accordance with that defined term. He also conceded that BWA, the Appellant's agent, were under an obligation to record the unique reference numbers in their ordinary business records, but did not do so. Therefore, BWA breached their obligations in doing so because they did not meet their record keeping obligations.

181. Nevertheless, Mr Thornton submitted that para 4.5 EN207 does not require the record keeping requirements of the DSR to be met by the person who obliterated the stamps as a precondition for a valid drawback claim. He also did not dispute that there could have been consequences for BWA's failure to record the duty stamp numbers by way of a penalty from HMRC, as legislation provides for penalties for non-compliance with the DSR, but ultimately none was issued. On its face, he submitted, this supports any condition at para 4.5 EN207 being limited to the specific requirements for obliteration of a duty stamp set out in paragraph 2(3) of the DSR.

182. In relation to (ii) and the lack of clarity of the condition in paragraph 4.5 of EN207, Mr Thornton contended that if the condition was wide, incorporated compliance with all DSR requirements and did include the record keeping of BWA, this would bring the validity of the condition into question. At [117] of the Decision the FTT acknowledged that DFUK as a taxpayer and revenue trader was reliant on others, in this case its agent BWA,

to affix or obliterate the duty stamp, reflective of the wider industry practice as a whole. At [118] the FTT found that the provisions of the DSR and Notice DS5 collectively applied directly to BWA as the person conducting the obliteration, and not to DFUK directly. This is save for one proviso.

183. At [119] the FTT decided that the only obligation on DFUK under the DSR appears to have been limited to notifying at the duty stamp team at HMRC of the intention to export goods that had duty stamps on them at least two clear days prior to export. However, he argued that the DSR imposed no such obligation on DFUK. The obligation is found in Regulation 24(2)(a) DSR and directly refers to "a person" who intends to carry out the obliteration, and that person was not DFUK. As highlighted, the point at para 4.5 Notice 207 to notify the duty stamp team was only a "note". It did not contain any of the clear mandatory language that the FTT accepted was required for a condition in a public notice at [66]-[68] of the Decision. Further, neither the April 2019 nor the March 2021 versions of the public notice contained the statement that any or all of para 4.5 had the force of law.

184. In relation to (iii) Mr Thornton argued that steps taken before or after the obliteration could not be part of the condition. He noted that at [120] of the Decision the FTT noted that the language of para 4.5 was odd in that it referred to "*you must first obliterate the duty stamp*" referring to the drawback claimant, despite that referencing a person who was not ordinarily able to take that action. He developed this as follows:

    a. At [123] the FTT decided that the Appellant did not verify that BWA had complied with its obligations. Accordingly, the FTT perceived a lack of after the event checking.

    b. At [124] the FTT recorded that the condition as they saw it was simple to comply with as the taxpayer "*simply needs to obtain the necessary confirmation and supporting records of compliant obliteration…"* again referring to an after-the-event action.

    c. At [165] the FTT reiterated in the Decision that DFUK had not sought confirmation that the obliteration had been carried out compliantly.

185. He submitted that the fundamental flaw in this analysis is that it ties compliance with checks and the obtaining of records after the obliteration has already occurred. If the warehousekeeper's record keeping obligation was not met, then no amount of after the event checks can change that and cause that to be recorded which had not been recorded prior to obliteration. Accordingly, the FTT's analysis that the task for a drawback claimant is simple is wrong. The claimant is reliant on the correct actions of a separately approved and inspected individual to meet their obligations which are wholly outside of their experience or control.

186. In light of the above, Mr Thornton's submission was that para 4.5 of EN207 did not impose a valid or effective condition at all:

(a) It did not state it had force of law.

(b) Whilst it appears to be directed to claimants on its face, it is clear that it refers to the actions of a limited pool of third parties approved by HMRC in relation to stamping.

(c) The subject of the condition is ambiguous. It might refer to the physical obliteration of each stamp, or it might refer to the circumstances of obliteration or both.

(d) The condition as interpreted by the FTT incorporates compliance obligations to check after the event at a time when the taxpayer's actions are futile because the obligations have already either been met or irreparably failed by that third party.

HMRC's submissions

187. It is unnecessary to record in any detail Ms McArdle's arguments in response to Ground 1. She submitted that the FTT made no error of law in deciding that the record keeping obligation under the DSR was a condition of making a drawback claim under the EGDR by virtue of para 4.5 EN207. We have adopted many of her submissions, to the extent we agreed with them, in our reasoning below.

Discussion and analysis

188. We do not accept Mr Thornton's submissions on this ground. The FTT did not err in law in deciding that paragraph 4.5 EN207 contained a lawful condition forming part of the drawback claim procedure that the independent person removing duty stamps from bottles had to record the number of each stamp removed and/or that the claimant (in this case the Appellant) had to satisfy itself that such a record had been kept and/or that positive steps were ordinarily required by any claimant to ensure compliance (see Decision at [123]). The FTT did not err in finding that HMRC was entitled to take this non-compliance with a condition of the EGDR into account and acted reasonably in refusing the claim on this basis.

189. We consider that the FTT did not err in its Decision that the Appellant had failed to comply with paragraph 4.5 of the EN207 because it had failed to comply with Regulation 24(2)(b) of the DSR in ensuring that records were made of the URNos of the duty stamps that had been obliterated. Hence HMRC were entitled in law to refuse the claim to drawback on this ground pursuant to Reg. 7(1)(b) of the EGDR as there was a breach of a valid and effective condition imposed by EN207 which had the force of law.

190. We agree with all that the FTT stated at [65]-[68] as to how EN207 should be construed. The purpose behind the public notice is to set limits on when an excise duty drawback claim may be made. Those limits must be clear and precise and not impossible or excessively difficult to meet precisely in order for the EN207 to be valid and effective - to have the force of law by virtue of Reg. 7(1)(b) of the EGDR.

191. In relation to his first sub-ground, we do not accept that paragraph 4.5 of EN207 can reasonably be read as narrowly as Mr Thornton submits as only requiring compliance with the DSR in relation to the physical act of obliteration. The words 'you must first obliterate the duty stamps in accordance with the DSR...' should not be read in the narrow manner in which the Appellant contends. When read as a whole and in context it is clear that para 4.5 provides that a drawback claimant must ensure that when obliterating duty stamps they must comply with all the requirements of the DSR in relation to obliteration. This imports the requirements of Reg. 24(2) DSR as much as Reg. 2(3). If only part of the DSR were to comply then para 4.5 would have said so.

192. If there were any ambiguity in the phrase 'obliterate the stamps in accordance with the DSR' it is resolved by the following sentence in the guidance – '*Note that at least 2 clear business day notice is required before you obliterate the stamps*'. Mr Thornton suggested that this further sentence supported his construction as it would be unnecessary to include it if all the requirements of the DSR had been imported by the prior sentence. Furthermore, he submitted that this additional sentence, in only making implied reference

to the notice requirement of Reg. 24(2)(a), was specifically excluding the possibility of the record keeping requirements of Reg. 24(2)(b) applying.

193. We consider that this additional sentence in fact undermines the Appellant's construction. Reference to the notice requirement in EN207 reinforces the requirement in the prior sentence to comply with the whole suite of measures concerning how obliteration is to be effected 'in accordance with', meaning 'as required by', the DSR. The phrase 'in accordance with the DSR' is naturally to be construed as meaning 'in compliance with the DSR'. It incorporates all the circumstances of how the stamps are to be obliterated in accordance with the law: the requirements of Reg. 24(2) DSR as to notice and record keeping as well as the narrow definition of the physical manner of obliteration in Reg, 2(3). It would be an absurd interpretation if a person could fail to comply with the mandatory requirements of Reg. 24(2)(b) that '*a person must not deliberately obliterate or remove a duty stamp…unless—(b) .. he makes a record of the unique reference number of that stamp in his ordinary business records*' but yet be found to have obliterated duty stamps in accordance with the DSR for the purposes of making a successful drawback claim for the purposes of the condition in para 4.5 EN207.

194. There is also some further support for the FTT's construction of paragraph 4.5 because paragraph 7.4 EN 207 provides that the Appellant must provide the supporting documentation relating to obliteration in support of the claim: "*if the claim includes alcoholic goods subject to duty stamps, a copy of the notification of obliteration sent to the Duty Stamps team plus an extract from your records showing the details of the stamps that were obliterated*."

195. We agree with the FTT's reasoning at [123]-[125] that there was a rational basis for the condition imposed by paragraph 4.5 of EN207, the prevention and detection of excise duty fraud. The FTT's construction of paragraph 4.5 was also the purposive one. Therefore, it would not be disproportionately onerous for the Appellant or its agent to carry out, monitor or ensure compliance.

196. In relation to Mr Thornton's second sub-ground, we do not accept there is a lack of clarity as to the condition imposed by paragraph 4.5 EN207 by virtue of the fact that the obliteration was carried out by the Appellant's agent, BWA. The FTT's approach at [65]-[68] and [120]-[125] of the Decision discloses no error of law. The condition in Reg. 24(2)(b) DSR, as imported by para 4.5 of EN207, was correctly interpreted. Regulation 24 had not, as a matter of undisputed fact, been complied with as unique reference numbers were not recorded by BWA or any other person. The Appellant had the responsibility to ensure compliance if it was to make a successful drawback claim. Consequently, refusal of the drawback claim in relation to all affected goods was lawful.

197. Thus, the Appellant's secondary argument on Ground 1 fails: clear words have been used to impose the condition in para 4.5, that "you must first obliterate the duty stamps in accordance with the Duty Stamps Regulations". There is no error of law in the FTT finding that the words amounted to a condition and that the Appellant, as much as BWA, had failed to meet it.

198. The Appellant's argument in relation to para 4.5, that "any condition requiring compliance with record keeping must be minimal barring exceptional circumstances" also fails. There is no source for such a limitation, which has no authority. It is not available to the Appellant to argue, as it did in its Grounds of Appeal that: "as recorded at [127] in this case it was not possible to obtain such documentation"; and "In the event that the FTT is correct at [123] that the condition is more abstract requiring the person appointed to

operate the de-stamping to act in accordance with any and all de-stamping rules, that is impossible or excessively difficult for a drawback claimant to achieve. They are not in control of the actions of such a person."

199. The FTT made material findings of fact to the contrary, in relation to how the Appellant arranged for duty stamp obliteration at [32]-36]:

> "32. Having undertaken this exercise Mr Thornton was satisfied that the Appellant could proceed to arrange for the de-stamping and movement of the goods to The Netherlands. The Appellant approached BWA to carry out these tasks. BWA were selected because they were the cheapest provider (3-4 times cheaper than LCB).
>
> 33. Mr Roy's unchallenged evidence sets out that BWA were experienced in the obliteration of duty stamps having been approved by HMRC and subject to a number of inspections over a period of time. He states that he was contacted by Mr Thornton in June 2020. Following some delays in setting up an account for the Appellant, he arranged for the transfer of four containers of goods from LCB to the BWA warehouse. On receipt the goods were logged using the same stock information as provided by LCB, new rotation numbers were recorded.
>
> 34. Using the rotation numbers HMRC were notified of the proposal to de-stamp the goods on 12 November 2020. Mr Roy was aware that de-stamping could not begin until at least 2 clear days after the notification was given. The notification indicated that the goods would not be removed by way of dispatch prior to 19 November 2020, i.e. after the two clear days' notice had expired.
>
> 35. The duty stamps were removed using a Dremel hand drill to obliterate the words "for the UK market" with a sticker then placed over the site of the drilling. BWA's business record of the stock information was noted to show that the relevant stock had been de-stamped. No record was made of the URNo of the stamp as Mr Roy did not understand there to be such a requirement in light of the other records maintained and which had been subject to HMRC inspection previously.
>
> 36. There is no evidence, and we find that the Appellant did not, at any time, seek to verify for themselves that the provisions of the DSR regarding obliteration were complied with by BWA until after HMRC had refused the claim."

200. There was no factual dispute, and the FTT accordingly correctly found as a fact, that the duty stamps were obliterated on direction of the Appellant by a third party, BWA. Far from the Appellant having no control of BWA, the FTT found that BWA acted on the direction of the Appellant and would not have obliterated the duty stamps had it not been so directed. It is not open to the Appellant to argue that it had no control of that process, having arranged with BWA for it to act on the Appellant's behalf. Thus the reference to [127] of the Decision is not an accurate description of what was found: what the FTT actually noted there was that, by the time of the appeal, which came after the duty stamps had been obliterated, it was then impossible to produce a record of their unique reference numbers, not that it had been impossible to produce such records before de-stamping:

> "127. The breaches of paragraphs 4.5 and 7.4 are clearly connected. In the case of a claimant who is not authorised to obliterate duty stamps we would interpret paragraph 7.4 as requiring the provision of the records they obtained from the party which obliterated the stamps in order to satisfy themselves that obliteration had been carried out in accordance with the DSR. In this case such evidence does not exist as it is admitted that obliteration was not carried out fully in accordance with the DSR as the URNos were not recorded by BWA. There can therefore be no evidence which the Appellant was capable of producing."

201. The Appellant's third sub-ground likewise has no merit. The timing as to the requirements of lawful obliteration – whether the notice and record keeping requirements could effectively be complied with before or after obliteration, has no bearing on the lawfulness of the condition in para 4.5 EN207. There is nothing impossible or impractical in imposing these requirements as a condition that would render the condition, uncertain, void or ineffective such as it would be invalid.

202. The Appellant confirmed before the UT that it withdrew its reliance, first set out in the Grounds of Appeal, on compliance with this condition breaching Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights. Furthermore, the argument had not been raised before the FTT.

203. In any event, the argument would be likely to have no substance because the necessity and proportionality of the condition could be established. HMRC considered it necessary at the time to impose conditions on drawback claims, including para 4.5 of EN 207, which served to reduce the risk of fraud in a field where it considered such risk to be high, by requiring recording of unique duty stamp reference numbers. That condition served to assist HMRC in: a) identifying if, for instance, obliteration had been fraudulently stated to have occurred where a unique reference number appeared on non-obliterated goods; or b) indicating that duty stamps were counterfeit, where a stamp bears a unique reference number of goods which have been obliterated. Such a condition would be likely to be proportionate in all the circumstances of this case, being in pursuit of the legitimate and sufficiently important aim of reducing the risk of fraud, being rationally linked to that aim, with no less intrusive measure applicable and striking a fair balance.

204. In conclusion, in answer to the Appellant's sub-grounds, para 4.5 of EN207 did impose a valid and effective condition with which it failed to comply. Therefore, the FTT made no error of law in deciding HMRC were entitled to take this into account in refusing a claim for excise duty drawback:

a) The FTT did not err in finding EN207 had the force of law by virtue of Regulation 7(1)(b) of the EGDR – this did not even appear to be in issue before the FTT and the fact that EN207 did not itself state it had force of law is irrelevant;

b) The extent of the condition 'obliterate in accordance with the DSR' in para 4.5 EN207 is not ambiguous. It clearly refers to the physical obliteration of each stamp, as well as all of the methods and consequences of obliteration as provided for by Regs. 2(3) and 24(2) of the DSR.

c) Para 4.5 of EN207 is directed to the claimants for drawback on its face, it is clear that it would also refer to the actions of their agents acting on their behalf - the pool of third parties approved by HMRC in relation to stamping.

d) The condition as interpreted by the FTT incorporates compliance with obligations and it is irrelevant when this occurs. Whether there is an obligation to check before or after the event of obliteration does not render the condition invalid or ineffective.

205. This ground of appeal discloses no error of law in the Decision and is dismissed.

Ground 2 – Evidence of export (see [5] above).

The Law

206. Regulation 7(1)(b) of the EGDR, on compliance with conditions contained in public notices, has been set out above. Regulation 10 of the EGDR also imports the requirements

of public notices such as EN207 on the evidence to be provided in order for a drawback claim to be made after export:

"Conditions to be complied with after export

10. Where an eligible claimant claims drawback after export, the eligible claimant must include with the claim such documentary evidence of export and (in the case of claims in respect of goods that have been transported from Great Britain to Northern Ireland via the EU), payment of excise duty as is specified by the Commissioners in a notice published by them (and not withdrawn)."

207. Paragraph 7.4 of EN207, 2019 edition, provided at the relevant times:

"7.4 What supporting evidence do I need to submit with my drawback claim form?

You must provide the following documents with your completed drawback form:

- evidence of UK duty payment
- the CHIEF S8 print out showing the Entry reference number and a 'departed' status of 60 for direct exports or 62 for indirect export, or if you are exporting by post a certified C and E 132, and
- if the claim includes alcoholic goods subject to duty stamps, a copy of the notification of obliteration sent to the Duty Stamps team plus an extract from your records showing the details of the stamps that were obliterated…"

208. Paragraph 7.4 of EN207, 2021 edition, provided at the relevant times:

"7.4 The supporting evidence you need to submit with your drawback claim form

This paragraph contains requirements that have force of law under regulations 7(1) and 10 of the EGDR. In particular it imposes additional conditions on your claim for drawback and specifies the documentary evidence of export required to accompany a claim for drawback.

You must provide all of the following documents with your completed drawback form:

- evidence of UK duty payment (see paragraphs 4.7 to 4.9)
- the CHIEF S8 print out showing the Entry reference number and a 'departed' status of 60 for direct exports or 62 for indirect export, or CDS equivalent, or if you are exporting by post a certified C and E 132
- if the claim includes alcoholic goods subject to duty stamps, a copy of the notification of obliteration sent to the Duty Stamps team plus an extract from your records showing the details of the stamps that were obliterated…"

HMRC's Decision

209. HMRC's review decision dated 24 November 2021 relied on the Appellant's failure to provide proof that it had exported the goods in respect of which it sought the drawback of excise duty as follows:

"The goods were exported

The S8 print out is a specific report generated by the CHIEF system, when a declaration has

been finalised at departure, Mr Thornton has argued that these print outs are no longer produced and therefore their custom agent cannot be provided it. This is not strictly true, Mr Thornton is correct that the production of the form is no longer available at non-inventory linked ports, as these ports do not use the CHIEF system.

The S8 print out is required as evidence in drawback claims and when this form is unavailable an exporter can obtain confirmation the goods have been departed via one of the following options;

• a Community System Provider link

• a local loader badge for direct access to CHIEF

• form C1602 submitted to the NCH (National Customs Hub detailed above.

Therefore, I do not accept Mr Thornton's argument that the form is no longer available. As an experienced agent, I share Officer O'Rourke's view that Mr Thornton would have had some awareness of the ongoing situation regarding the S8 print outs and the appropriate workarounds in place for exporters.

Alternatively, the company could have exported the goods via an inventory port and obtained a copy of the S8 from CHIEF, thus eliminating any problems in acquiring the necessary documentation."

The FTT's Decision

210. The FTT made the following findings of fact regarding the Appellant's provision of export evidence at [48]-[53]:

"48. Also provided were the relevant tracing documents. For the shipments made in December 2020 SAADs were also provided. Those SAADs included the 112 cases of Vodka which were shipped but not included in the NOI or subsequent claim. For the April 2021 shipment T1 (Transit Accompanying Documentation) was provided.

49. No CHIEF S8 showing a departed status of 60 was provided.

50. By letter dated 13 May 2021 the Appellant explained that they understood that a CHIEF S8 could not be obtained and provided such evidence as they had of the export.

51. At about that time Mr Thornton was also corresponding with HMRC on the unavailability of CHIEF S8s. That correspondence, and Mr Thornton's evidence, on which he was cross examined, was that although he had been unaware of the issue prior to the 8 April 2021 export he was aware post that time that HMRC had agreed to waive the requirement for other exporters who had used lorries and roll-on-roll-off ferries as the means of movement. He considered that HMRC were required to waive the requirement because it was impossible to comply with.

52. As part of Mr Thornton's engagement with HMRC on this issue generally, HMRC indicated that where no S8 was available HMRC may accept alternative evidence of export provided that there was a full explanation of the reason was to why the claimant could not obtain a S8. It was indicated that commercial evidence was insufficient as alternative evidence, and that official evidence of arrival was required.

53. From the correspondence it is unclear whether it is or is not possible to obtain a CHIEF S8 printout showing a departure status of 60 when using a roll-on-roll-off ferry. It is apparent that one could still have been obtained if an alternative means of movement had been used i.e. shipping via an inventory port."

211. The FTT concluded at [130]-[132] that the Appellant had breached the condition imposed by paragraph 7.4 EN207 in relation to producing evidence of export:

"130. HMRC contend that the Appellant failed to provide a CHIEF S8 with a departed status of 60 or any of the alternative forms of documentation considered to be acceptable evidence of movement in breach of the condition contained in paragraph 7.4 EN 207 in respect of the goods exported on 8April 2021.

131. The Appellant does not deny that the requirements of paragraph 7.4 are a condition of drawback, and the Appellant accepts that it was in breach of this condition because it did not provide either a CHIEF S8 showing a departed status of 60 or the CDS equivalent but contends that the requirements specified in paragraph 7.4 were impossible to comply with as from 1 January 2021 the ferry ports no longer operated CHIEF.

132. In view of this concession we find that the Appellant failed to meet the condition requiring export evidence. We consider the implications of the breach below."

212. At [167]-[174] the FTT considered whether it was reasonable for HMRC to refuse the drawback claim based upon the lack of export evidence.

213. The FTT explained the background to and effect of HMRC's original and review decisions in relation to the Appellant's lack of evidence of export of the goods providing a reason for refusing the drawback claim at [167]-[170] of the Decision:

"167. As indicated above, regulation 8(2)(b) EGDR authorises HMRC to specify in a notice the documents required to evidence export. EN 207 (in both the 2019 and 2021 versions) specified that a CHIEF S8 showing a departed status of 60 or the CDS equivalent be provided.

168. On 13 May 2021 when providing supporting evidence to the claim the Appellant included the export documentation endorsed by the Netherlands customs authorities confirming payment of duty in The Netherlands. By that letter the Appellant informed HMRC that an S8 could not have been obtained in circumstances in which the movement was by lorry on a roll-on-roll-off ferry. A copy of a Q&A forum on gov.uk was provided substantiating that the S8 could not have been obtained.

169. The Original Decision to refuse the claim acknowledges that the Appellant had indicated that it had been unable to obtain a CHIEF S8 and that the gov.uk forum indicated there was an issue but nevertheless refused the claim for failure to produce the S8.

170. The Review reiterates that no S8 was provided and accordingly, the Claim failed to meet the condition in paragraph 7.4. It goes on to indicate that an S8 could have been obtained by exporting via an inventory port or through the production of alternative acceptable documentation confirming departure by way of: 1) a community system provider link, 2) a local loader badge for direct access to CHIEF, or 3) a form C1602 submitted to the National Customs Hub. None of these means were open to the Appellant after export."

214. It concluded with reluctance at [171]-[174] that it was reasonable for HMRC to refuse the drawback claim based upon the lack of required export evidence:

"171. In cross examination of Mr Thornton HMRC sought to establish that the failure to obtain a CHIEF S8 was a failing of his, that he had not sufficiently researched how the necessary evidence could have been obtained, principally through use of a method of movement other than the one selected. Mr Thornton openly accepted that he had been unaware that S8s were not issued post 31 December 2020 in respect of roll-on-roll-off ferry movements but pointed out that there had been no publicity of, or change in the guidance regarding, the impending change and that it had taken many by surprise. He referenced communications he had had with freight forwarders and customs agents which demonstrated that it was a problem for many.

172. We have great sympathy for the Appellant in this regard. To have adopted an alternative method of export without warning or notice that they needed to do so in order to be able to claim drawback is harsh.

173. However, having reviewed the evidence, it is clear that HMRC considered the material provided by the Appellant as to the difficulties faced by exporters using roll-on-roll-off ferries. Had they failed to do so entirely then we could have required a re-review and a direction that they consider it. However, they have not failed to take account of a relevant factor, nor have

they taken account of an irrelevant factor. They have considered whether the Appellant was able to offer alternative evidence of export and rejected such evidence as was produced on the grounds that it was commercial documentation and not official evidence. In doing so they have adopted a hard line that results in an outcome with which we disagree, but we are unable to conclude it was outside the bounds of reasonable. It is not therefore a decision which it is open to us to call them to re-review.

174. Accordingly, we refuse the appeal in this regard."

The Appellant's submissions

215. Mr Thornton submitted that this ground related to the requirement for the provision of a document known as an S8 showing status 60 as part of the proof of export when making a claim for drawback.

216. By way of background, he suggested that this document is produced by HMRC's systems CHIEF. Prior to the end of the Brexit transitional or implementation period on 31 December 2020, it was a document only produced for movements that went to third countries (those outside the EU). The S8 document showing status 60 was the document which formed prima facie proof that the goods in question had been exported. Dispatches to EU member states took place under cover of a Simplified Administrative Accompanying Document ("SAAD") instead. However, Roll on Roll Off ("RoRo") transport generally, if not universally, went to EU member states.

217. It was not widely known by the industry that HMRC had opted not to generate the S8 document, instead having an internally recorded deemed export for any goods that were marked as using RoRo shipping. Mr Thornton clarified, for the avoidance of doubt, that the UK's systems have since changed and they are not using CHIEF for exports at all. The S8 document showing status 60 is no longer required for any exports.

218. Mr Thornton addressed the FTT's finding at [131]-[132] of the Decision that recorded DFUK had conceded that there was a valid condition at para 7.4 of EN 207 to obtain and produce an S8 on export of drawback goods even when using RoRo for the export. As the FTT considered the Appellant made that concession, it simply found that there was a breach of the condition and moved on to whether it should be considered to have been waived.

219. He argued that this ground of appeal must succeed as there was no such concession made by the Appellant, therefore the FTT's finding is wrong in law. The purported concession was recorded in the Judge's notes at and reads as follows: *"Primary submission for such movement it was an ultra vires condition or didn't apply to movements of that kind"*.

220. Mr Thornton contended that it was trite law that an ultra vires condition is void. It cannot be considered a valid, binding condition that requires any waiver because it does not apply so cannot be waived. This is wholly consistent with the Appellant's alternative argument that if it is a binding condition *per se* it is simply one that had no application to the movement at hand. If it did not apply to RoRo movements, then there was no non-compliance with a condition that otherwise needed to be waived by HMRC.

221. He submitted that, for the avoidance of doubt, DFUK's position was clearly a challenge to the validity of the condition as set out in [58]-[60] of its skeleton argument**.** Only at [61] of the skeleton was the alternative argument raised that it would be conspicuously unfair not to have waived the condition if DFUK was wrong as to its validity. He accepted

that the March 2021 version of EN 207 does contain the proviso that para 7.4 has force of law, but that alone does not prevent the condition being void or found not to apply to RoRo exports at this time.

222. Mr Thornton recommend the approach of the FTT in the decisions of *Global Foods Ltd & Others* v *HMRC* [2014] UKFTT 1112 (TC) ("*Global Foods*") and of *Centrax Ltd v Customs and Excise Comrs* (1998) VAT Decision 15743 which it followed. In *Global Foods*, the FTT were considering a VAT public notice which expressly stated that it had force of law (see [24]). This related to the need to obtain and show on a VAT invoice one's customer's VAT number in another EC member state in order to zero-rate a cross-border supply. The issue had arisen that where a taxable person moved their own goods to another member state, it was a deemed supply and as such there was no invoice issued to a customer that could state the VAT number in the member state of receipt.

223. At [51] of *Global Foods* the FTT considered the application of EU jurisprudence to the effect that VAT zero-rating was available even if not all domestic requirements for it were met so long as the taxpayer had shown they had done all that was reasonably required to provide information that showed the point in question. However, at [52] the FTT considered that approach was not necessary. Instead, they could construe the elements of the condition that did not apply to the taxable supplies in question to be irrelevant to them.

224. Mr Thornton submitted that the same approach would apply to this appeal. Where transport via RoRo does not cause the specified document to be generated, its production cannot be a part of the condition as it applies to that form of movement, even if it applies to other forms of movement.

225. If this is incorrect, then the routine non-generation of the S8 document in question by HMRC when RoRo transport is used prima facie renders that document at least excessively difficult to obtain and provide back to HMRC when making a drawback claim.

HMRC's submissions

226. Ms McArdle, for HMRC, submitted that there was no error in the FTT Decision upholding the refusal of the claim for excise duty drawback based upon the failure to comply with the evidence of export condition.

Discussion and analysis

227. We do not accept Mr Thornton's submissions. We are satisfied that the FTT did not err in law in deciding that the condition found at paragraph 7.4 of EN 207 requiring an S8 document showing status 60 to be provided was a valid, lawful condition of a drawback claim for excise duty. Further the FTT did not err in deciding that HMRC was entitled to take this into account and acted reasonably in not waiving the condition and refusing the claim on this basis.

228. The Appellant takes issue with the FTT noting at [131] its acceptance of being in breach of the paragraph 7.4 condition because its primary argument was that the condition was void or ultra vires because providing evidence of export in a S8 document with status 60 was impossible. The FTT's own notes of the hearing, which it disclosed following the application to it for permission to appeal, record Mr Thornton, for the Appellant, saying the following:

"Evidence was actually or effectively impossible…evidence is that it realistically was not an exercise that could be complied with. Primary submission for such movement [is that] it was an ultra vires condition or didn't apply to movements of that kind."

229. The FTT's hearing notes are consistent with the Mr Thornton's skeleton argument. In the skeleton he made the primary submission that the condition relating to production of the S8 in paragraph 7.4 EN207 was invalid but alternatively it should be waived as unfair and should not apply to the Appellant's movements of goods.

230. At [131] of the Decision the FTT recorded the factual submission of the Appellant that it was impossible to meet the condition. Thereafter, the FTT considered the secondary argument as to the reasonableness of HMRC relying on the failure to meet the condition in the circumstances of this case. However, the FTT does not appear to have addressed the Appellant's primary argument as to the validity of the condition.

231. The FTT's hearing notes do not necessarily support its finding at [131] that the Appellant accepted that para 7.4 was breached (and HMRC agree that the notes reflect that part of the Appellant's submissions). It appears that the Appellant did not dispute that it was a condition, but the Appellant primarily argued that it was an invalid condition. Alternatively, the Appellant argued that it was an unreasonable condition and thus open to challenge.

232. Nevertheless, even though there may be merit to the Appellant's sub-ground of appeal – that the FTT did not consider the primary argument on the validity of the paragraph 7.4 condition – we are satisfied it does not give rise to a material error by the FTT.

233. Any error by the FTT in not addressing the validity argument could not be material because we are not satisfied that the condition in paragraph 7.4 of EN207 requiring the production of an S8 document with status 60 was invalid nor ultra vires. We accept, contrary to HMRC's submission, that the FTT, and the UT, may have jurisdiction to consider whether a condition in a public notice such as EN207 is valid or enforceable as the FTT did in *Global Foods*. Likewise, for the reasons set out in relation to the cross-appeal it is within the FTT's and UT's jurisdiction to consider on an appeal whether HMRC acted reasonably in relying on a breach of a condition in a public notice. In short, this is because an appeal to the FTT and UT pursuant to section 13A(2) and 16(5) FA 94 also incorporates the jurisdiction and powers in section 16(4) to consider the reasonableness of HMRC's decision to deny drawback on the basis of refusal to waive the strict conditions for it.

234. Paragraph 7.4 of EN 207 is a condition with the force of law by virtue of Regs. 7(1)(b) and 10 EGDR imposing evidential requirements, even expressly stating as much in the words in the 2021 edition: "This paragraph contains requirements that have force of law under regulations 7(1) and 10 of the EGDR. In particular it imposes additional conditions on your claim for drawback…".

235. As the FTT stated at [68] "… in order to represent a condition which must be met, thereby restricting the basis on which a claim may be made, the conditions must be clear and precise, and not impossible or excessively difficult to meet". This reflects that the law concerning excise duty, and the embedded right to claim drawback was derived from EU law – latterly, Excise Directive 118/2008/EC. Accordingly, the validity of conditions imposed by EN207 are subject to the principle of effectiveness.

236. It is not in dispute that neither a CHIEF S8 document nor CDS equivalent were produced by the Appellant, as found by the FTT at [49]. There is no challenge to the finding of the FTT at [53] that it was unclear from the correspondence whether an S8 showing the required status 60 could be obtained using RoRo transport but, the correspondence did show that using an alternative method such as an inventory port to export instead would still cause that document to be produced. At [170] the FTT referred to the decision of the Review Officer to the effect that there were three options for replacing an S8 document showing status 60. The FTT also found that none of those options were available to DFUK after the export had already occurred. At [171] the FTT referenced the evidence of Mr Thornton that the change had taken many by surprise and there appeared to be no publicity of the changes in HMRC's systems and no change to the guidance given to claimants to reflect that changed framework.

237. Nonetheless the FTT correctly found in this regard at [171] that it would not have been impossible or excessively difficult to obtain a S8 document (or substitute evidence) if the Appellant had researched the position prior to export:

> "171. In cross examination of Mr Thornton HMRC sought to establish that the failure to obtain a CHIEF S8 was a failing of his, that he had not sufficiently researched how the necessary evidence could have been obtained, principally through use of a method of movement other than the one selected. Mr Thornton openly accepted that he had been unaware that S8s were not issued post 31 December 2020 in respect of roll-on-roll-off ferry movements…"

238. Thus, the evidence of Mr Thornton and the finding of the FTT was not that it was excessively difficult or impossible to obtain the relevant documents required by paragraph 7.4 of EN207. Instead, the FTT's finding was that Mr Thornton, as the Appellant's agent, had not conducted sufficient research on the alternative evidence that would suffice, or how to obtain the S8 document with status 60 through using a different type of export movement. It was not disputed that there were alternative movement methods for the export of the goods other than RoRo, such as an inventory port, through which the relevant documents could have been obtained. There was no finding that the Appellant could not reasonably have discovered the correct position before making the export, even if the position was not widely known or made publicly available by HMRC. Mr Thornton's own witness statement explained at [24] that he discovered the position through his own research on 12 April 2021 that RoRo no longer caused an S8 document showing status 60 to be produced.

239. The Appellant bore the burden of proof on the issue of whether it was impossible or excessively difficult to comply with the condition in paragraph 7.4 EN207. Given Mr Thornton's evidence, which included an acceptance that through other available types of movement such evidence could be obtained, there was no proper basis to allege impossibility or excessive difficulty such as to render the condition invalid or ineffective. During the hearing before the UT, Mr Thornton sought to submit that there would likewise be practical problems obtaining the alternative export evidence from the CDS as is provided as the equivalent condition in the 2021 edition of paragraph 7.4 EN207. However, there was no evidence before the FTT nor finding made by it regarding this evidence being impossible or impractical to obtain. Nor was there any application to admit fresh evidence on appeal to the UT.

240. Therefore, even if the FTT had fallen into error in finding that the Appellant conceded that it had breached a valid or lawful condition, this was the only conclusion open to it in

law because the condition in paragraph 7.4 was valid and enforceable. The FTT could not find otherwise, properly directing itself.

241. Thereafter, the FTT carefully considered the secondary argument as to the reasonableness of the condition itself and of HMRC relying on the condition in refusing the drawback claim at [167]-[174]. No challenge is made to the FTT's conclusion at [172]-[173] that despite its sympathies, the FTT could not find that the condition was unreasonable nor that HMRC had failed to take into account relevant evidence as to the difficulties faced by exporters nor taken into account of irrelevant evidence. The FTT's decision that it was not unreasonable for HMRC to refuse to waive the condition in light of all the circumstances contained no error of law.

242. Therefore, even if there was any error in relation to any failure to rule on all aspects of the Appellant's submissions, it is immaterial and not a basis to overturn the Decision. There was no material error of law in the FTT's Decision to uphold the refusal of the claim for excise duty drawback on this ground.

243. This ground of appeal is dismissed.

Ground 3 – Failure to remit to HMRC for a new decision (see [5] above).

The FTT Decision

244. The FTT made a number of criticisms of, and found flaws in, the reasons relied upon for refusing the drawback claim in HMRC's original and review decisions.

245. At [100]-[102] of the Decision it rejected HMRC's reliance on the Appellant's failure to notify a change of status in relation to the goods as a ground for refusing the claim:

> "100. Viewing the terms of the NOI form (EX75) we do not consider that there was a change in the information required which, in this regard, required further notification to HMRC. Accordingly, the fact that a proportion of the goods were exported on 8 April 2021 cannot, of itself, justify a refusal of either the whole claim or that part of the claim relating to the goods exported on that date.
>
> 101. Our view in this regard is reinforced by the terms of paragraph 12.2 EN 207 (2021) which clearly envisages that a pre-Brexit NOI may have been completed for a post Brexit export to an EU country; it reminds claimants that they must have the correct supporting documentation but does not advise that they must notify a change in status.
>
> 102. There is no part of the claim which is only affected by the position taken by HMRC on this issue."

246. At [107]-[108] the FTT rejected HMRC's reliance on a failure to notify a reduction in the quantity of the goods exported or the value of a claim as a ground for refusing the claim:

> "107. Given the terms of paragraph 12.1 EN 207 we consider that there is also a general waiver of the requirement to notify a reduction in the quantity of goods exported where the claimant themselves made the reduction in claim value. As such, we conclude that there was no failure to meet the conditions required for drawback by virtue of the errors identified in paragraph 44. above.
>
> 108. HMRC were therefore not entitled to refuse the entire claim on the basis of those errors. There is no part of the claim which is only affected by the position taken by HMRC on this issue."

247. At [109]-[111] the FTT rejected HMRC's reliance on the claim being made in respect of goods, 112 cases of vodka, in respect of which no duty had been paid:

> "109. HMRC contend that because one of the SAADs for the December 2019 dispatched included 112 cases of vodka the Appellant has failed to comply with the requirement that the goods were duty paid. During the hearing Ms McArdle indicated, in a response to a question put to her by us, that the Appellant should have made clear in the claim itself that the supporting documentation also demonstrated that further goods not part of the claim had been dispatched so as to ensure the claim was compliant.
>
> 110. The Appellant contends that there is no legal requirement to so notify HMRC. It is submitted that the claim cannot be said to be inaccurate because additional goods were dispatched at the same time.
>
> 111. We agree with the Appellant. The drawback claim was made in respect only of goods which on which duty had been paid (i.e. excluding the 112 cases of vodka) and in respect of which a NOI had been given. There is no requirement or condition within EGDR or EN 207 which precludes a movement including other goods and therefore there can have been no failure to meet such a condition."

248. At [154] the FTT went on to state, "*The basis of on which HMRC refused the full drawback claim is not entirely clear to us despite careful consideration of the Original Decision and the Review*."

249. At [156]-[158] it reiterated its interpretation of the correspondence and findings at [30] and [74] that HMRC had waived the time limit to make the drawback claim and found it was unreasonable for HMRC to reject the entire claim on that basis:

> "156. HMRC contend that the claim was rejected because various conditions had not been met and that the terms of the 27 December 2019 email required those conditions to be met before the time limit would be waived.
>
> 157. On the basis that we have found that there was a waiver of the time limit condition we consider that rejection of the claim in its entirety is unreasonable. Exercising our full appellate jurisdiction we have already allowed the appeal in respect of those parts of the claim which are unaffected by the Appellant's failure to ensure that the duty stamps were obliterated in accordance with the DSR and the failure to provide evidence of export.
>
> 158. Given the terms of paragraph 12.1 EN 207 which confirm that where a claimant fails to meet the prescribed conditions for part of a claim the claim will be reduced, and the compliant part paid, we also consider that the total refusal of the claim was unreasonable."

The Law

250. The Court of Appeal in *GB Housley v HMRC* [2016] EWCA Civ 1299 ("*GB Housley*") overturned the UT and discharged a VAT assessment. The UT had found that HMRC had failed to exercise their discretion as to whether to accept alternative evidence under Regulation 29(2) of the VAT Regulations 1995 but nonetheless it remitted the decision to HMRC giving them a further opportunity to exercise their discretion on receipt of further material from the taxpayer. The Court of Appeal found that the UT's directions had wrongly preserved the existence of what had been found to be a flawed assessment; it wrongly placed the burden of challenging any revised assessment on the taxpayer, without affording the taxpayer the opportunity to raise the time bar possibly available to challenge any new assessment raised by HMRC. It also wrongly enabled HMRC to support the correctness of their earlier decision by reference to subsequent factual materials, which

was not in itself legitimate. The taxpayer's appeal was thus allowed, and the assessment discharged.

251. At [77] and [79] of *GB Housley* the Court of Appeal stated that the tribunal should remit decisions to HMRC where they had been found to be flawed unless it was inevitable HMRC would come to the same conclusion or make the same decision:

> "[77] Thus the Court of Appeal endorsed the approach adopted by Turner J namely that, save in circumstances where the Commissioners could show that, had the additional material which should have been taken into account, in fact been taken into account, the decision would inevitably have been the same, where a tribunal could nonetheless dismiss the taxpayer's appeal against a wrongly made decision of the Commissioners, the taxpayer's appeal should be allowed and that it was not for the tribunal to re-exercise the discretion. The tribunal should have allowed the taxpayer's appeal and 'left it to the commissioners to take a fresh decision if they thought fit on the facts as they had become by the date of the fresh decision'.
>
> …
>
> [79] In my judgment a similar approach to that adopted by this court in *John Dee* is applicable to a case such as the present, where the relevant decision was a failure by HMRC, as a result of a misapprehension as to the necessity of a billing agreement, to consider the exercise of their discretion under reg 29(2) to allow input tax. The present case was one where, on the findings of fact by the FtT, HMRC clearly could not have suggested that, if they had properly considered or re-considered the exercise of their discretion under reg 29, they would have inevitably have come to the same result—ie to have refused to allow the credit for the input tax. Indeed, Mr Mandalia did not seek so to argue."

Submissions on behalf of the Appellant

252. Mr Thornton submitted that HMRC made one decision, as upheld on review, being to reject the whole of the excise duty drawback claim. At [154] the FTT recorded that it was unclear how HMRC came to make that decision. Nevertheless, he argued that what was clear is that the FTT disagreed with the grounds for refusal relied upon by HMRC in their decisions on a number of points, finding:

    i. That the time limit had already been waived ([157]);

    ii. That there was no change in information which required submission of a new Notice of Intention before export ([100]-[102]);

    iii. That there was no requirement for DFUK to have notified HMRC of a reduction in the value of the claim ([107]-[108]);

    iv. That there was no failure or breach of procedure for not informing HMRC that additional goods outside of the claim were shipped at the same time ([109]-[111]).

253. At [165] the FTT had found that HMRC's decision not to waive the duty stamp condition was not unreasonable. Mr Thornton submitted that it was implied within that finding that the FTT was aware of and applied the correct test of considering whether reasonable or unreasonable matters were taken into account. This was explicitly set out at [173] where the FTT decided that HMRC did not fail to take into account relevant factors nor take into account irrelevant factors in deciding not to waive the export evidence condition. The FTT had also recorded this test at [136] and [153] and there is no doubt it understood the correct approach.

254. Mr Thornton noted that HMRC produced only one witness, the original decision-maker, Officer O'Rourke. His evidence did not set out what factors were or were not taken into account in the exercise of the discretion to refuse the claim in the original and review decisions. To the contrary, it appears that there was no attempt to exercise discretion in the decisions. At [11]-[14] of his statement Officer O'Rourke recorded a number of perceived breaches of the drawback conditions. At [15] Officer O'Rourke acknowledged that HMRC had the discretion to waive the time limit condition. He then briefly outlined what he needed to consider and what he had been provided with at [16] before concluding at [17] that he saw no mitigating circumstances and so could not exercise HMRC's discretion to waive the time limit. At [18] Officer O'Rourke confirmed the decision that the claim would have been rejected solely on that basis. He reiterated that position at [19] before noting that the rest of the issues were secondary and would only have come to prominence if the mitigating circumstances he considered were missing at [17] had been present.

255. In short, Mr Thornton argued that the evidence presented appeared to demonstrate that, having concluded the claim would be dismissed, Officer O'Rourke did not even turn his mind to the remaining discretion to otherwise allow the claim even if conditions had not been complied with.

256. He contended that HMRC chose not to produce the review officer, Officer Ramsay, as a witness which meant DFUK had no opportunity to test her evidence and challenge any purported exercise of the discretion on her part. However, at [58] of the Decision the FTT recorded that the review letter had explained that due to non-compliance with other requirements, the time limit condition would not be waived. It also found that there was no indication in the decision that HMRC believed they had the power to waive any of the other conditions and accordingly there was no evidence before the Tribunal that any person at HMRC had actually and effectively decided whether or not to waive those conditions.

257. Even if this is wrong, Mr Thornton submitted that it was abundantly clear that both decision makers believed other conditions to have been breached when, as the FTT found, they were not. Those points must have been in their minds when considering whether to waive any one of them and must naturally have influenced that decision.

258. Accordingly, in light of the FTT's findings, he contended that it was not open to the FTT to conclude that HMRC took no irrelevant factors into account when deciding whether to waive these conditions. The FTT ought to have determined that as there was no evidence of any decision not to waive them, the discretion was exercised unlawfully or not at all and the decisions were consequently unlawful. The judgment in *GB Housley* clearly implied that a non-exercise of a discretion was as unlawful as the improper exercise of discretion at [70(i)].

259. The FTT also noted at [170] that the review decision had outlined three methods of obtaining an S8 document showing status 60. Whilst it was not accepted by DFUK that each of these were correct, the FTT did record that none of them were available to DFUK. Mr Thornton argued that these appear to have been irrelevant factors taken into account by the review officer. Even if these were perceived as ways that DFUK might have complied with the condition by acting in different ways from the start, it chose to export the goods in the ways in did, and given the absence of publicity by HMRC on the way their system had been set up, it did not know in advance that there was an issue. It was

not unreasonable for DFUK to have chosen RoRo transport but it then discovered it was stuck with the impossible task of providing HMRC's required confirmation of export.

260. He contended that each express or implied finding of fact by the FTT to the effect that HMRC took no irrelevant factors into account when deciding not to waive the duty stamp and export conditions was plainly irrational. It was inconsistent with other elements of the decision and was not based on supporting evidence.

261. Having decided that HMRC's decision not to waive the conditions was not unreasonable, the FTT did not need to address whether the decisions would inevitably have been the same if made again. However, the FTT did so at [165] in relation to the duty stamp decision alone. The Court of Appeal confirmed at [77]-[79] of *GB Housley* that the test was one of inevitability. This cannot be a low bar and it was for HMRC to show that it applies. The FTT appeared to rely on the decision in *Corbitt* to justify their reaching this conclusion without evidence or submissions on the point from HMRC. It is unclear why the FTT believed this as it flies in the face of the normal approach to burden of proof.

262. Mr Thornton submitted that the FTT's finding on inevitability was based on no evidence. HMRC's only witness did not make that claim in evidence. HMRC also made no submissions that the decision would inevitably be the same – they could not have done so without misleading the Tribunal. In addition to the above, the FTT relied on DFUK not having taken steps after the event to ensure that BWA had complied with its duty. There was no evidence or argument submitted by HMRC that this was relevant or should be a factor in the decision. It appears to be an invention of the FTT and its logic is unclear. No action of DFUK after the event would change whether or not the duty stamp details were recorded and it is unclear why this would be a relevant factor at all, let alone one that shows it is inevitable the condition would not be waived.

263. Mr Thornton argued that the Upper Tribunal was in a sufficient position to remake the Decision or, at the least, remit the drawback decision back to HMRC to consider waiving any of these two conditions that are considered to apply.

HMRC's submissions

264. There is no need to record Ms McArdle submissions opposing this ground of appeal. We have incorporated her reasoning below where we have agreed with it.

Discussion and Analysis

265. The Appellant essentially argues that: i) the FTT failed to apply its own finding that HMRC failed to exercise its own discretion as to whether to waive each and every condition that had not been complied with; and ii) having rejected some elements of HMRC's reasoning in rejecting the drawback claim, the FTT fell into error of law by not remitting the claim for reconsideration as it could not know that HMRC would inevitably have reached the same conclusion.

266. We are satisfied that the FTT made no material error of law in the Decision. We accept the FTT's point that the rationale for HMRC's decisions could have been clearer but this much is tolerably clear. In refusing the drawback claim, HMRC relied on it being made out of time and deciding that this condition should not be waived as the Appellant had not provided a good reason for the delay and had also failed to comply with other requirements of the drawback regime.

267. On appeal the FTT decided that the drawback claim was made out of time but found that HMRC had waived the time limit. However, the FTT found that the Appellant failed to satisfy the duty-stamp and export evidence conditions and it was not unreasonable for HMRC to rely upon the failure to satisfy these conditions to refuse the claim. The FTT therefore upheld the refusal of the vast majority of the value of the claim on the basis that it was affected by these two conditions.

268. Addressing Mr Thornton's first point, to the extent that HMRC's decisions only consider the exercise of the discretion to waive the time limit and fail to consider the exercise of a discretion to waive the other conditions, that might be expected. The decisions are premised on the Appellant's request which in turn was based on it meeting all the drawback conditions other than the time limit condition – the Appellant was not asking HMRC to exercise any discretion in relation to the other conditions. Therefore, HMRC should not properly be criticised for failing to address waiver of other conditions explicitly.

269. Further and in any event, the original and review decisions do provide some evidence that HMRC considered all the circumstances of the case beyond the mere question of strict compliance with the conditions. For example, in the review decision Officer Ramsay considered alternative evidence of export being provided or alternative means of transport being undertaken in light of the ports not using the CHIEF system for RoRo exports. She did not simply rely on the lack of the specific evidence of export being provided as required by EN207. Therefore, even if the decisions did not expressly state that they had considered whether to waive any of the conditions apart from the time limit, it was implicit that HMRC had considered the exercise of their discretion more widely.

270. Finally, the FTT independently considered the reasonableness of HMRC's reliance on the two conditions which it upheld, namely the failure to comply with the DSR in relation to duty-stamps and failure to provide the required evidence of export.

271. The FTT went on to make a specific finding in relation to the duty stamps that it was reasonable for HMRC to rely upon non-compliance with the DSR to refuse that part of the claim in light of all the circumstances, and that even if HMRC did not specifically consider the exercise of its discretion to waive the condition, it is inevitable that HMRC would have come to the same conclusion (see [165]). Addressing Mr Thornton's point that the FTT was required to hear evidence that it was inevitable that HMRC would have come to the same conclusions if they did not exercise a discretion, we disagree. As a matter of law, if a condition of drawback is not complied with and it would be reasonable for HMRC not to waive that condition, then it is inevitable any claim based upon the satisfaction of this condition would be refused. The FTT would not be required to hear evidence on the point because inevitability flows as a logical consequence of the law.

272. In relation to the evidence of export, while the FTT did not make the equivalent finding on inevitability at [173], it did find that HMRC acted reasonably in relying upon the Appellant's failure to comply with this condition. The FTT found that HMRC took into account all relevant matters and did not take into account irrelevant ones. It found that HMRC had exercised a discretion to consider all the circumstances, including the difficulties faced by importers, when relying upon this ground. Therefore, it implicitly found there was no failure by HMRC to exercise a discretion to waive non-compliance. Thus, it was not required to apply a test of inevitability because HMRC had effectively and reasonably considered all the circumstances and decided not to exercise a discretion to waive the condition.

273. Mr Thornton's second broad point was that the FTT found that HMRC took into account a number of irrelevant matters or acted unreasonably in relying on reasons that it found to be flawed. He is right about this and HMRC did not cross-appeal in respect of most of the matters that the FTT found to have contained flaws. Mr Thornton correctly listed a number of matters, including the refusal to waive the time limit, that HMRC relied upon but which the FTT found to be flawed or unreasonable. However, it does not follow that this required the FTT to remit the matter for a fresh decision based upon HMRC taking into account irrelevant matters.

274. As set out above, if any one drawback condition is not complied with and it would be reasonable for HMRC not to waive that condition, then it is inevitable that any claim which relies on the satisfaction of the condition would have to be refused. This applies to the duty stamp and export-evidence conditions. The reliance on additional flawed or irrelevant additional grounds for refusing the claim cannot be material in these circumstances. As a matter of law, it is inevitable that any part of a claim relying upon satisfying a condition must be refused in any respect where a condition has not been met and it was reasonable for HMRC not to waive it. Therefore, it is not material that HMRC relied on the Appellant failing to satisfy additional conditions which turned out to be flawed. All the conditions of drawback would have to be met unless HMRC waived them in respect of any claim.

275. The FTT was entitled to find that, in respect of that part of the claim affected by the duty stamp and export evidence conditions, HMRC's refusal of drawback was a reasonable decision which they were entitled to make and involved a reasonable exercise of their discretion. The decision treated each of the conditions as material matters which the Appellant was required to comply with. Each of the conditions, if not waived and not complied with, was capable of forming the basis on which some of the claim could be refused.

276. The FTT's guidance as to its supervisory jurisdiction at [153] was without flaw and it followed it without error. Thus, there was no error of law in the FTT's approach.

277. We dismiss this ground of appeal.

CONCLUSION ON APPEAL AND CROSS APPEAL

278. We have dismissed both the cross-appeal and the appeal. There was no material error of law in the Decision. It therefore follows that the Decision is confirmed. The Appellant's claim for drawback is to be refused for the most part but is allowed to the limited extent of £9,695.27.

JUDGE RUPERT JONES **JUDGE KEVIN POOLE**

UPPER TRIBNAL JUDGES

RELEASE DATE: 25 September 2025