UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Neutral Citation No. [2026] UKUT 00043 (TCC)**

Applicant: IT Way Transgroup Clearance LLP	**Tribunal Ref: UT-2025-000076**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE FOLLOWING HEARING ON 14 JANUARY 2026

JUDGE JEANETTE ZAMAN

1. The applicant, IT Way Transgroup Clearance LLP ("IT Way"), applies to the Upper Tribunal (Tax and Chancery Chamber) (the "UT") for permission to appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) ("FTT") released on 2 December 2024 (TC/2021/03135). References below in the form FTT[x] are to paragraphs of the Decision.

2. IT Way applied to the FTT for permission to appeal against the Decision. In a decision notice released on 23 June 2025, the FTT refused permission (the "FTT PTA Decision"). On 7 August 2025 IT Way renewed its application for permission to appeal (the "Application"). I decided to admit that late application but refused permission to appeal (the "UT Papers Decision").

3. IT Way applied for the Application to be considered at a hearing and this is my decision following that hearing, which was held on 14 January 2026. I heard from Leslie Allen of Allens Tax Disputes Limited for IT Way and Charlotte Brown, counsel, for HMRC.

4. Pursuant to s11(1) Tribunals Courts and Enforcement Act 2007 an appeal to the Upper Tribunal may only be made on a point of law. An application for permission to appeal must demonstrate that it is arguable that the FTT made an error of law in reaching its decision which was material to that decision. "Arguable" means an argument that carries a realistic as opposed to fanciful prospect of success.

FTT DECISION

5. HMRC had issued an assessment for customs duty and import VAT to IT Way in relation to a shipment of goods imported by a third party, the Trader, into the UK on which "Disaster Relief" had been incorrectly claimed. IT Way is a customs clearance agent and had been

assessed jointly and severally with the Trader for the unpaid customs duty and import VAT. This was because it had declared itself as acting as the Trader's indirect agent. IT Way appealed on the basis that it was not an indirect agent as it had subsequently signed terms with the Trader under which both parties agreed it was to be a direct agent. This was the "Direct Representation Letter".

6. Here, the FTT's findings included:

(1) One letter dated 1 April 2021 (defined as "Letter 1") was received by Officer Gardner. Letter 1 had been posted via special delivery, reference 0560, addressed to City Centre House, Birmingham. That letter had been posted to the NPCC Hub, which had scanned and emailed Letter 1 to Officer Gardner on 9 April 2021. That letter stated "we should have used Direct representation". It included copies of certain documents, which were listed by the FTT. The hard copy was destroyed in accordance with HMRC's protocol (FTT[15] to [18]).

(2) Officer Gardner received an email from the CCH Post Room on 13 April 2021 stating he had post. After asking questions, Officer Gardner concluded it was a hard copy of Letter 1 and did not ask for it to be sent to him. It was subsequently discovered that this was a second letter, "Letter 2" (FTT[19]).

(3) During the course of subsequent correspondence, Mr Du of IT Way notified Officer Gardner that he had sent two letters to HMRC – both by special delivery: (a) a letter to City Centre House with tracking reference 0560, and (b) a letter to the C18 Team with tracking reference 0559 (FTT[25]). IT Way asked for these letters to be returned. A soft copy of Letter 1 was sent by email, and a hard copy of Letter 2 was returned to IT Way by post (FTT[26]).

7. The FTT then considered the evidence of the two witnesses (Mr Du and Officer Gardiner). The FTT recorded at FTT[28(13)] that Mr Du's evidence was that he wrote two letters and that one of these letters, the one with tracking reference 0559 enclosed copies of the importation documents and the original copy of the Direct Representation Letter, and at FTT[28(22)] that Mr Du could not explain why he did not retain a copy of the Direct Representation Letter, or why there was no specific reference to it in Letter 1 or Letter 2.

8. The FTT then made findings in relation to the Letters, which included that Letter 1 did not contain any original documents and the contents did not match the description given by Mr Du in his written statement (FTT[31] to [32]); it is "impossible to ascertain" the content of Letter 2 as HMRC did not open it, IT Way has not provided a copy of it, and Mr Du had described it in a way which conflicted with the content of the letter received earlier (FTT[33]).

9. The FTT then said:

> "34. The inference that we draw from this is that either (i) Mr Du's descriptions of the C18 letter and the letter to Officer Gardner were not correct, or (ii) that the "wrong" letter had been placed in the envelope but with the "right" enclosures."

10. The FTT set out the relevant law and summarised the parties' submissions and its reasoning was then as follows:

> "67. It is apparent from HMRC's evidence that for the Appellant to be regarded as direct representative (and so not jointly and severally liable with the Trader for the Customs Debt) there must be clear evidence to displace its initial submission that it was an indirect representative.
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> 68. No clear evidence has been submitted to show that this is the case.

> 69. The evidence for direct representation consists primarily of Mr Du's written and oral witness evidence, the Appellant's primary contention being that the one piece of clear evidence available (the Direct Representation Letter) was provided to HMRC but has been lost by reason of HMRC's failure to open the letter and review the contents followed by HMRC's decision to return the unopened letter to the Appellant by ordinary post.
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> 70. The Appellant's case relies heavily therefore on Mr Du's witness evidence and inevitably on our findings in respect of the purported Direct Representation Letter.
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> 71. On the evidence before us we cannot conclude, on the balance of probabilities, that the Direct Representation Letter existed. Even if it did exist no evidence has been adduced as to its contents and it is therefore not possible to consider whether it would be sufficient to displace the fact that the Appellant entered itself as the Trader's indirect agent.
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> 72. We accept that this will be a hard conclusion for the Appellant to accept – but it is a consequence of where the burden of proof lies in this Appeal. Put simply, the Appellant has not managed to persuade us on the evidence before us that, on the balance of probabilities, it was the Trader's direct representative."

11. The FTT dismissed the appeal. It stated at FTT[74]:

> "74. …the Appellant has not persuaded us that, on the balance of probabilities, it was the Trader's direct representative rather than the Trader's indirect representative as stated on the Customs clearance form…"

THE APPLICATION AND UT PAPERS DECISION

12. The Application sought permission to appeal on the grounds that the FTT failed to correctly interpret the burden of proof, and that this was because of what were said to be substantial errors of fact in the Decision.

13. Most of the reasons relied upon by IT Way were *Edwards v Bairstow* challenges to the findings of fact made by the FTT. As has been repeatedly emphasised by the courts, the bar to establishing an error of law based on challenges to findings of fact is deliberately set high (see in particular the decisions of the Court of Appeal in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 and *Volpi v Volpi* [2022] EWCA Civ 464).

14. I addressed each of the reasons and evidence relied upon in support of IT Way's submissions that the FTT had erred in making the findings of fact upon which it then relied in reaching its conclusion and then set out my conclusion as follows:

> "25. I have considered both the Application and the Decision in their entirety, and am not persuaded that any of the matters identified by IT Way in the Application (alone or taken together) demonstrate that the FTT made an arguable error of law in making its findings of fact or reaching its conclusions. The FTT took account of all of the evidence before it, and was entitled to reach the conclusion as to what was and was not received by HMRC, what was and was not enclosed, and whether it is established that the Direct Representation Letter existed. The Application is inviting me to island hop amongst the evidence, which is warned against by the Court of Appeal in Fage v Chobani.
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> 26. Reverting to the submissions made on the burden of proof, IT Way states that the FTT accepts that it did not consider the question of law of burden shifting in the Decision; and that this has not been considered fully in the FTT PTA Decision. The Application submits that the FTT failed to deal properly with the burden of proof and applying it to IT Way, and failed to examine the

> fact that once it was agreed that the "document in relation to indirect representation was sent to the officer" that the burden then shifted to HMRC to read and consider the documents sent to them and form a value judgment in relation to them. From the context, I assume that the reference to "indirect representation" should be to "direct representation". However, the very point is that it was not found, or agreed, by the FTT that the Direct Representation Letter was sent to HMRC. I am not persuaded that it is arguable that the FTT made an error of law in its approach to the burden of proof."

ORAL RENEWAL HEARING

15. Mr Allen explained that IT Way was not renewing its application for permission to appeal against the findings of fact made by the FTT. Instead, he would focus on one ground of appeal, which he described as being that the FTT made an error of law by failing to consider what burden was on HMRC, and whether HMRC's failure to read and consider any documents sent to it by IT Way constitutes a failure of HMRC to discharge that burden.

16. Mr Allen referred to the FTT's findings from the HMRC officer's evidence at FTT[29(7), (8) and (14)], submitting that there was clear evidence of two letters being sent to HMRC, with one of them then being returned unopened by HMRC.

17. Mr Allen submitted that the evidential burden had shifted to HMRC when these letters were sent, and that this issue raises the question whether HMRC have a duty to open and read documents which are sent to them, noting that here the letters were sent by special delivery. He submitted that this was an important point as to the expectations on taxpayers, who expect HMRC to read and consider documentation which is sent to them.

18. Mr Allen relied on the decision of Woolf J in *Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505, referring in particular to Woolf J's statement that the use of the word "judgment" in what was then s31(1) Finance Act 1972 makes it clear that the Commissioners are required to exercise their powers in such a way that "they make a value judgment on the material which is before them". Mr Allen accepted that there was no applicable statutory "best judgment" applicable in the present case, but submitted that a duty must nevertheless apply to HMRC. The FTT had not looked to see whether there was a duty on the officer to consider all material before them. IT Way's position is that this is enough to suggest that the burden of proof had shifted from IT Way to HMRC.

19. Mr Allen submitted that this is an important issue for taxpayers in general, who generally do send documents to HMRC when challenging an assessment and that the idea that the officer may choose (for whatever reason) not to read those documents must be wrong. He emphasised that the test for permission is that it must be arguable, or more than fanciful, that the FTT made an error of law, and not that it would or is likely to succeed.

20. Ms Brown submitted there was no arguable error of law:

(1) For any burden of proof to shift, IT Way needs to prove that the letter they say was sent to HMRC and needed to be opened did contain the confirmation that IT Way was a direct representative. The FTT found that this was not the case, there is no challenge to that finding and it cannot be said that the FTT's conclusion was rationally insupportable.

(2) HMRC does not accept that *Van Boeckel* would apply here. It is clear from FTT[59] to [60] that the appeal was made on a single issue and there was no challenge to quantum. The only issue was "whether the Appellant was a direct representative or indirect representative of the Trader" (at FTT[60]).

21. I am grateful to Mr Allen and Ms Brown for their clear and helpful submissions.

DISCUSSION

22. In the Application IT Way's submission that the evidential burden had passed to HMRC had relied on *Wood v Holden* [2006] EWCA Civ 26. There, at [30] Chadwick LJ referred to Park J's statement that:

> "However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the revenue."

23. That statement must be read in the context of that appeal, which included that at [60] Park J had referred to all of the evidence adduced by Mr and Mrs Wood in support of the central management and control being in the Netherlands, and continuing:

> "Surely at that point they can say: "We have done enough to raise a case that Eulalia was not resident in the United Kingdom. What more can the Special Commissioners expect from us? The burden must now pass to the Revenue to produce some material to show that, despite what appears from everything which we have produced, Eulalia was actually resident in the United Kingdom.""

24. Here, Mr Allen relies on the (not unreasonable) expectation of taxpayers that HMRC would read the letters that are sent to them. It was accepted that Officer Gardiner did not (based on his mistaken belief that the letter in the CCH Post Room was the same as the one that had been scanned and emailed to him).

25. However, the question whether it is arguable that any evidential burden should be said to have been shifted to HMRC in any case must be considered by reference to the evidence which has been adduced by the relevant taxpayer. The FTT has found that IT Way sent two letters to HMRC on the same date, both by special delivery, to two different addresses, but it has not found either that the Direct Representation Letter existed, or that it would have been sufficient to displace the fact that IT Way had recorded itself as the Trader's indirect representative.

26. The position is notably different from *Wood v Holden*, where Park J referred to a taxpayer being able to say "we have done enough", what more can HMRC expect from us. It is very clear that the FTT had significant concerns with the evidence adduced by IT Way. The findings of fact made by the FTT, which are not challenged and which cannot be said to be rationally insupportable, do not include any finding that Letter 2 did include the Direct Representation Letter. Indeed, the FTT explains why it has not accepted this at FTT[73]:

> "73. Our decision takes into account all of the evidence before us. We also took into account in our deliberations the fact that Mr Du's first language is not English. We found the following points to be particularly relevant:
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> (1) The Appellant is a well-established customs clearance agent and Mr Du is experienced in dealing with HMRC. It is difficult therefore to accept that no record would have been kept of a document as important as the Direct Representation Letter. This is particularly the case given that the Appellant decided specifically to seek confirmation of direct representation as it was concerned about the expected Customs Duty and Import VAT liability having entered itself as on the customs clearance form as an indirect representative.
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> (2) The Appellant did not refer to the existence of the Direct Representation Letter in its correspondence with HMRC until after it realised that one of its letters sent to HMRC had been returned to it unopened. This reference was in an email to HMRC dated 17 August 2021 when it referred to an "importer signed direct representation letter" which had been sent to HMRC and lost.

(3) In the Appellant's email sent to the NPCC team at HMRC on 26 March 2021 (and copied to Officer Gardner) in which Mr Du outlined the Appellant's position explaining that it had done all that it could do to ensure direct representation, there was no mention of the Direct Representation Letter nor was the letter included in the various enclosures attached to the email – despite what would have been its centrality to the question of its liability.

(4) In the formal letter dated 1 April 2021 received by Officer Gardiner, again there was no specific reference to the Direct Representation Letter despite its importance.

(5) There is significant confusion in the description and circumstances relating to the two letters sent by the Appellant to HMRC via special delivery. The letter scanned to Officer Gardner although addressed to him was in an envelope addressed to the C18 team. The enclosures did not include the Direct Representation Letter which Mr Du contends was included in the letter to Officer Gardner. It is simply not possible to determine what actually happened here. The lack of inclusion of the Direct Representation Letter may have been because it did not exist or because the incorrect enclosures were placed in the correct envelope or vice versa.

(6) Mr Du gave somewhat inconsistent evidence in respect of the two letters sent to HMRC on 1 August 2021. In his written evidence he indicated that the letter to the C18 team was not the same as the letter to Officer Gardner – as the C18 letter referred to not receiving a right to be heard letter or decision. However in his oral evidence and in his email to Officer Gardner on 12 July 2021 he appeared to say that the two letters were copies (the only difference being that one of the letters included the Direct Representation Letter as an additional enclosure).

(7) There was no reason for the Appellant to have sent the original Direct Representation Letter to HMRC, given that HMRC did not require original documentation to be submitted to it as evidence. Mr Du's explanation was that the original was sent because it was so important for HMRC to see it. We found this hard to accept."

27. I agree with Ms Brown that *Van Boeckel* does not assist here. Woolf J was concerned with the statutory provision that HMRC "may assess the amount of tax due from him to the best of their judgment". There is no equivalent statutory provision relevant here, and the amount of customs duty and import VAT was not challenged.

28. Whilst it may well be that there are some instances where it may be arguable that the conduct of HMRC, including expectations as to how HMRC deals with correspondence, should be expressly considered when addressing the approach to the burden of proof in relation to an issue and whether there is an evidential burden on HMRC, this is not such an instance.

29. I am not persuaded that it is arguable that the FTT made an error of law in its approach to the burden of proof.

DECISION

30. It is not arguable that the FTT made an error of law by failing to consider what burden was on HMRC and whether HMRC's failure to read and consider any documents sent to it by IT Way constituted a failure of HMRC to discharge that burden. Permission to appeal is refused.

Signed: **Judge Jeanette Zaman**
Issued to the parties on: 29 January 2026