Neutral Citation: [2023] UKFTT 00979 (TC)

Case Number: TC08998

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/02620

EXCISE DUTY – refusal of drawback claim – whether conditions for drawback met – in part – jurisdiction of tribunal where conditions not met – supervisory – whether HMRC acted reasonably with regard to conditions not met – yes – appeal allowed in part

Heard on: 25 – 26 September 2023
Judgment date: 16 November 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MRS SONIA GABLE

Between

DRINKS AND FOOD UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tristan Thornton, tax consultant.

For the Respondents: Isabel McArdle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the refusal by HM Customs & Excise (**HMRC**) of a claim for drawback of excise duty in the sum of £385,165.31 made by Drinks and Food UK Limited (**Appellant**).

2. For the reasons set out below we have determined that the Appellant's claim is limited to the sum of £9,695.27.

PROCEDURAL BACKGROUND

3. The Appellant's business is buying and selling wholesale drink and food. In the course of that business goods which are subject to excise duty are imported and exported. The Appellant's excise goods which are the subject matter of this appeal were imported and originally warehoused under duty suspension arrangements in a bonded warehouse operated by London City Bond (**LCB**).

4. In or around February 2014, LCB notified the Appellant that HMRC had revoked the relevant authorisation to be a warehouse keeper in respect of the Appellant's goods in October 2009. HMRC did not notify the Appellant of the withdrawal of the authorisation. As a consequence, for the period from October 2009 through to February 2014 the Appellant continued, incorrectly, to treat the goods held in the LCB warehouse as duty suspended goods. On 1 May 2014 HMRC assessed the Appellant to excise duty in relation to those excise goods. The amount assessed was £649,715. HMRC required that the assessment be paid otherwise the goods would have been seized and forfeit. At the time of the assessment the Appellant was notified that it would be entitled to claim drawback if the provisions of Excise Notice 207 (**EN 207**) were met. The Appellants paid the assessment in full on 5 June 2014 and there was no appeal against the assessment.

5. A Notice of Intention (**NOI**) to claim drawback was lodged by the Appellant with HMRC on 16 November 2020. The NOI was given the reference number DR144520. The export of the goods took place in a number of tranches on 7 December 2020, 8 December 2020 and 8 April 2020. On 21 April 2021 the Appellant submitted its drawback claim (**Claim**).

6. The Claim was refused on 2 September 2021 (**Original Decision)** on the basis that it had been made outside the required three-year time limit; a condition which, in HMRC's view, it was inappropriate to waive (despite the statutory power to do so). The Original Decision and the relevance of the three-year time limit are considered in detail below.

7. An independent review of the decision was requested. The review conclusion letter, dated 24 November 2021, upheld the decision (**Review**).

8. There is a right of appeal against the Review. The Appellant exercised that right on 23 December 2021.

RELEVANT LAW

9. Article 9 Council Directive 2008/118/EC provides that excise duty shall be "levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State".

10. Article 33 of the same Directive states:

> "1. … where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be

subject to excise duty and excise duty shall become chargeable in that other Member State.

…

6. The excise duty **shall**, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State." (emphasis added)

11. In simple and uncontroversial terms, the effect of these articles requires that where goods are moved from one member state to another after excise duty has been paid in the first member state, excise duty shall nevertheless be payable in the second member state but the first member state is required to reimburse or remit the excise duty paid to it upon the request of the owner of the goods; however, such reimbursement or remittance is made in accordance with the procedures of the reimbursing member state.

12. The UK provisions providing for reimbursement/remittance are principally contained in the Excise Goods (Drawback) Regulations 1995 (**EGDR**) authorised under section 2 Finance Act 1992 (No 2) which (so far as relevant) provides:

"(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 …"

13. The relevant parts of EGDR are:

(1) Regulation 3 provides that EGDR applies in respect of goods which have not been and will not be consumed in the UK.

(2) Regulation 5 defines when goods have not been consumed in the UK and are eligible to a drawback claim, in particular it requires that UK duty has been paid on the goods and, relevant in the present case, that the goods have been exported.

(3) Regulation 7 provides:

"(1) … 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 …

…

(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 was paid."

(4) Regulation 8(2) imposes the conditions to be met where the event justifying the claim is the export of the goods. These conditions are:

(a) that notice be given to HMRC providing: name and address of the claimant, the address at which the goods may be inspected prior to export, the description of the goods including their nature and quantity, the amount of duty paid and the address of the premises to which they are to be exported (regulation 8(2)(a));

(b) prior to 31 December 2020 where the export was to the EU an accompanying document was completed (regulation 8(2)(b));

(c) that all customs declarations or other pre-export requirements as HMRC specify in a notice are met (regulation 8(2)(c));

(d) that the goods and any documents which HMRC specify in a notice are available for inspection for not less than two clear business days following the day on which notice is given (regulation 8(2)(d)).

(5) Prior to 31 December 2020 Regulation 10 required that where a claim to drawback was made after export by way of a dispatch to another EU country, the claimant must include with the claim evidence of export and that duty had been paid in the receiving member state together with a copy of the accompanying export documentation endorsed with a certificate of receipt.

(6) Post 31 December 2020, the drawback claim must include such documentary evidence of export and evidence of payment of duty as specified by HMRC in a notice.

14. Also relevant in this appeal are the provisions of the Duty Stamp Regulations 2006 (**DSR**). So far as relevant these provide as follows:

(1) 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.

(2) Part 4 provides detailed rules for the affixing and obliteration of duty stamps. Regulation 24 requires that where stamps are to be obliterated two clear days' notice is given to HMRC of the proposed obliteration. 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 and preserve the records for a period of three years.

15. Finally, the provisions of sections 13 and 16 Finance Act 1994 (**FA94**) are relevant.

(1) Section 13A(e) 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" within the definition of relevant decision for the purposes of bringing an appeal.

(2) Section 16 sets out the jurisdiction of the Tribunal in respect of appeals against relevant decisions. In the context of this appeal the relevant decision was the refusal of the Appellant's drawback claim. The Original Decision offered a review (pursuant to section 15A). The Review was carried out pursuant to section 15C. Accordingly, this appeal is an appeal made in accordance with section 16(1C). It is not an appeal in respect of an "ancillary matter" (as defined under section 16(8), Schedule 5 and section 13A(a) – (h)). As such the Tribunal's jurisdiction is as prescribed in section 16(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." (emphasis added).

(3) There is a dispute between the parties as to the meaning of the emphasised part of section 16(5) above.

(4) The provisions of section 16(4) must also be considered in this appeal:

> "In relation to any decision as to an ancillary matter, … 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.

16. In accordance with the delegated powers set out in Regulation 7 EGDR HMRC have issued EN 207. The Tribunal was provided with a number of versions of EN 207: for the purposes of this decision we consider that dated 5 April 2019 (that extant for the first two tranches of export) (**EN 207 (2019)**) and that dated March 2021 (extant in respect of the third tranche of export) (**EN 207 (2021)**). We were informed and understand that there were two April 2019 versions, one was extant for two days (9 – 11 April); we do not refer to this version as it was not in force at any time relevant to this appeal.

17. So far as relevant the key provisions of EN 207 (2019) are summarised below by reference to the relevant paragraphs numbers:

(1) 1.2 sets out what the notice is about.

(2) 1.3 informs those whose business is the dispatch, export, warehouse for export or destruction of excise goods that the notice is relevant to them.

(3) 1.4 informs readers that they may need to refer to other notices including DS5 – UK Duty Stamps Scheme.

(4) 2.4 responds to the question "what happens if I fail to meet my legal obligations?" and states that the consequence of a failure to comply is that HMRC are permitted to "reduce or reject your claim".

(5) 3.2 confirms that to be eligible for drawback the relevant duty paid goods must be dispatched to another EU country or exported outside the UK.

(6) 3.3 explains that the claimant must compete a NOI and prepare any documentation required to accompany the goods. The goods and documents must be made available for inspection by HMRC "**at least as long** as the minimum period of notice" (emphasis added) in case HMRC decide to inspect. Once the period of notice has expired the claimant is able to export/dispatch and in the case of a dispatch duty must be guaranteed to be paid in the receiving member state. After the goods have been dispatched or exported the claim may be submitted.

(7) The main conditions and requirements are set out in paragraph 4. 4.1 identifies a list of "main conditions" including, of relevance and dispute in this appeal:

(a) The duty which is the subject of the claim has not been paid more than 3 years prior to the event giving rise to drawback (i.e. in this case dispatch or export) (reflecting regulation 7(6) EGDR).

(b) The drawback claim documentation has been completed fully and accurately and has been submitted with correct supporting evidence

(c) Suitable records have been maintained to support the claim.

(8) 4.5 deals with goods which carry duty stamps and provides:

> "Before you can claim drawback on spirits bearing duty stamps you must first obliterate the duty stamps in accordance with the Duty Stamp 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…"

(9) 4.10 deals with the notice required to be given. It sets out with examples how to calculate the 2 clear business days' notice. It also provides: "If you intend to hold the goods **only** for the minimum period of notice required … contact [HMRC] to check the correct period of notice".

(10) 4.11 sets out the information to be included in the NOI. We need not summarise the listed information. It is reflected in the prescribed form which was used by the Appellant (summarised in paragraph 37. below and the provisions of Regulation 8(2)(a) EGDR as above).

(11) 4.12 concerns changes to "the details … submitted in [the]" NOI. It states:

> "if you find that you need to change any information **on your NOI form** after you have submitted it, you must contact [HMRC] …
>
> If the change affects the inspection of the goods … the period of notice will start again …
>
> If you do not notify us of changes to the information **on your NOI form**, … your drawback claim may be reduced or rejected …" (emphasis added).

(12) 4.13 informs claimants that drawback must be claimed within 3 years of the date on which the duty was originally paid on the goods.

(13) 4.15 states that the records required of a revenue trader must be kept together with evidence of the UK duty payment and, in respect of goods dispatched to an EU member state, payment of duty in the receiving state.

(14) 5.1 prescribes that the EX75 (NOI) and EX76 (drawback claim) forms are to be used (or replicated). It states:

> "You use the NOI to notify us that you intend to make a claim for drawback. You submit this form **before the event giving rise to drawback takes place** (see paragraph 4.10). The NOI provides us with the opportunity to inspect the goods.
>
> You use the drawback claim form to make the claim for drawback of Excise Duty. You submit this form **after the event giving rise to drawback takes place**. No payment will be made under drawback procedures unless a correctly completed drawback claim form is submitted **along with any requested supporting evidence**." (emphasis added).

(15) Paragraph 6 concerns the formalities to be complied with in respect of a dispatch to an EU country. These include completion of the documentation required to

accompany duty paid goods, obliteration of duty stamps, submission of a NOI, and evidence of payment of duty in the receiving state. 6.2 permits dispatch after the notice period has expired and once the steps required have been completed.

(16) Paragraph 7 relates to exports of goods outside the EU. It requires the claimant to lodge an export declaration. As with a dispatch, export is permitted after completion of the required steps and after the notice period has expired. Paragraph 7.4 requires:

> "the CHIEF S8 print out showing the Entry reference number and a 'departed' status of 60 for direct exports … or CDS equivalent.
>
> 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"

(17) HMRC explain, at paragraph 12.1, that claims will be reduced where:

> "…
>
> - The drawback claim form contains more, or different, goods than declared on the NOI …
> - You only meet 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 (we will only consider the goods for which all the conditions and requirements were met."

(18) HMRC confirm, at paragraph 12.2, that claims will be rejected where the claimant has "not complied with conditions or procedures set out in this notice …"

18. EN 207 (2021) includes substantively the same requirements as EN 207 (2019). However, there are some differences which it is important to note:

(1) Paragraph 3.3 (How the drawback scheme works) states:

> "This paragraph contains requirements that have force of law under regulation 66(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. In particular this paragraph imposes additional requirements with which you must comply when dispatching goods from Northern Ireland to an EU country."

The substance of the paragraph, other than regarding dispatches from Northern Ireland, is as in the 2019 version.

(2) The provisions of paragraph 4.12 (which, in the main, replicate those of the 2019 version) are now prefaced with the rubric: "this paragraph contains requirements that have force of law under regulation 7(1) of the EGDR. In particular, this paragraph imposes additional requirements with which you must comply as a condition of receiving drawback."

(3) Paragraph 4.15 is also in the same terms as the previous 2019 version but prefaced with the following: "This paragraph contains requirements that have force of law under regulations 7(1) and 8(2)(c) of the EGDR. In particular this paragraph imposes additional requirements with which you must comply as a condition of receiving drawback."

(4) Paragraph 6 relates only to dispatches to the EU from Northern Ireland and paragraph 7 to movements from mainland Britain to the EU as, following IP completion day on 31 December 2020, any movement of goods to the EU from mainland Britain was now classified as exports.

(5) Paragraph 7 is also introduced by a paragraph informing the reader that it "contains requirements that have force of law under regulation 8(2)(c) and (d) of the EGDR. In particular, this paragraph sets out the pre-export declarations and other requirements that must be completed and made available for inspection before you export goods on which you later intend to claim drawback. Export declarations must be submitted to HMRC in connection with the intended export."

(6) Paragraph 7.4 announces that it "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."

(7) There is a new paragraph 12.2 which addresses the change in status of exports to EU countries and the documentation required as evidence of export. It explicitly acknowledges that an NOI may be submitted before 31 December 2020 with the export being made after that date. Claimants are reminded that in those circumstances they "must include the supporting evidence described in section 7 of [that] notice instead of the documents required by EGDR in the form it had been before the end of the transitional period".

THE CLAIM AND THE RELEVANT DECISION

19. In order to understand the Original Decision and subsequent Review it is necessary to set the Original Decision in the context of some of the correspondence which preceded it.

20. We were provided with the witness statements of Mr Tristan Thornton, Mr Alan Powell (advisor to the Appellant in connection with the initial assessment), Mr Cornelis Dirkzwager (director of the Appellant), Mr Andrew Roy (of BWA Logistics Ltd (**BWA**)), and Mr Lawrence O'Rourke (original decision maker of HMRC). The statements of Messrs Powell, Dirkzwager, Roy and O'Rourke were all accepted and none of the witnesses were called to give evidence. Mr Thornton was subject to detailed cross examination. We note for the record that there are significant complexities when an advocate also gives evidence. The demarcation between evidence and submission in a matter such as this is not clearcut and the situation would have been better avoided by Mr Thornton ceding representation to someone else and limiting his contribution in the hearing to being a witness of fact.

21. There was considerable detail in the accepted statements. Much of that detail was helpful context but not, in the end, material to the decision we need to make.

22. From the statements and the other documentary evidence we make the following findings of fact.

23. When warehouse keeper authorisation affecting the goods to which this appeal relates was withdrawn the Appellant was not informed and remained in ignorance of the withdrawal for a period of over 4 years during which it continued to believe that the goods held by LCB were under duty suspension. Whilst it was subsequently accepted by HMRC that the there was an alternative basis on which authorisation would or could have been permitted, the effect of withdrawal was that the goods held by LCB were no longer considered duty suspended and there was a liability to excise duty. That liability was duly met by the Appellant in the expectation that it would then be able to secure a reimbursement or remittance of the duty where the goods were not ultimately consumed in the UK. A number of issues arose, and various means of securing reimbursement were unsuccessfully pursued. In this period some of the goods were sold in the UK; however, a substantial proportion of them remained duty paid in LCB's warehouse. LCB continued to monitor and record, by way of record of rotation, where, within the warehouse, they were held.

24. In late 2019 Mr Thornton was instructed. Following instruction, on 15 November 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 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 (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"

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.

31. Following receipt of what Mr Thornton considered, and we have found, to be a waiver of the time limit condition in regulation 7(6) EGDR, he worked with the Appellant to remove the remaining goods which had been the subject of the assessment to outside the UK so as to claim drawback. He contacted LCB with a view to obtaining the information necessary for him to be able to trace the payment of duty on the assessment to the goods which remained in the warehouse. He was provided with records that enabled him to identify which goods had been the subject of the assessment through the original storage references and then, through the various rotation records, was able to confirm precisely which goods remained in the warehouse.

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.

37. Following the de-stamping exercise, Mr Thornton prepared and submitted the NOI. He completed form EX75 providing the following information:

(1) Name, address and contact details for the Appellant as claimant

(2) The reason for the claim was stated to be "dispatch to another EU country". The alternatives were "export to a non-EU country", "warehouse for subsequent export or dispatch" and "planned destruction".

(3) The name and address of the recipient in The Netherlands.

(4) Attached to the EX75 was a schedule detailing the goods to be removed and tracing the individual items to the payment of duty.

(5) BWA's premises were identified as the place where the goods were available for inspection.

(6) The declaration was duly signed and dated by Mr Dirkzwager on 16 November 2020.

38. The NOI was submitted under cover of an email dated 19 November 2020. The email provides the details of the suppliers from whom the goods were originally purchased. HMRC were informed that the goods were with BWA undergoing the process of duty stamp obliteration. The email of 27 December 2019 was enclosed. Mr Thornton also stated: "we understand that these goods will be able to be sent to the Netherlands on Wednesday 25 November 2020 for excise duty drawback purposes". Mr Thornton's oral evidence on the terms of that email were clear and we accept his evidence. He stated that the reference to 25 November 2020 was a reference to the first date from which, in accordance with EGDR, movement could commence. Such interpretation is entirely consistent with the language used in the email. We deal below with the legal significance of this date in paragraphs 88. to 95..

39. We were told that following export and as part of the preparation of the duty drawback claim itself (EX76) Mr Thornton identified a number of minor errors in the schedule accompanying the NOI. However, subject to those errors (which we address below), we find that the EX75 was accurately completed.

40. Mr Roy then made arrangements for the shipment of the goods. Given the volume of goods and the proximity to 31 December 2020 Mr Roy could not arrange for all of the goods to be transported in a single movement. Some but not all of the goods were shipped on 7 and 8 December 2020. The goods were loaded onto lorries and were transported to the Netherlands by way of roll-on-roll-off ferry. The goods were accompanied by the required customs documentation (single administrative accompanying document (**SAAD**)) which was duly certificated.

41. Included within the shipments made in December 2020, and thereby included on the SAAD documentation, were 112 cases of Vodka Dworek which had not been the subject of the 1 May 2014 assessment.

42. The final shipment did not take place until 8 April 2021. Mr Roy's (again unchallenged) evidence was that the delay was caused by difficulties in the logistics industry following Brexit, though we also note that the UK at least was also in the second COVID lockdown from 5 November 2020 through to 8 March 2021. Again the movement was by

way of lorry and roll-on-roll-off ferry. The Brexit appropriate export documentation (T1s) was issued.

43. No amendment was made to form EX75 prior to the movement of the goods.

44. Prior to the submission of the EX76 Mr Thornton gathered together the information and documentation he understood was required to submit the claim. He noted that he had not been provided with a CHIEF S8 showing a departed status of 60. He enquired of the customs agents and was informed that the S8 was no longer produced because it related to exports from the EU. He was advised that the correct document to use was known as an X2. Mr Thornton questioned this but continued to be advised that he had the only documentation available.

45. The drawback claim was submitted on 21 April 2021. The schedule accompanying the claim corrected the errors that had been identified in the schedule accompanying the NOI. The claim was for drawback of £376,724.41 in respect of spirits and £8,448.90 in respect of wine; the claim total was £385,165.31. The amendments made to the schedule were to notify that:

(1) 5 bottles fewer of Barona vermouth had been shipped

(2) 9 cases and 5 bottles fewer of Lion Heart 37.5cl had been shipped

(3) 1 bottle fewer of Minkoff vodka had been shipped

(4) 58 cases and 5 bottles fewer of Spice Explosion (rum) had been shipped

(5) 3 cases fewer of Tequila Don Cruzado Gold had been shipped

(6) 5 bottles fewer of Van Gough banana vodka had been shipped

(7) 1 bottle fewer of Vodka Tarpan premium had been shipped

(8) 3 bottles fewer of White Diamond rum had been shipped

(9) 5 bottles fewer of White Diamond rum 37.5cl had been shipped

(10) 6 cases and 3 bottles fewer of Vodka Igobrow had been shipped

(11) 1 case fewer of Minkoff vodka 37.5cl had been shipped

46. The consequence of these differences was that the claim made was £10,879.43 lower than as stated in the NOI schedules.

47. The claim was also accompanied by both the original EX75 and an EX75 signed and dated 21 April 2021. Mr Dirkzwagen's unchallenged evidence was that the second EX75 included the same information as the original but was resigned and dated as he had misunderstood that he was being asked to provide a copy of the original. We accept his evidence and find that there was one NOI provided to HMRC, the original one.

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.

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 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.

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.

(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 2021.

(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.

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.

OUR APPROACH

59. We considered the most appropriate starting point in this appeal was to identify the conditions which HMRC contend have not been met thereby entitling them to refuse, in its entirety, the Appellant's claim for drawback. We then considered whether the conditions we identify have, or have not, been met. Having done so, and as set out below, we identified that there were conditions which had not been met.

60. That conclusion has required us to consider the second dispute between the parties: that concerning the Tribunal's jurisdiction. The Appellant contends that were we to conclude (as

we have) that there has been a failure to meet some of the conditions, then we have the power to require HMRC to conduct, in accordance with the directions of the Tribunal, a further review. The Appellant contends that we can make directions regarding the potential to waive any statutory conditions and those imposed in EN 207. HMRC contend that the Tribunal is permitted only to determine whether the conditions for an excise drawback claim as set out in EGDR and EN 207 have been met; to the extent that they have not then the appeal must fail and, in the alternative, that a requirement to re-review the decision would result in the same and inevitable answer that the claim be refused such that we should not exercise the power to require a further review.

61. We set out below our consideration in respect of each of the bases/conditions on which the Appellant's claim was rejected, providing a summary of the party's submissions on each following by our discussion and conclusion on each.

62. We are grateful to the parties for their detailed skeleton arguments, comprehensive oral submissions and responses to the additional questions raised after the hearing had concluded. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission and evidence. It is, however, inevitable, given the detail of the arguments and the quantity of material before us, that not everything in the appeal is given specific mention in this judgment.

WHAT ARE THE RELEVANT CONDITIONS

63. There was some dispute between the parties as to what were and were not conditions/requirements for the purposes of a drawback claim.

64. HMRC contended that everything which was identified in EN 207 as a condition, requirement or direction, whether as a summary of the provisions of EGDR or in exercise of their powers to impose further conditions by virtue of EGDR, was conditions which had to be adhered to unless the condition in question had been waived by them.

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 *Sage Cellars Ltd b 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 of 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.

TIME LIMIT CONDITION

69. HMRC contend that regulation 7(6) EGDR requires that a valid claim to drawback must be made by reference to a drawback event which occurs no more than 3 years after the payment of duty to which the claim relates. They acknowledge that they have the absolute power to waive the time limit condition but that they did not do so in those case. As a consequence, they contend that as the movements (by way of dispatch and export) occurred significantly more than 3 years after the payment of the assessment in June 2014 the claim, in its entirety, was properly rejected.

70. The Appellant contends that by the email of 27 December 2019 HMRC waived the time limit condition and as such the fact that the claim was submitted outside the otherwise prescribed 3 years is not a basis for rejection of the whole claim, in particular, it cannot be a basis for rejecting that part of the claim which is "untainted" by HMRC's contention that other conditions too have not been met. They contend that £9,695.27 of the total claim should be allowed on this basis (HMRC do not contest that this figure has been correctly calculated).

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.

REQUIREMENT TO HAVE AMENDED THE NOI

75. HMRC contend that the dispatch/export made by the Appellant and the associated drawback claim was not consistent with the NOI submitted and that the Appellant should have amended the details on the NOI when the Appellant found itself unable to move all the goods before 30 December 2020. In this regard HMRC say that the Appellant was in breach of EN 207 paragraph 4.12. In particular, HMRC contend that the information which the Appellant was required to have notified in order to validate the claim was:

(1) The goods were no longer to be exported on 25 November 2020;

(2) That a proportion of the goods were not dispatched but exported;

76. The Appellant contends that the EX75 NOI form did not need to be changed as none of the required particulars had materially changed and that the minor amendments which were made to the accompanying schedule between the submission of the NOI and the Claim all had the effect of reducing the drawback claim and, as such, did not need re-notification.

Requirements for NOI

77. Regulation 8(2)(a) EGDR provides the requirements to be included in the NOI where it is proposed that a claim for drawback be made "after export". Whilst regulation 8(2)(b) introduced specific requirements for an export to the EU (i.e. a dispatch) the statutory requirements for the NOI itself did not distinguish between an export and a dispatch. The information required was: the Appellant's name and address, the address of the premises at which the goods were available for inspection, the description of the goods including their nature and quantity, the amount of duty paid in respect of the goods, and the address to which they were to be exported.

78. Again, there can be, and was, no dispute that the provision of this information is a condition which must be met.

79. Both versions of EN 207 provide that the NOI is to be given (Paragraph 4.1). They also both specify the information to be provided.

80. The 2019 version provides that if the claimant intends to dispatch the goods to another EU country then the following information is also to be provided:

> "the name and address of the premises the goods are being dispatched to in the other EU country. The name, address, VAT registration number, phone and fax numbers of the buyer in the other EU country …"

81. For an intended export of the goods outside the EU the information required was:

> "the name and address of the premises the goods are being dispatched to in the other country. The name, address, phone and fax numbers of the buyer in the other country."

82. The 2021 version includes the language from paragraph 80. in respect of dispatches from Northern Ireland to the EU and that from paragraph 81. for all other exports.

83. These paragraphs of EN 207 reflect the conditions laid down in EGDR.

84. EN 207 paragraph 4.12 requires that if the information on the NOI form (see emphasised quotation at paragraph 17.(11) above) changes the changes must be notified to HMRC in writing and that if the changes affect the inspection of the goods (including a change in quantity of the goods) the period of notice for inspection will begin to run again.

85. The purpose of the requirements of paragraph 4.12 are reasonably apparent, HMRC must be able to ensure that a drawback claim made has been properly notified to them in order to ensure that the amount of duty repaid on a claim reflects the claimant's statutory entitlement to remission/refund of previously paid duty.

86. The Appellant accepts that the requirements of paragraph 4.12 have force of law and must be met.

87. We were not referred to any authority which has considered the issue we have to determine with regard to whether the changes HMRC contend were required to be made to the NOI are matters which were required to be notified.

25 November 2020

88. HMRC's objection to the Claim by reference to what they assert was a declared date of dispatch of 25 November 2020 is, in our view, wholly mis-founded and, with respect, disingenuous.

89. Nothing within EGDR nor EN 207 requires a claimant to notify HMRC precisely when it is intended that the movement will take place, or the number of shipments that will be made.

90. Regulation 8(2)(d) EGDR requires that the goods and relevant documentation shall be available for inspection at identified and notified premises for "not less than two clear business days". It is quite apparent that the use of "not less than" means that the period may be more than two clear business days.

91. As identified in paragraph 17.(9) above EN 207 is clear that "if you intend to hold the goods for only the minimum period" the claimant should make sure that they have calculated the period correctly. The detailed examples provided on calculating the notice period both confirm that "the goods can be dispatched, exported … **on or after** [the day on which the notice period ends]".

92. There is also nothing on form EX75 which requires an indication of the date of movement.

93. The Appellant signed and dated the EX75 on 16 November 2020, and it was provided to HMRC under cover of the email dated 19 November 2020 (see paragraph 38. above). We have found that the only reasonable interpretation of that email is that it was only on or after 25 November 2020 that the goods could be sent to the Netherlands in order to meet the requirement of 2 clear business days' notice. In accordance with the narrative in EN 207 paragraph 4.10 the email sent at 17:38 on 19 November 2020 was not treated as received by HMRC until 20 November 2020 (it being sent after 16:00). The day of receipt does not count towards the period of notice and a business day is not a Saturday or a Sunday. The two clear days' notice were therefore 23 and 24 November 2020 and the first business day after the end of the notice period was therefore 25 November 2020.

94. It would also be quite remarkable that HMRC would want to be notified of the precise date on which movements were intended to take place and then renotified every time the date of a movement changed.

95. We find:

(1) There is no requirement that HMRC be informed of the date of intended dispatch or export;

(2) HMRC were not notified of the proposed date on which the movements (by way of dispatch or export) were intended to take place.

(3) There was no amendment necessary to the information requested on the NOI form (EX75) regarding the date of dispatch/export.

(4) There can therefore have been no failure to notify HMRC of a change in the information required on the NOI and, in this regard at least, no breach of a condition capable of justifying a refusal of a claim to drawback.

Dispatch v Export

96. Consideration of the language adopted by EGDR, and subsequently reflected in EN 207, in our view, reflects that a dispatch from anywhere in the UK prior to 31 December 2020 and from only Northern Ireland post 31 December 2020 was and is a subset of "export". On the basis that a claimant is only entitled to drawback following a movement of duty paid goods to another EU country where payment of the relevant duty and associated VAT in the receiving EU country is evidenced, additional information is required regarding such exports.

97. We note that in response to the heading "reason for the claim" on the EX75 form available in November 2020 there were two options:

(1) "Dispatch to another EU country. Give us details of the buyer in the other country in boxes A, B, C and D. … If different, enter the name and address of the premises the goods are being delivered to in the other country in boxes E and F."; and

(2) "Export to a non-EU country. Give us details of the buyer in the other country in boxes B, C and D. If different, enter the name and address of the premises the goods are being delivered to in the other country in boxes E and F.""

98. As such, there was no means on the EX75 which permitted notification of an intention to export (rather than dispatch) to an EU country. This was so despite the imminence of the end of the Brexit transitional period. HMRC were unable to provide us with any evidence that claimants generally were told that a movement to an EU country which would no longer treated as a dispatch post 31 December 2020 would have required a different notification or how that notification would have been made. In our view it is wholly unsurprising that there was no such notification. In the context of the anticipated difficulties of implementing Brexit and in the midst of a work from home order it was entirely reasonable that unnecessary administration be avoided. The EX75 information provided in boxes A – D (and where relevant E and F) would give HMRC everything they needed to ensure that the goods identified on the EX75 were being exported so as to justify a drawback claim.

99. The Appellant completed boxes A – F. As such HMRC were well aware that the goods for which notification had been given were destined for The Netherlands. EX76 and the accompanying documentation would confirm whether the movement took place before or after 31 December 2020 and thereby whether the duty and VAT required to be paid prior to that date had been so paid.

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.

Errors in the schedule

103. The provisions of regulation 8(2)(a) EGDR require the goods to be identified in the NOI. Such identification requires particularisation of the quantity and nature of the goods.

104. Paragraph 4.12 EN 207 indicates that a change in quantity of the goods is a matter which must explicitly be notified as a change and that such notification starts a period of amended notice. However, paragraph 12.1 explains that a claim will be reduced (as set out in paragraph 17.(17) above) to the extent that the NOI and the claim form relate to the same goods (including quantity), there is a shortage of goods on the SAAD, where there has been a failure to notify a change in the NOI, or where the conditions and requirements are met only for some of the goods. In our view, the statement that they will reduce the claim rather than reject it in totality in these circumstances represents a waiver of any right HMRC may otherwise have had to reject the whole claim where only part of it is affected by a breach of condition.

105. It is therefore plain, by reference to the terms of EN 207, that HMRC will accept claims where there is a discrepancy between the NOI and the drawback claim but only to the extent that goods for which drawback has been claimed are also recorded on the NOI and notice for inspection has been effectively given. We consider this paragraph to represent a formal waiver of the requirement to notify changes which cause a reduction in a drawback claim.

106. The individual errors identified in the schedule attached to the NOI form are particularised at paragraph 44. above. In each case they resulted in fewer goods being dispatched/exported than had been notified. However, there was no need to reduce the drawback claim because the claim submitted had already been adjusted for the errors.

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.

CONDITION AS TO PAYMENT OF DUTY

109. HMRC contend that because one of the SAADs for the December 2019 dispatches 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.

FAILURE TO PROVIDE COMPLETE DUTY STAMP RECORDS

112. HMRC contend that the Appellant is in breach of the condition requiring them to ensure that BWA recorded and maintained the record of each URNo obliterated.

113. In this regard HMRC emphasise the terms of paragraphs 4.1, 4.5 and 7.4 of EN 207. HMRC contend that these provisions unambiguously and clearly impose conditions on the Appellant: 4.1 imposes a condition that the drawback claim documentation has been submitted with the correct supporting material. They contend that paragraph 4.5 represents a clear condition that duty stamps be obliterated in accordance with the requirements of the DSR and the provisions of Notice DS5, and that paragraph 7.4 imposes a condition that the record of obliteration be provided with the claim.

114. The Appellant contends that there is no condition imposed on it (as distinct from BWA) to maintain a record of obliterated duty stamps and no condition requiring the provision of the relevant record of obliteration when making a drawback claim. The Appellant contends that paragraph 4.5 EN 207 does not have force of law. Unlike many of the provisions of the 2021 version it does not state that it has force of law and, the Appellant contends, that cannot be by mistake given the careful and painstaking exercise undertaken between the 2019 and 2021 drafts to clearly identify the sections having force of law. Further, the Appellant notes that the language adopted is not that of a condition.

115. In the alternative, the Appellant also contends that to the extent that there was a failure to comply with this condition the failure occurred because BWA had not maintained the relevant record of the URNos obliterated on the understanding, confirmed or at least not identified by HMRC, on their various inspections. This they contended indicated that the requirement was not a material one and failure to comply could be considered de minimis.

116. We note that regulation 24 DSR provides that "a person" must not deliberately obliterate or remove a duty stamp unless "he" has given HMRC two clear days' notice of the date, time and address, at which "he" intends to obliterate the stamp and, for type A stamps (i.e. a free-standing stamp which is not part of a label) "he" makes a record of the unique reference number of that stamp in "his" ordinary business records.

117. We have carefully considered the provisions of DSR and DS5 and it is apparent that the Appellant was not a person who was registrable under the DSR, at least not as regards the goods to which the drawback claim relates. The Appellant was not a warehouse keeper and, as per paragraph 6.11 DS5, was not entitled to order and apply type A stamps. The Appellant was reliant on others to affix and obliterate duty stamps on the excise goods owned by it.

118. We consider that the plain reading of those provisions is that they apply to the person who will physically, and in a practical sense, undertake the obliteration. In this case, that is BWA and not the Appellant. As we have found at paragraph 35. BWA de-stamped the Appellant's goods, maintained a record of the products that had been de-stamped but made no record of the URNos which had been obliterated. As such, it was BWA that were in breach of the regulation 24 DSR obligation.

119. The obligations on the Appellant under DSR appear to have been limited to notifying HMRC (at the duty stamp team) of the intention to export goods that had had the duty stamps obliterated at least two clear business days prior to export. Such notification can expressly run concurrently or separately to the drawback notification. The unchallenged evidence of Mr Roy confirms that this notice was duly given.

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.

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.

122. We are clear that it is not a condition which enables HMRC to refuse the claim in its entirety. We reach that conclusion for similar reasons to those set out at paragraph 104. above.

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. We consider below the consequence of such breach.

126. There was some dispute between the parties as to whether HMRC also were entitled to rely on what they latterly contended was a breach of paragraph 7.4 in the context of de-stamping. Paragraph 7.4 provides that a drawback claimant "must provide … an extract from your records showing the details of the stamps that were obliterated". Neither the Original Decision nor the Review referenced this requirement as a basis on which the claim was rejected. However, it was subsequently referenced by HMRC after evidence had closed. The Appellant objected on the basis that it was a new argument and one which would have required them to produce evidence they are now precluded from producing.

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.

128. However, on the basis that HMRC's decision did not reference the paragraph 7.4 de-stamping record keeping requirement and it was raised after the hearing and in connection with further submissions we requested, we agree with the Appellant that HMRC may not now defend their decision by reference to this alleged failure. In the end, however, that makes no difference given the failure to comply with paragraph 4.5.

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.

EXPORT DOCUMENTATION

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.

TRIBUNAL'S JURISDICTION

133. As set out in paragraphs 125. and 132. above the Appellant was in breach of the condition to ensure that the duty stamps were obliterated in accordance with the DSR and in breach of the condition to provide the particular documents specified in paragraph 7.4 as evidence of export.

134. HMRC contend that having done so the appeal should be dismissed on the grounds that we have no jurisdiction beyond a pure evaluation of compliance against the conditions imposed for a valid drawback claim. In particular HMRC contend that we have no jurisdiction to consider the reasonableness of their decision and that there is no basis on which they can be required to re-review the decision to refuse the drawback claim.

135. For the reasons already given, and as identified in paragraphs 74., we have determined that even were HMRC correct as to our jurisdiction the appeal would be allowed to the extent that £9,695.27 of the claim is valid.

136. The Appellant contends that HMRC are wrong on the question of jurisdiction. The Appellant contends that we have the power, pursuant to section 16(5) FA94 properly interpreted, to require HMRC to conduct a further review and to make directions in

connection with that re-review. The Appellant contends that given we have that power it is within our jurisdiction to consider the reasonableness of HMRC's decision to refuse the drawback claim and in the event we are satisfied that the Review came to an unreasonable conclusion, or was conducted failing to take account of relevant factors or taking account of irrelevant factors, we are able to make directions as to the matters which HMRC should and should not take into account when re-reviewing their decision to refuse the claim.

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.

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.

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).

146. The Upper Tribunal has affirmed that position in *Caerdav Ltd v HMRC* [2023] UKUT 179 (TCC). It is right to note that in the context of an appeal under section 16(5) FA94 against an assessment to customs duty in respect of which there is no discretion to assess there was considered to be no statutory scope to assess HMRC's reasonableness and thereby the powers prescribed under section 16(4) FA94 did not need to be considered.

147. This appeal concerns a drawback claim. Whilst not squarely an enforcement decision, in our view, drawback represents a component of enforcement considered broadly. Article 33 of Council Directive 2008/118/EC requires that HMRC "shall" reimburse, or remit excise duty collected on the basis that excise goods were to be consumed here but in fact are subsequently consumed in another member state and thereby chargeable to excise duty in that other member state. It is therefore at least arguable that a decision on drawback is part of the framework in which the right duty is levied.

148. Despite this view, 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.

153. When undertaking the latter exercise, and following the guidance of the Court of Appeal in *GB Hounsley 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.

HMRC'S REASONABLENESS

Decision to reject the whole claim

154. 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.

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.

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.

Refusal of that part of the claim affected by the condition to ensure that the duty stamps were obliterated in accordance with the DSR

159. The original decision to reject the claim stated 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. The Review references only a failure to provide confirmation that the obliteration had been carried out in line with guidance.

160. Since the Review HMRC were provided with the witness statement and exhibits of Mr Roy. HMRC now have evidence that due notification of obliteration was given, the details as to how the stamps were obliterated, together with the de-stamping record. They do not have a record of the URNos obliterated and such a record cannot be obtained. Mr Roy, in unchallenged evidence, states that BWA have been obliterating stamps for a number of years and had been subject to three inspections by HMRC in which HMRC raised no concerns as to the processes adopted despite them not routinely recording details of the obliterated URNo.

161. As previously indicated we consider that the record of which URNos have been obliterated is an important feature of the integrity of the duty stamp process. The provisions of the DSR and DS5 represent a coherent framework by which HMRC can track and trace duty paid spirits. The security which surrounds the production, holding and movement of duty stamps sensibly requires a record of stamps which are obliterated. This fact alone would indicate that a decision not to pay a drawback claim where the necessary assurance and records have not been provided cannot be unreasonable.

162. We have considered the evidence of Mr Roy which was accepted by HMRC. That evidence permits a view that HMRC were satisfied that the processes adopted by BWA were acceptable to HMRC.

163. However, we note from the evidence of Mr Dirkzwager that BWA were selected to obliterate on the basis that they were the cheapest and offered the service for under £1 per case whereas LCB would have charged £3-4 per case. We have found that BWA were left to obliterate the marks without the Appellant ensuring that they were doing so in accordance with the DSR.

164. We also note that Mr Roy's evidence conflicts with what HMRC were told was the reason for the failure to provide the duty stamp numbers. In Mr Thornton's email of 2 August 2021 he stated that it was because the quantity and range of products that were being exported made it impractical to record the individual stamp numbers.

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.

Refusal of that part of the claim which relates to the export undertaken on 8 April 2021

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.

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.

DISPOSITION

175. For the reasons above we have allowed the appeal in respect of those products which were exported prior to 31 December 2020, and which did not require de-stamping. The value of the claim is thereby reduced to £9,695.27.

176. The balance of the appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

177. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 16th NOVEMBER 2023