Appeal number: FTC/38/2012
[2013] UKUT 0108 (TCC)

Excise Duty - reclaim of excise duty on exportation of beer - appeal from the FTT's decision that HMRC had breached European law and the supplier's human rights by undertaking extended verification of its claim for drawback of excise duty on beer warehoused for export - the effect of the FTT's finding that the supplier had failed to satisfy the duty paid drawback condition by demonstrating that excise duty had previously been paid on the beer and had not been refunded – whether the supplier had legitimate expectations that HMRC would not undertake such extended verification in the light of HMRC's existing policy – whether HMRC had changed its policy without notice to suppliers – whether the FTT had jurisdiction to consider the arguments on legitimate expectation and the European law points, or whether such claims were beyond the jurisdiction of the FTT under sections 14 and 16 of the Finance Act 1994

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

The Commissioners for Her Majesty's Revenue and Customs **Appellants**

- and -

Europlus Trading Limited **Respondent**

Tribunal: Mr Justice Vos

Sitting in public in London on 13th, 14th and 18th February 2013

Ms Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants, the Commissioners of Her Majesty's Revenue and Customs
Mr David Yates, instructed by Byrne & Partners LLP, for the Respondent, Europlus Trading Limited

DECISION

Introduction

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") from a decision of the First-tier Tribunal (tax) (Tribunal Judge Howard M Nolan and Ms Gill Hunter) (the "FTT") released on 28th September 2011 (the "Decision") after a 6 day hearing. The FTT upheld Europlus Trading Limited's ("Europlus") appeal against review decisions made by HMRC on 13th March 2007 (corrected by letter dated 15th March 2007), 5th April 2007 and 18th April 2007. References in this decision simply to paragraph numbers are to paragraphs in the Decision.

2. HMRC's decisions wholly rejected 63 and partly rejected 5 of Europlus's 94 claims for drawback of excise duty on beer warehoused for export made between 1st July 2006 and 31st August 2006. The rejected claims for drawback totalled £1,225,943.05. The effect of the FTT's Decision was, therefore, in effect to require HMRC ultimately to pay that sum to Europlus.

3. HMRC's rejection of Europlus's drawback claims was made on the basis that the duty paid drawback condition (the "duty paid condition") had not been met. The crux of that condition is simply that, if drawback claims are to be paid, it has to be shown to the satisfaction of HMRC that the duty on beer warehoused for export has been paid to HMRC, and has not been remitted, repaid or drawn back (see regulations 5(2) and 12(1) of the Excise Goods (Drawback) Regulations 1995 (the "EGDR")). The nub of the guidance contained in HMRC's Notice 207 of November 2002 ("Notice 207") was the statement that: "*[i]f you cannot provide the original evidence of UK duty payment, you must provide other evidence which demonstrates that the goods are UK duty paid*".

4. The FTT decided the following six matters:-

   i) Europlus had not satisfied the duty paid drawback condition prescribed in the EGDR and Notice 207 for drawback (paragraphs 51-52).

   ii) The FTT declined jurisdiction to consider Europlus's claim based on legitimate expectation (paragraph 14).

   iii) None of Directive 92/12/EEC (the "Directive"), the EGDR or Notice 207 as regards drawback contravened the principle of the free movement of goods in Articles 34 and 35 of the Treaty on the Functioning of the European Union ("TFEU") (paragraphs 100-104).

   iv) The FTT had jurisdiction to consider whether HMRC had contravened EU principles of proportionality and legal certainty in applying new requirements to Europlus's claims for drawback (paragraph 106).

   v) HMRC had contravened EU principles of proportionality and legal certainty in applying new requirements to Europlus's claims for drawback (paragraph 110).

vi) HMRC's imposition of new requirements on Europlus's claims for drawback was a breach of Article 1 of Protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR") (paragraph 120).

5. HMRC puts forward the following 5 issues for determination in support of its appeal:-

i) Issue 1: Whether the FTT was wrong to conclude that HMRC applied new requirements to Europlus's claims for drawback.

ii) Issue 2: Whether the FTT was wrong to hold that it had jurisdiction to consider whether HMRC had contravened EU principles.

iii) Issue 3: Whether the FTT was wrong to hold that HMRC had contravened EU principles.

iv) Issue 4: Whether the FTT was wrong to hold that HMRC had breached A1P1.

v) Issue 5: Whether the FTT was wrong to order the payment of Europlus's drawback claims.

6. When the appeal was called on for hearing, Europlus applied for permission to cross-appeal out of time. I granted that permission on the basis that HMRC would be given time to respond to the new points raised. Europlus's cross-appeal raised the following two further issues:-

i) Issue 6: Whether the FTT was wrong to decline jurisdiction to consider Europlus's claim based on legitimate expectation.

ii) Issue 7: If so, whether Europlus did have a legitimate expectation that HMRC would accept its claims for drawback.

7. Before dealing with the remaining issues before the Upper Tribunal, I shall set out some of the relevant chronological background, the relevant statutory provisions, the FTT's findings of fact, and the authorities that are most pertinent to the appeal.

Chronological background

8. In June 2006, HMRC issued a consultative document entitled "Reform of the Excise Duty Drawback System" including the following passages:-

> *"1. Introduction*
>
> *Purpose of the consultation*
>
> *1.1 The consultation document seeks your views on proposed changes to the excise duty drawback system in respect of goods that are "warehoused for export". Over the past year, there has been a marked increase in the warehousing of beer and spirits for export, often for very short periods. HMRC is not aware of any clear commercial rationale for this and is concerned that, given the relaxed evidence requirements that currently apply to drawback claims in respect of goods warehoused for export, this*

could represent a fraud risk and a threat to the livelihood of compliant traders.

HMRC's objective is to introduce changes to the excise duty drawback system that:

- *manage revenue risk effectively and efficiently*
- *are clear and simple for businesses and HMRC*
- *do not increase burdens on compliant low risk businesses*".

9. Between the 1st July 2006 and 31st August 2006, Europlus submitted some 94 claims for drawback of excise duty.

10. On 8th August 2006, HMRC's Officer Martin Fennell ("Officer Fennell") visited the premises of Europlus to investigate 15 of the relevant 94 claims for drawback of excise duty. He asked for and was shown the invoices for the sales of the goods in question to Europlus, copies of the copy 3 accompanying administrative documents for the goods in question, and Europlus's bank statements.

11. On or about 16th August 2006, Officer Fennell was called to a meeting and told to reject Europlus's claims for July and August 2006 (see paragraphs 7, 34 and 86 of the Decision).

12. On 16th August 2006, Officer Fennell telephoned Mr Porter of Europlus to tell him that HMRC would be holding Europlus's drawback claims indefinitely, as they wanted to satisfy themselves that they had ample opportunity to identify the exact duty point of each claim.

13. On 21st March 2007, HMRC published Excise News clarifying its guidance on acceptable evidence in support of the duty paid condition with effect from 1st April 2007 in the following terms:-

"At Budget 2007, the Government published a summary of responses to the 2006 consultation "Reform of the Excise Duty Drawback System" and announced that HMRC would clarify its guidance on acceptable evidence in support of excise drawback claims, as evidence that UK duty has been paid on the goods in question. This is to assist HMRC in the verification of such claims, and to avoid further instances of claims being rejected, given what appears to be a systematic attack on the duty drawback system.

This edition of Excise News contains this clarification of the guidance. It takes effect from 1 April 2007, and is applicable to all products on which excise duty is liable and all provisions for claiming drawback (direct dispatch/export, warehouse for export, and destruction). …

Before submitting claims for drawback, claimants must ensure that they are able to provide the information specified in (a) or (b) below. HMRC requires this information to be submitted in support of every claim:

(a) The original duty payment document.

> *This is the clearest possible evidence that goods are duty paid and, wherever possible, claimants should submit this document, or a copy of it, in support of every claim. …*
>
> *(b) Evidence to demonstrate a clear audit trail between the goods which are the subject of the claim and the payment of duty. …*"

14. On 18th March 2008, Lloyd-Jones J (as he then was) refused Europlus permission, on paper, to apply for judicial review of HMRC's alleged abuse of power and breach of Europlus's legitimate expectation. His observations included: "*[i]t is arguable that the [FTT] has no jurisdiction to rule on [Europlus's] grounds of abuse of power and breach of legitimate expectation*", and "*these grounds are not reasonably arguable in particular because the material identified by [Europlus] cannot reasonably give rise to an expectation that [HMRC] would accept any claim for drawback regardless of whether they were satisfied that duty on the goods had been paid*".

15. On 27th June 2008, Europlus renewed its application for judicial review orally. The note of the hearing records that Underhill J adjourned the permission hearing until the outcome of Europlus's appeal to the FTT, and placed a formal obligation on both parties to write to the Administrative Court within 14 days of the FTT decision notifying the Administrative Court if they wished the matter to be resumed. It appears that neither party did so.

16. On 28th September 2011, the FTT released its Decision.

17. On 8th March 2012, the FTT granted HMRC permission to appeal to the Upper Tribunal.

18. On 5th February 2013, the Upper Tribunal gave permission to amend the Grounds of Appeal to add a fifth ground.

Directive 92/12/EEC

19. Article 22 of the Directive provided as follows:-

> "*1. In appropriate cases, products subject to excise duty which have been released for consumption may, at the request of a trader in the course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not intended for consumption in that Member State.*
>
> *However, Member States may refuse request for reimbursement where it does not satisfy the correctness criteria they lay down.*
>
> *2. In the application of paragraph 1, the following provisions shall apply:*
>
> *(a) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid. However, the competent authorities may not refuse reimbursement on the sole grounds of non-*

presentation of the document prepared by the same authorities certifying that the initial payment had been made; …

5. The tax authorities of each Member State shall determine the monitoring procedures and methods applying to reimbursement made in their territory. Member States shall ensure that the reimbursement of excise duty does not exceed the sum actually paid".

Domestic legislation

20. Sections 132-137 of the Customs and Excise Management Act 1979 ("CEMA") make provision for the operation of drawback. Section 133 of CEMA provides as follows:-

"*(4) No drawback shall be paid until the person entitled thereto or his agent has made a declaration in such form and manner and containing such particulars as [HMRC] may direct that the conditions on which the drawback is payable have been fulfilled.*

(5) [HMRC] may require any person who has been concerned at any stage with the goods or article –

(a) to furnish such information as may be reasonably necessary to enable [HMRC] to determine whether duty has been duly paid and not drawn back …"

21. Section 2 of the Finance (No 2) Act 1992 empowered HMRC to make provision for drawback by regulations as follows:-

"*2(1) Subject to the following provisions of this section, [HMRC] may, in relation to any duties of excise, by regulations make provision-*

(a) Conferring an entitlement to drawback of duty in prescribed cases where [HMRC] are satisfied that goods chargeable with duty have not been, and will not be, consumed in the United Kingdom; and

(b) Conferring an entitlement to drawback of duty, in prescribed cases, on the shipment as stores, or warehousing in an excise warehouse for use as stores, of goods chargeable with duty.

2(2) The power of [HMRC] to make regulations under this section shall include power—

(a) to provide for, or for the imposition of, the conditions to which an entitlement to drawback under the regulations is to be subject;

(b) to provide for the determination of the person on whom any such entitlement is conferred;

(c) to make different provision for different cases, including different provision for different duties and different goods; and

> *(d) to make such incidental, supplemental, consequential and transitional provision as [HMRC] think necessary or expedient.*
>
> *2(3) Without prejudice to the generality of subsection (2)(d) above, the power of [HMRC] to make regulations under this section shall include power, in relation to any drawback of duty to which any person is entitled by virtue of regulations under this section, to provide—*
>
> *(a) for entitlement to the drawback to be cancelled at any time after it has been conferred if there is a contravention of any conditions to which it is subject or in such other circumstances as may be prescribed; and …".*

The Excise Goods (Drawback) Regulations 1995

22. Regulation 5 of the EGDR provided as follows:-

> *(1) A claim for drawback may only be made in relation to eligible goods.*
>
> *(2) Subject to paragraphs (3) and (4) below, goods are eligible goods if duty has been paid and has not been remitted, repaid or drawn back and those goods have been –*
>
> *(a) exported,*
>
> *(b) warehoused for export, or*
>
> *(c) destroyed.*

23. Regulation 7 of the EGDR provided as follows:-

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

24. Regulation 12(1) of the EGDR provides as follows:-

> *(1) No drawbacks shall be payable unless it is shown to the satisfaction of [HMRC] that the claimant is an eligible claimant and that the goods are eligible goods.*

HMRC's Notice 207 of 2002

25. Notice 207 was issued in November 2002 including the following:-

> "*6.1 We will pay drawback of excise duty only if we are satisfied that all the following conditions have been met: …*
>
> *1. The goods have not been and will not be consumed in the UK*
>
> *2. The duty on the goods was paid not more than three years before the event giving rise to the claim for drawback….*
>
> *5. You have observed the relevant conditions set out in this Notice. …*"

26. Paragraph 7.1 of Notice 207 provided as follows:-

> "*If you wish to claim drawback you must do all of the following: …*
>
> *2. Ensure that duty was paid – and not reclaimed – on the goods no more than three years before the event giving rise to the claim*".

27. Paragraph 10.4 of Notice 207 provided as follows:-

> "***10.4 What do I do with the completed claim?***
>
> *Return the completed form to the [Glasgow Drawback Centre] along with:*
>
> - *evidence of the UK duty payment; and*
> - *where appropriate any other supporting documents…*
>
> ***If you cannot provide the original evidence of UK duty payment,*** *you must provide other evidence which demonstrates that the goods are UK duty paid*".

28. Paragraph 11.2 of Notice 207 provided that a claim could be rejected or reduced where "*you have not complied with any of the conditions either set out in this notice or notified by us in writing*".

29. Paragraph 11.4 of Notice 207 provided that, in answer to the question whether drawback can be cancelled or recovered: "*Yes. If irregularities come to our notice after drawback has been paid, we can assess you for the duty*".

HMRC's Notice 206 of March 2002

30. Notice 206 was issued in March 2002 pursuant to Regulation 7(1)(b) of the EGDR. It included the following:-

> "*[i]f you are … a wholesaler, retailer or distributor of excise goods … you … should ensure that duty has been paid on excisable goods in your possession, as you may need to satisfy us of this. If we have evidence to show that duty has not been paid you will not be able to rely on your business records to show otherwise. In these circumstances, we may seize your goods*".

31. That paragraph was amended on 1st August 2004 to read as follows:-

> "*If you are … a wholesaler, retailer or distributor of excise goods … you … should ensure that dutiable goods in your possession have come from a bona fide source. You should be able to provide us, on request, with commercial documents such as a supply or purchase invoice to demonstrate this. If we are not satisfied that duty has been paid on goods in your possession, we may seize the goods*".

The statutory jurisdiction of the FTT

32. The Finance Act 1994 applied to the jurisdiction of the FTT in this case. The events in issue in this case took place prior to its amendment by paragraph 2(2)(c) of schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56).

33. Section 14(1)(bc) of the Finance Act 1994 provided that review could be sought of the following type of decision made by HMRC: "*any decision by [HMRC] as to whether or not any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled*".

34. Section 16(1) of the Finance Act 1994 provides that an appeal lies to an appeal tribunal with respect to any decision by the Commissioners on a review of a decision to which section 14 applies. Sections 16(4) and (5) provide for the powers of the tribunal as follows:-

> "*(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that [HMRC] 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) 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 [HMRC] to conduct, in accordance with the directions of the tribunal, a further review 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 further review, to declare the decision to have been unreasonable and to give directions to [HMRC] as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.*
>
> *(5) In relation to other decision, the powers of an appeal tribunal on an appeal under this section shall also include the power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal*".

35. An "*ancillary matter*" is defined in section 16(8) of the Finance Act 1994 as any decision within Schedule 5 that is not comprised in a decision falling within sections 14(1)(a) to (c).

The statutory jurisdiction of the Upper Tribunal

36. In Mertrux Ltd v. HMRC [2012] STC 2327, the Upper Tribunal (Newey J and Judge Sinfield) said this about the proper test on an appeal from the FTT at paragraph 10:

> **"***The authorities on the nature of an appeal to the Upper Tribunal and the approach that the tribunal should take to an appeal such as this were conveniently set out by Arnold J in Smith v Revenue and Customs Comrs [2011] UKUT 270 (TCC) at [46]–[50], [2011] STC 1724 at [46]–[50]. From those authorities, it is clear that we can only allow the appeal if we are satisfied that there was an error of law by the FTT. Error of law in this context is not only a failure to apply the relevant legislation or authorities in arriving at the relevant decision but also includes making a finding of fact which was not supported by the evidence, as described by Lord Radcliffe in Edwards (Inspector of Taxes) v Bairstow (1955) 36 TC 207 at 229, [1956] AC 14 at 36. As Lord Diplock observed in his speech in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 at 951, [1985] AC 374 at 410–411, a better term for this ground for challenging a decision might be 'irrationality'. In approaching the question of whether the FTT was entitled to make a finding we should exercise an appropriate degree of caution and we should not interfere simply because we might have reached a different conclusion but only where we are satisfied that the FTT has reached a conclusion that is, to use Lord Diplock's word, irrational. Under s 12(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal, if it allows the appeal, must either remit the matter to the FTT for a fresh hearing or substitute its own decision for that of the FTT*".

37. In Edwards v. Bairstow [1956] AC 14 at page 36, the House of Lords described the test for an appeal of this kind as "*no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*".

The relevant evidence before the FTT

38. It is not necessary for me to set out any large amount of evidence that was before the FTT. There is, however, a challenge to the finding that there was a high level HMRC policy or practice, which prevented HMRC undertaking extended verification of whether Europlus had satisfied the duty paid condition without giving notice of a change of that policy or practice. It is, therefore, important that I set out the most central evidence upon which that finding seems to have been based as follows.

39. Officer Fennell said this in his first witness statement:-

> "*5. In March 2006 Excise Policy established a National Duty Drawback Project that consisted of a team based at Stratford (mainly with*

Stratford-based Excise Officers) to look into the marked recent increase in the volume of Duty Drawback claims. In the early stages, those involved in the Duty Drawback Project operated within their usual teams, and so I conducted assurance activities for the Project in my assurance team. My team consisted of two Officers, Bryce Holgate and Clare bailey and one Assistant Officer, Farhana Akthar (who reported to Officer Holgate). There were also three case Officers, Steve Munn, Anupam Rawal and Imran Mohiuddin, who reported on their assurance activities and visits to our Senior Officer, Adrian Dobson, who was in overall charge of our team and who attended the Duty Drawback Project group meetings. …

19. On 8 August 2006, I carried out a further unannounced visit to Europlus, accompanied by VAT Officer Nunn. … This visit had two purposes. Officers Nunn's role was to conduct VAT assurance and my role was to verify 15 Excise Duty Drawback claims.

20. During the 8 August 2006 visit Officer Nunn and I spoke to [Mr Porter of Europlus] and he showed me sales invoices, copies of the Copy 3AAD documents for the goods at issue in each Duty Drawback claim and Europlus' bank statements. All of the claims related to goods sold to two French companies, Mini Marche and Les Boissons. A number of the claims were for goods that appeared to have been exported before they had been warehoused for the 48 hour minimum period. I noted that one of the claims (number 52533) related to goods bought from J&J Stores Ltd, which was a subsidiary of Europlus and which was used by Europlus to trade with companies that did not wish to trade with one company only. I also noted that the Mini Marche invoices did not have a fax number. [Mr Porter] told me that he had already raised this with the trader in the past but would do so again.

21. The documentation [Mr Porter] had shown me on 8 August 2006 appeared to meet the basic requirements so far as the immediate suppliers and customers were concerned. Based on standard practice at the time, I therefore recommended that HMRC process the claims. However, a few days after the visit I was informed that a policy decision had been taken by HMRC to withhold payment on Europlus' Duty Drawback claims from late June 2006 onwards. In due course the supply chains were inquired into further, which resulted in all bar three of the claims I had looked at on my 8 August 2006 visit being fully or partially rejected in April 2007 due to the presence of missing/defaulting traders in the supply chains and no evidence of Excise duty payment on the said goods. …

25. My role in this visit was to verify 21 excise Duty Drawback claims. The documentation [Mr Porter] showed me on 17 August 2006, consisting of sales invoices and copies of the copy 1 AAD for each claim, appeared to meet the HMRC policy basic requirements so far as the immediate suppliers and customers were concerned. However, I was aware that the claims would need to be inquired into further so that the duty point could be established (as I noted in my handwritten notes for

> *the visit). In due course the supply chains were inquired into further, which resulted in all bar one of these claims being fully or partially rejected in April 2007 due to the presence of missing/defaulting traders in the supply chains*".

40. Ms Susan Green of HMRC said this in her statement:-

> "*I think I first became aware of the Drawback Project in late 2006 or early 2007. It was around this time that I was contacted by the Drawback Project team. The project was set up to conduct in-depth checks of excise duty drawback claims that had been submitted to HMRC, with one of the checks being tracing the goods back down the supply chain. This was with the aim of identifying the excise duty point and duty payment, and thereby ensuring the goods were duty paid*".

The FTT's findings of fact

41. The FTT's findings of fact are important to HMRC's first and most fundamental ground of appeal. They require careful analysis, because each of the parties has sought to construe them differently.

42. The point of most contention is that HMRC says that the FTT decided in paragraph 6 that, until 2006, HMRC had tested the entitlement of exporting traders to duty refunds under a "*relaxed system*", whereby:-

> "*HMRC had generally indicated that claimants would be treated as having satisfied the condition about original payment of the duty if they could produce an invoice from their immediate supplier, indicating that the beer was "duty paid", provided that they had done some due diligence to vet the credibility of the supplier, and provided that the purchase price of the beer (or indeed other alcoholic product) was not suspiciously low*".

43. Europlus, on the other hand, submits that HMRC's "*relaxed policy*" found by the FTT was in paragraph 89 as follows:-

> "*to operate the drawback regime in accordance with the relaxed evidential requirements, and only to deny drawback if the claimant failed to provide the limited invoice information, or was otherwise shown to be "a participant in the fraud""*.

44. It will be clear immediately that there is a significant discrepancy between the two formulations in paragraphs 6 and 89. As a result, the parties provided supplemental submissions as to the other findings of the FTT that bore on the precise nature of the "relaxed policy" that the FTT found to have been established.

45. The FTT's other most relevant findings of fact were as follows.

46. Europlus had recovered all duty reclaimed under the relaxed system for at least 18 months up to July 2006 (paragraph 7).

47. Some claims made by Europlus in this period had been subjected by HMRC to extended verification, but that process had always culminated in the claims being met (paragraph 7).

48. The process of extended verification which HMRC undertook in August 2006 in respect of Europlus's claims to drawback involved HMRC undertaking their own tracing exercise to see whether they could verify the original payment of duty. If they failed to do so, they rejected the claim. This process only required Europlus to satisfy requirements plainly laid down in the statute, the EGDR and Notice 207 (paragraph 7).

49. In paragraph 15, the FTT said this: "*[w]e consider, however, that the "relaxed approach" was itself an established way in which the drawback regime was administered at one stage, and that the way in which that regime was withdrawn without proper, or indeed any, notice to traders was unacceptable. We consider that the withdrawal of the relaxed approach was the result of a high-level policy decision*".

50. In Paragraph 26, the FTT again described the "relaxed approach" as follows:- " … *what seems to have been a consistent practice on the part of HMRC of granting duty repayments purely on the basis of the claimant producing a purchase invoice that indicated that the product was "duty-paid", and demonstrating some level of due diligence in relation to the integrity of the supplier*".

51. In paragraph 51, the FTT reached the following factual findings as to Europlus's failure to satisfy the duty paid condition:-

> " … *we were unable to conclude in relation to any particular supplies (including those where [Europlus] had advanced arguments to occasion doubt in relation to HMRC's tracing exercise) that the [Europlus] had established to our satisfaction that duty had in fact been paid in the first place in relation to any of the beer. It might have been, but that is not good enough. When the whole essence of the frauds has been to make tracing difficult, by passing beer through various intermediaries, it is not surprising that demonstrating payment of the duty becomes difficult and often impossible, and it is fair to say that HMRC's expectation that duty was not paid seems eminently realistic*".

52. In paragraph 64, the FTT set out its factual findings about the assurances (or lack of them) that had been given to Europlus as follows:-

> "*It was reasonably obvious that the Appellant was told to produce supplier invoices when making drawback claims, and it was certainly the case that many claims were made and accepted on this basis prior to the refusal in August 2006. All that was said about the discussion with Theresa Jolly is that she took Mr. Porter and Mr. Green through Notice 207, emphasising various parts of it. It was certainly not claimed by Mr Porter, in his evidence, that Theresa Jolly had said anything along the lines that it would always be sufficient just to submit copies of supplier invoices and to exercise due diligence. It was not even clear that she had confirmed unequivocally that the claimant was bound to receive duty repayments on*

> *that level of evidence. What was clear is that that evidence proved both satisfactory and sufficient until August 2006, and that the Appellant derived great confidence from this, and from the fact that those claims in relation to product from Makro that were subjected to extended verification prior to August 2006 were all approved and granted*".

53. The FTT referred in paragraph 68 to HMRC's "*administrative practice*" and "*policy*" as follows:-

> "*However, our conclusion is that for some period (at least from 2004, when Notice 206 was amended in a fairly extraordinary way – see below), there had in fact been an administrative practice that accepted that duty repayments would be made on the limited evidence required under the "relaxed evidence requirements". We are absolutely clear that those requirements were not just isolated applications of a practice to low-risk claimants, or isolated applications by a few HMRC officers. There is not the slightest doubt, something amply confirmed by the very wording of the June Consultative Document, that official HMRC policy in administering duty reclaims was, and had for some time been, precisely in accordance with the relaxed requirements. Withdrawing those requirements without notice was not only unacceptable, but it was manifestly unacceptable …*".

54. In paragraph 80, the FTT found that the "*so called "relaxed evidential requirements" were adopted as policy by HMRC*" in 2004.

55. Paragraph 86 referred to the evidence of Officer Fennell as to HMRC's policy, which the FTT accepted as follows:-

> "*Further evidence of the relaxed evidential requirements, that subsisted between at least 2004 and mid-2006, was provided by the evidence of Officer Fennell, who was the officer directly responsible for vetting [Europlus's] claims. In cross-examination, Officer Fennell said that he was called to a meeting attended by many senior officers and told of the changed policy decision to deny all [Europlus's] claims immediately after he had just made a satisfactory assurance visit to [Europlus], and after he himself had decided, on the original evidential requirements, to accept all the claims. He said that he was very surprised at this meeting of the change of plan. He was not asked for his views, and was simply told of the revised policy, and told to reject [Europlus's] claims for July and August 2006. When asked whether he questioned that instruction, he said that the decision was obviously a policy decision and it was not for him to question that. When asked to confirm whether the decision was indeed a policy decision made by, or communicated by, the other people at the meeting, his answer was "Absolutely"*".

56. The FTT then summarised its "*conclusions in relation to the evidential requirements prevailing over the period 2004-2007*" at paragraph 99 as follows:-

> "● *From 1 August 2004, if not earlier, HMRC was in practice accepting drawback claims on a "relaxed evidential" basis, requiring only sight of the immediate supplier's invoice, and a reference to the fact that the goods*

were "duty paid", coupled with due diligence in relation to the supplier, and a realistic purchase price;

- *Evidence from the Huntingwood case [infra] illustrates the extreme confirmations of this policy that HMRC officials were prepared to give, extending even to the confirmation that a claimant that had satisfied the limited requirements would not forfeit a refund even if it emerged that duty had not originally been paid;*

- *The terms of the June 2006 Consultative Document conceded that the then current system operated by HMRC was appropriately described as one involving "relaxed evidential requirements", and while it mooted two possible changes to the drawback system, it gave no indication that the evidential requirements would be changed;*

- *No formal notice was given of any change of evidential requirements until 21 March 2007, and that was only to take effect from 1 April 2007; but*

- *From dates in mid-2006 onwards, HMRC had been challenging drawback claims made by traders that were, or might very well have been, entirely honest, having bought from impeccable suppliers and at full prices, and applying in relation to those traders the rules that were later said to be operative only from 1 April 2007*".

57. HMRC took an overall firm and official high-level policy decision in or before 2004 effectively to introduce relaxed evidential requirements. (paragraphs 105, 108 and the first bullet point in paragraph 109).

58. HMRC's formal policy change in April 2007 was broadly equivalent to that imposed on Europlus without prior notice in August 2006 (the last bullet point in paragraph 109).

Authorities

59. Before turning to the issues that I have to decide, it is worth dealing with four authorities upon which special reliance has been placed by one party or another.

The Huntingwood case

60. First, both the FTT and the parties to this appeal placed considerable reliance on the facts in a judicial review decision by Stadlen J in The Queen on the application of Huntingwood Trading Limited v. HMRC [2009] EWHC 209 (Admin) (the "Huntingwood case"). That case concerned similar claims for drawback as are before the Upper Tribunal. 101 claims had been refused between July and September 2006 on the grounds that an invoice from the trader's supplier stating that the goods were duty paid did not in itself provide proof that duty had in fact been paid. The trader sought judicial review of HMRC's decision to refuse the drawback claims, contending that it had a legitimate expectation that, provided it followed a particular course of conduct, it would satisfy the conditions in regulation 12 of the EGDR even if the goods subsequently turned out not to be eligible goods, and that it was unfair and an abuse of power for HMRC to frustrate that legitimate

expectation by refusing to make the payments. Stadlen J held that HMRC's conduct had not constituted a clear, unambiguous and unqualified representation that the proposed conditions were not going to be imposed, so that HMRC had not engendered a legitimate expectation in the trader.

61. First, in paragraph 62 of the Decision, the FTT set out some of the evidence from the Huntingwood case which was not disputed by HMRC. It was taken from a note prepared by Huntingwood, but read by an HMRC officer, and confirmed by that officer to be a fair record of the discussions:-

> "*I contacted [the HMRC officer] by phone to clarify Huntingwood position in regard to two questions.*
>
> *Question 1. Huntingwood purchases duty paid beer/lager from a supplier. The supplier provides an invoice for the goods which contains all of the detail expected on a professionally prepared document. Could Huntingwood be required by [HMRC] or Drawback Processing to provide additional evidence of duty payment, and if so what evidence will be required?*
>
> *Answer 1. [HMRC]/Drawback Processing do not require any further evidence over and above a professionally prepared VAT invoice.*
>
> *However Huntingwood has a duty of care to make reasonable enquiries of the supplier prior to entering into a transaction. Huntingwood should also assess if the price being offered is reasonable for duty paid goods. By way of example, if the market rate at a given point for a case of lager was in a range of £10.50 to £12, but Huntingwood had been offered a case price of £7.00 – [HMRC] would expect Huntingwood to either satisfy itself that the duty element had been paid or not enter into the transaction, as the price differential should give rise to suspicion of non-payment of duty or the validity of the goods being offered.*
>
> *Question 2. Huntingwood purchases duty paid goods from a supplier in good faith, it receives a professionally [prepared] invoice and submits a claim for duty drawback. At a later date [HMRC] investigate the supplier of the goods and discover that despite charging a sum reasonably expected to include a duty payment, the duty had not been paid on the goods supplied. Who would become liable to pay the duty and could Huntingwood be required to repay the duty retrospectively?*
>
> *Answer 2. [HMRC] would carry out a duty assessment on the supplier and then require them to pay the unpaid duty. Provided Huntingwood makes reasonable enquiries of the supplier and is in no way involved or complicit in the non-payment of duty then Huntingwood acting in good faith, would have no obligation to repay the duty drawback*".

62. Secondly, Europlus submitted that HMRC had effectively conceded in the Huntingwood case that it would not have been *ultra vires* for it to have satisfied the contested claim for drawback even though the duty paid condition had not in fact been met. Europlus said that the relevant requirement was simply that it had to be

shown "*to the satisfaction of*" HMRC that the relevant goods were eligible goods. Mr Yates relied on the following passage in Stadlen J's judgment at paragraph 24:-

> "*Mr Coppel at one point in the course of argument submitted that in this case there is no applicable discretion in the sense that there is no discretion, on the part of the Commissioners, to depart from or waive compliance with the conditions set out in the regulations for the entitlement to claim drawback. He did, however, accept that in so far as those requirements include and involve the need for [HMRC] to be satisfied that duty has been paid, it is open to [HMRC] to indicate the kind of evidence with which they would or would not regard as being capable of as in fact satisfying themselves of that fact. However, he did accept that in principle in a case such as this, [HMRC] are capable through words or conduct of giving to a person in the position of a claimant an indication such as to give rise to a legitimate expectation*".

Elmeka

63. Secondly, Europlus placed great reliance on the ECJ decision in Elmeka NE v. Ipourgos Ikoomikon (joined cases C-181/04 to C-183/04), which was a VAT case in which a shipping company had been told by the Greek tax authority that various supplies of services would be exempt from VAT. The exemptions were not permitted by the Sixth Directive. The company successfully relied on its legitimate expectation that VAT would not be payable, even though the conduct of the authority in authorising the taxpayer not to pass on VAT under the exemption was unlawful.

64. Advocate General Mrs Stix-Hackl said this at paragraph 46 of her opinion:-

> "*The situation with respect to the collection of value added tax, which is primarily in the interests of the Member States, should, it seems to me, be rather differently appraised. In this case, there is much less risk of a Member State preventing the full implementation of Community Law in favour of the trader and at the expense of the Community through its own unlawful practices. In this context, the question of the legal protection of the trader from the administrative actions of the Member State in implementing Community law assumes greater importance and it seems reasonable that a trader should be able to rely on the Community principle of protection of legitimate expectations in his dealings with the authorities of the Member State*".

65. The judgment of the ECJ included the following:-

> "*26 In its third question, the referring court asks in essence whether, under the rules and principles of Community law on VAT, conduct of the national tax authority authorising a taxable person not to pass on the VAT to the other party to a contract can, even if that conduct is unlawful, give rise to a legitimate expectation on the part of the taxable person that would preclude subsequent payment of the tax.*

27 According to the Commission, the principle of protection of legitimate expectations does not permit subsequent payment of VAT that the taxable person did not pass on to the other party to a contract during the tax years in question, and which he did not pay to the tax authority, to be required where the conduct of the latter over a number of years has reasonably led that taxable person to believe that he was not obliged to pass on that tax. At the hearing, however, the Commission added that the fact that the information had not been communicated by the competent tax authority might lead to a different conclusion.

28 By contrast, the Greek Government takes the view that the rules of Community law on VAT do not preclude the subsequent collection of a tax which was not paid to the tax authority because the taxable person believed that he was not obliged to pass on that tax, where that belief is due to an interpretation of the relevant legal provisions given, at the request of the taxable person, by an organ of the tax authority and, in particular, where that organ was not competent to answer such requests. …

30 It is apparent from the orders for reference that the interim decisions of the competent tax authority of 5 June 1997, requiring payment of VAT due for the tax years 1994 (Case C-183/04), 1995 (Case C-182/04) and 1996 (Case C-181/04), and effectively withdrawing an exemption from the said tax previously granted by the Piraeus tax authority, are in issue.

31 Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives (see in particular Case C-381/97 Belgocodex [1998] ECR I-8153, paragraph 26, and Case C-376/02 'Goed Wonen' [2005] ECR I-3445, paragraph 32). It follows that national authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents".

Lindsay

66. To similar effect, Europlus relied on Lindsay v. Customs and Excise Commissioners [2002] STC 588, where Mr Lindsay took his car worth some £12,000 to France. He loaded it up with cigarettes and alcoholic drinks. Under UK regulations he was permitted to bring in excisable goods for his own use free of duty, but not for a commercial purpose. The regulations specified that, where the amount was more than 800 cigarettes, the importer had to prove he did not hold them for a commercial purpose. HMRC seized the goods and the car in respect of the duty of some £2,100. HMRC's policy was to seize vehicles in such circumstances and only to depart from the policy in exceptional circumstances. Mr Lindsay's case was that he had bought the excisable goods for himself and members of his family who had paid him for them. The review of HMRC's decision to confiscate the motor car was unsuccessful, but Mr Lindsay's application to the tribunal succeeded under section 16(4)(a) of the Finance Act 1994 on the ground that the decision was disproportionate. The Court of Appeal upheld the tribunal's decision, but held that

it did not have jurisdiction to order that the vehicle should be restored to Mr Lindsay or to order compensation (see paragraphs 68-70 of Lord Phillips MR's judgment).

67. Lord Phillips MR (with whom Judge and Carnwath LJJ agreed) said this at paragraph 40:-

> "*However, the principal issue before the tribunal, was whether [HMRC's] decision not to restore Mr Lindsay's car to him was one that they 'could not reasonably have arrived at'—within the meaning of those words in s 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998, there can be no doubt that if [HMRC] are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention). Quite apart from this, [HMRC] will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters—see Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd [1980] STC 231 at 239, [1981] AC 22 at 60 per Lord Lane. It was argued before the tribunal that [HMRC's] decision fell at both hurdles. It violated the convention in that it involved depriving Mr Lindsay of his rights under art 1 of the First Protocol to the convention to the peaceful enjoyment of his possessions in circumstances which were disproportionately harsh. By the same token, because of the policy which was applied, the decision ignored the relationship that the value of the car bore to the duty that should have been paid, although this was a highly relevant matter*".

68. The Court of Appeal in Lindsay thought that both European Human Rights principles and the EU law principle of proportionality were applicable, even though the latter had little to add in the particular circumstances of the case (see paragraphs 52-4 of Lord Phillips MR's judgment).

Noor

69. Finally, in reply submissions, HMRC introduced the very recent Upper Tribunal decision (the President Warren J and Judge Colin Bishopp) in HMRC v. Noor FTC/67/2011 released on 14th February 2013. In that case, Mr Noor was told by HMRC that he had 3 years in which to register for VAT so as to be able to claim input tax. In fact, the statutory time limit was 6 months. Mr Noor sought to rely on the legitimate expectation arising from what he had been told by HMRC. Mr Noor appealed HMRC's decision that he could not deduct the relevant input tax to the FTT, which considered it had jurisdiction to consider the question of Mr Noor's alleged legitimate expectation in Mr Noor's statutory appeal under section 83 of the Value Added Tax Act 1994 which provided that an appeal lay to the FTT in respect of "*the amount of any input tax which may be credited to a person*". The FTT relied on Sales J's dicta in Oxfam v. HMRC [2010] STC 686 at paragraphs 61-79.

70. The Upper Tribunal said this in Noor:-

> "*30. It is clear that TCEA 2007 does not confer a general supervisory jurisdiction. It is also the case that section 83(1) VATA 1994 does not confer a general supervisory jurisdiction, as Sales J recognised (see*

Judgment [73]); and there is no other provision of VATA 1994 (or indeed any other legislation) which confers such a jurisdiction in relation to the legitimate expectation on which Mr Noor seeks to rely.

31. It does not follow from the analysis above that the F-tT can never take account of or give effect to matters of public law, and in particular legitimate expectation. There are many examples in the authorities of a court or tribunal with no judicial review function giving effect to public law rights. Examples are given by Sales J in Oxfam and we will identify them when addressing his judgment. It would, however, be open to the F-tT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in deciding an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994, which comes down to a point of statutory construction. …

87. In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric "VAT legislation" it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. … In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the F-tT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83. As Mr Mantle puts it, the jurisdiction of the F-tT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The F-tT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg Best Buys Supplies Ltd v HMRC [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers. …

89. Suppose then that a taxpayer had received express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation. Suppose that the Administrative Court

were prepared to grant a remedy in order to give effect to that legitimate expectation. We are not clear precisely what such a remedy would be, but one thing it could not do would be simply to order that HMRC give credit for the input tax. Take the present case as an example. Obviously the Administrative Court could not declare the VAT on the Invoices to be allowable input tax – it clearly was not. Indeed, it would not have been input tax even if Mr Noor had claimed it within the 6 month time limit since it would only have been counted (section 24(6)(b)) or treated (regulation 111(1)(a)) as input tax. Nor, we consider, could the Administrative Court order HMRC to authorise Mr Noor to treat the VAT on the Invoices as if it were input tax for the purposes of Regulation 111(1): that would fly in the face of Regulation 111(2). What we think the Administrative Court could do is to order HMRC to treat Mr Noor as entitled to a credit of an amount equal to the VAT on the Invoices. But that amount it not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a "credit" within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC.

90. We can put this point in a slightly different way. The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, prima facie, to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is "input tax" (or what can be counted or treated under the legislation as input tax eg under section 24 or Regulation 111) or what can be "credited" for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of "input tax which may be credited" to a person. The F-tT has no jurisdiction to effect that financial adjustment since its jurisdiction under section 83(1)(c) relates only to "input tax which may be credited" to a person.

91. Our conclusion, in the light of this discussion, is that the F-tT has no jurisdiction over Mr Noor's claim to a credit in respect of VAT on the Invoices. In so concluding, we disagree with and depart from the decision of Sales J. …"

Issue 1: Whether the FTT was wrong to conclude that HMRC applied new requirements to Europlus's claims

71. In truth, this issue and the issues that concern Europlus's legitimate expectations are intimately related. HMRC's reasoning evolved during the hearing but may be summarised as follows:-

i) The Directive, the domestic legislation, the EGDR and Notice 207 required that Europlus should show to the satisfaction of HMRC that duty had been paid on the goods that were the subject of the drawback claims (paragraph 43).

ii) It was always open to HMRC to check whether the duty paid condition had been satisfied in relation to goods that were the subject of a drawback claim by undertaking so-called "extended verification" of the claims.

iii) There was no evidence before the FTT or finding by the FTT that:-

a) Europlus was told that HMRC would not subject its claims to extended verification so as to check whether the duty paid condition had been satisfied; and/or

b) HMRC had ever paid any drawback claims when it knew that the duty paid condition had not been met.

iv) In the period between 2004 and July 2006, HMRC had undertaken some extended verification of Europlus's drawback claims (paragraph 7), though not so as to check specifically whether the duty paid condition had been complied with.

v) Nothing in Notice 207 or in the 2004 amendment to Notice 206 allowed a trader to conclude that HMRC would not in future check whether the duty paid condition had been satisfied in relation to goods that were the subject of a drawback claim.

vi) Even in the Huntingwood case, the representations were not unequivocal, which is why the claim for judicial review on the grounds of a legitimate expectation failed (paragraphs 99-102 and 117-8 of the Huntingdon case, and paragraphs 60-64).

vii) Officer Fennell had been told by his superiors at HMRC to undertake extended verification of Europlus's drawback claims by checking whether the duty paid condition had been satisfied (paragraph 7).

viii) Accordingly, there was no proper basis for the FTT's decision, which was in effect that there had been a relevant HMRC policy or practice to the effect that extended verification that the duty paid condition had been satisfied would not be undertaken, and that drawback claims would be dealt with in accordance with the "*relaxed evidential requirements*" and allowed if those requirements were complied with (paragraphs 7 and 89).

72. In these circumstances, HMRC submitted that the FTT's decision that HMRC had applied new requirements or a changed policy to Europlus's drawback claims was perverse, irrational and/or not justified on the evidence.

73. Europlus's central answer to these submissions was to emphasise that the requirement in regulation 12(1) of the EGDR was only that "*no drawbacks shall be payable unless it is shown <u>to the satisfaction of [HMRC]</u> that … the goods are eligible goods*" (emphasis added). Thus, the argument runs, it was entirely open to HMRC to lay down the circumstances in which it would be satisfied that the duty paid condition was satisfied, and that is what it had done. Having established such a policy or practice to the effect that it would be satisfied if the "*relaxed evidential requirements*" were met, HMRC could not, as the FTT held, withdraw that policy or

practice without giving notice to the affected traders. Europlus relied specifically on paragraph 25 of HMRC's Statement of Case that had said expressly that "*the "relaxed" mode by which it was prepared to be satisfied of the statutory requirements for the payment of drawback*" was rendered insufficient by increasing frauds. HMRC accepted that this paragraph was inappropriate and sought to withdraw it.

74. As I have already said, I solicited supplemental submissions from the parties as to the precise findings of fact made by the FTT. I did this because it seemed to me that the apparent finding at paragraph 89 was to the effect that HMRC's "*relaxed policy*" was "*only to deny drawback if the claimant failed to provide the limited invoice information, or was otherwise shown to be "a participant in the fraud"*". If that were the finding, then the policy would indeed have been denying HMRC's right to undertake extended verification to ensure that the duty paid condition was satisfied in respect of a particular drawback claim.

75. Conversely, if the finding were that in paragraph 6 to the effect that the "*relaxed system*" was one where "*HMRC had generally indicated that claimants would be treated as having satisfied the condition about original payment of the duty if they could produce an invoice from their immediate supplier, indicating that the beer was "duty paid", provided that they had done some due diligence to vet the credibility of the supplier, and provided that the purchase price of the beer (or indeed other alcoholic product) was not suspiciously low*", then it seemed to me that HMRC would not be taken to have been abrogating its right to undertake extended verification to ensure that the duty paid condition was satisfied.

76. Europlus argued that the paragraph 89 formulation was only consistent with the summary in paragraph 99 to the effect that: "*HMRC was in practice accepting drawback claims on a "relaxed evidential" basis, requiring only sight of the immediate supplier's invoice, and a reference to the fact that the goods were "duty paid", coupled with due diligence in relation to the supplier, and a realistic purchase price*". But this does not seem to me to be correct. It is true that the paragraph 99 formulation uses the word "*only*" in respect of its requirements, but it otherwise bears far greater similarity to the formulation in paragraph 6 than it does to that in paragraph 89. The three essential elements are (i) the immediate supplier's invoice showing the goods as duty paid (ii) due diligence in relation to the supplier, and (iii) a realistic purchase price. All these elements are found in the paragraph 6 formulation, whilst only the first is found in the paragraph 89 formulation. Moreover, two or more of the three elements are found also in paragraphs 26, 64 and 90 of the Decision.

77. Europlus's next argument was based upon the FTT's clear view that the policy or practice had been "changed" or "withdrawn". It submitted that it could not have regarded HMRC as having changed or withdrawn its earlier policy or practice if it had found that the practice itself allowed for extended verification that the duty paid condition had been satisfied. This is a 'bootstraps' argument, because if Europlus is right that the decision is entirely logical, then the appeal would not succeed, but the question here is simply what did the FTT find the policy or practice to be on the evidence. That question cannot be answered by referring to other illogicalities that might arise if its findings were indeed inconsistent with one another.

78. In my judgment, it is very clear from the decision of the FTT read fairly as a whole that it did not find that HMRC had a policy or practice of the kind described in paragraph 89. That was a somewhat careless formulation, which was inconsistent with almost the entirety of the remaining findings. Instead the FTT found that there was the policy described in paragraphs 6 and 99 and elsewhere. The important point about that policy, however, was that it did not exclude HMRC's discretion to undertake extended verification of the satisfaction of the duty paid condition or indeed any other requirement. The FTT found that the HMRC had undertaken extended verification of Europlus's claims (paragraph 7). There was no suggestion that HMRC had told Europlus that it would only undertake one kind of extended verification and/or not extended verification aimed at checking that the duty paid condition had been satisfied.

79. As it seems to me, the FTT was carried away with its pejorative view of the extrinsic evidence, and thereby fell into error. The FTT was much taken with:-

i) Its view that changes to Notice 206 in 2004 had effected a relaxation of the documentary requirements (paragraphs 82-83);

ii) The evidence in the Huntingwood case set out above (paragraphs 62-63 and 84-85); and

iii) The reference to "*relaxed evidential requirements that currently apply to drawback claims in respect of goods warehoused for export*" in the Consultation Paper (paragraph 87).

80. None of these points could, however, properly evidence a policy whereby HMRC agreed not to investigate one of the two main conditions that were required to be fulfilled under statute if a drawback claim were to succeed. Moreover, the FTT never properly focussed on the element of the supposed policy or practice that was most significant. That element was not the precise terms of the evidence that HMRC would want to see before normally being prepared to accept a drawback claim. Instead, the most significant question in relation to the supposed policy was whether or not it involved an assurance that if its conditions were complied with, HMRC would not undertake any extended verification to ensure that the duty paid condition had been complied with.

81. HMRC's supposed policy or practice would indeed have been a surprising one (though not, of course, an impossible one) if it had completely negated the statutory requirement that the trader should show that the duty paid condition was satisfied. There was, thus, a need for the very greatest attention to the evidence upon which the FTT came to the conclusion that such a policy existed.

82. In short, as HMRC has submitted, there was no evidential basis for such a finding. The evidence fell hugely short of any such thing. I have cited the relevant witness evidence of Officer Fennell, which goes nowhere near supporting such a finding, and I have already referred to HMRC's two important points that there were no findings that:-

i) Europlus was told that HMRC would not subject its claims to extended verification so as to check whether the duty paid condition had been satisfied; or

ii) HMRC had ever paid any drawback claims when it knew that the duty paid condition had not been met.

83. In my judgment, the FTT was somewhat carried away by its two-fold indignation: (i) that HMRC had certainly carried out its duties in a very relaxed manner over some years and then sought to clamp down without notice; and (ii) by the economic effects of the clamp down on an honest trader like Europlus. These considerations may be emotionally persuasive, but they go nowhere near supporting a case that there was in place a sufficiently clear policy or practice that HMRC had deprived itself of the right to undertake extended verification of the satisfaction of the duty paid condition in drawback claims without giving prior notice.

84. In my judgment, even on the basis of the findings of fact made by the FTT, its decision cannot stand. There was no basis for the finding that, even if HMRC had been operating on the basis of the policy or practice found by the FTT, HMRC had applied new requirements to Europlus. The policy or practice found to have existed by the FTT did not, in any sense, prevent HMRC from undertaking extended verification that the duty paid condition was satisfied whenever it chose.

85. In these circumstances, Europlus cannot succeed on its main argument that regulation 12 (1) of the EGDR only provided that "*no drawbacks shall be payable unless it is shown to the satisfaction of [HMRC] that … the goods are eligible goods*" (emphasis added). Whether or not it would have been open to HMRC to lay down the circumstances in which it would be satisfied that the duty paid condition was satisfied may be relevant to issue 5, but cannot be relevant to issue 1, since the policy or practice found by the FTT was not sufficient to carry the burden that the FTT placed upon it.

86. For these reasons, in my judgment, the FTT was wrong to decide that HMRC applied new requirements to Europlus, and to decide that the policy or practice that the FTT found to have been in place needed to be altered varied or withdrawn in order to allow it to undertake its extended verification of Europlus's drawback claims.

87. It is worth mentioning that it was originally argued that the FTT decision could be supported on the ground that HMRC had imposed the requirements of the March 2007 Notice upon Europlus in 2006. Ultimately, however, Europlus did not persist in that contention, accepting that there had been no requirement upon it, as there would have been after the March 2007 Notice, to provide chain of title invoices showing the duty to have been paid.

Issue 2: Whether the FTT was wrong to hold that it had jurisdiction to consider whether HMRC had contravened EU principles

88. The FTT decided as follows at paragraphs 105-110:-

"*105. There were competing contentions between [Europlus] and [HMRC] as to whether the European principle in relation to the need to transpose Community Directives into clear and proportionate domestic legislation, with any retrospective effect limited to what could be justified as strictly necessary was first a matter on which we had jurisdiction and secondly a principle that extended to high level policy decisions affecting the overall application of the principles, rather than just to primary and secondary legislation. Leaving aside the issue of whether we had jurisdiction to rule on such a matter, it was clear that the principle applied to the actual enactment of legislation, and that it did not apply to isolated administrative acts, for which the right remedy would be domestic judicial review. The question for us, beyond the one of jurisdiction, was whether the overall high-level policy decisions, first effectively introducing the relaxed evidential requirements, and secondly withdrawing them in July 2006, could and should be subjected to the same scrutiny as the actual enactment of primary and secondary legislation.*

106. We accept the Appellant's contention that we have jurisdiction to deal with this current issue. If our conclusion in relation to jurisdiction is wrong, it may be overturned on appeal, but that may be of secondary relevance since we believe that we plainly have jurisdiction to apply the Human Rights principles when we deal with the fifth issue. Unless our conclusion in relation to those principles is itself overturned on appeal, absence of jurisdiction on our part in relation to this fourth issue will be of minor relevance, since we reach the same conclusion in relation to both the fourth and fifth issues. …

110. Our decision in relation to the fourth issue is that the denial of duty refunds to [Europlus] in August 2006 was in conflict with the principles of legal certainty and proportionality, and not justified by any public policy expedient in being introduced retrospectively. Accordingly the whole of the duty reclaimed should be paid to [Europlus]. We accept that this does involve HMRC in repaying duty that may very well not have been paid in the first place, and certainly duty that [Europlus] has not established to have been so paid. This consequence results however from the requirement that when a particular procedure had been laid down for establishing what evidence was required from traders in making draw-back claims, any change to that procedure had to satisfy the European requirements of certainty and proportionality in order to be valid, and the unannounced change made in or around July 2006 did not satisfy those requirements. In other words in July 2006 HMRC failed to do what it had obviously realised by 21 March 2007 that it needed to do, namely to announce a policy change clearly, and indeed one said merely to have prospective effect from 1 April".

89. This issue may not now be of any significance to the outcome of this appeal, because I have already held that there was no policy or practice which deprived HMRC of the right to initiate extended verification of Europlus's compliance with the duty paid condition.

90. Nonetheless, since the parties have argued the point, I should state my conclusions briefly. The argument in my judgment largely missed the point. There is plainly authority in the ECJ's decision in Elmeka that European law principles can be used to require a national authority to act so as to fulfil a taxpayer's legitimate expectations, even where the exemption from the payment of the tax in question would be unlawful. Moreover, the Lindsay decision, to which I have already referred, demonstrates that European law and ECHR principles may in some circumstances be applicable to VAT questions determined by tribunals.

91. In my judgment, however, the question is really what these principles are relevant to. The FTT is this case was given a confined jurisdiction by section 16(4) of the Finance Act 1994 "*where the tribunal are satisfied that [HMRC] could not reasonably have arrived at [their decision on review]*" broadly to (a) direct that the decision is to cease to have effect; (b) require HMRC a further review of the original decision; or (c) to declare the decision to have been unreasonable. Section 16(5) allows the tribunal to quash or vary any decision and to substitute its own decision.

92. The appeal to the FTT is, therefore, all about the decision made on review under section 15 of the Finance Act 1994, in relation to the decision made originally by the HMRC under section 14(1)(bc) "*as to whether any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992 …*". As the Upper Tribunal made clear in Noor, the FTT has no jurisdiction to give effect to any legitimate expectation that the taxpayer may have, because its jurisdiction is statutory. In that case, the FTT was limited to deciding the amount of any input tax that Mr Noor was entitled to under the VAT legislation. In this case, the FTT was limited to quashing the decision not to pay the drawback claimed or substituting its own decision, or declaring that decision to be unreasonable and sending it back to the HMRC for a new decision to be made.

93. Had the FTT thought that the decision on review was one that it was "*satisfied that [HMRC] could not reasonably have arrived at*", it could presumably have said so even relying on principles of EU law. But it is very hard to see how it could rationally have formed that view when it had already decided that the duty paid condition under the legislation was not satisfied, so that there was no statutory jurisdiction for HMRC to decide to make the drawback payments claimed.

94. Properly analysed, what the FTT was doing was reviewing the entitlement of HMRC to withdraw its supposed high level policy decision or practice. It found that Europlus (i) had a legitimate expectation that it would receive the drawback, and (ii) that the denial of duty was in conflict with the EU principles of legal certainty and proportionality, and in violation of Europlus's rights under A1P1.

95. These findings all target the supposed withdrawal of the policy or practice without notice, not HMRC's decision on review "*as to whether [Europlus was] entitled to … drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992 …*". To challenge the withdrawal of the policy, Europlus needed, in my judgment to bring either (i) judicial review proceedings aimed at the decision to withdraw the supposed policy or practice without notice, or (ii) proceedings for compensation for breach of EU law under the principles and pre-conditions set out in Francovich and Bonifaci v. Italy [1991] ECR I-5357 (joined cases C-6/90 and C-

9/90), or (iii) proceedings for compensation for breach of A1P1 or any other part of the ECHR. I should not be taken as suggesting that any such proceedings would have been successful. But what the FTT could not do, certainly once it was established that the duty paid condition was not satisfied and the drawback could not be paid under the applicable EU and domestic legislation, was to allow what is in effect a claim for damages or compensation for the withdrawal of the supposed policy or practice without notice, under the guise of a statutory appeal under sections 16(4) and (5) of the Finance Act 1994. The conclusion that this is what the FTT was really doing is made good by two passages at the end of the decision as follows:-

i) Paragraph 120 said: "*[o]ur conclusion is accordingly that the action by HMRC did breach the Appellant's human rights, and that the consequence is that the Appellant's legitimate expectation, that it should have received the refund of duty, should be satisfied and that the entire duty reclaimed should be paid*".

ii) Paragraph 122 included this: "*[this case] has been decided by reference to the entire way in which HMRC modified, on a high policy basis, the whole way in which duty drawback claims should be made and evidenced, and it was the way in which that was done that has offended both European principles of certainty and proportionality and the Appellant's human rights*".

96. In short, the FTT lost sight of the fact that the jurisdiction to review and provide remedies for HMRC's conduct in withdrawing policies unreasonably lies elsewhere.

97. Accordingly, in the circumstances of this case, I would hold that the FTT was wrong to consider that it had jurisdiction to decide upon breaches of general principles of EU law, certainly so far as those breaches were in respect of a supposed policy or practice that was entirely distinct from the entitlement to drawback that was the sole subject of the statutory appeal.

98. The ECJ case of Elmeka is indeed similar, but is not directly in point. There, the tax authority had, in effect, granted an exemption under the Sixth Directive and then withdrawn it. The conduct that was unlawful was the granting of the exemption in the first place. One may be able to use EU law principles to satisfy a legitimate expectation that an exemption unlawfully granted should be given effect to. But here what is in issue is HMRC's alleged conduct in withdrawing an extra statutory policy without proper notice and deciding to insist on fulfilment of the statutory conditions of the payment of drawback – namely satisfaction of the duty paid condition. The FTT cannot have any jurisdiction to investigate or review the conduct of HMRC in those respects, even if HMRC violated principles of EU law. Europlus's mistake in thinking that Elmeka was conclusive was in equiperating the unlawfulness of the ultimate payment of drawback in this case with the unlawfulness of the grant of the original exemption in Elmeka. EU principles may well apply to the implementation and withdrawal of exemptions under a directive, but they cannot give the FTT the jurisdiction to review HMRC's conduct in relation to extra statutory policies and practices, particularly where the result is to require repayment by HMRC, contrary to all the legislation, of duty that was never paid to them in the first place.

99. In the light of the fact that this issue is now not essential to the outcome of the appeal, I shall not deal in detail with the possible inconsistencies between the Elemka decision and two further decisions of the ECJ referred to by HMRC: namely Alois Lageder SpA v. Amminiistrazione delle Finanze dello Stato (joined cases C-31/91 to C-44/91), and Association nationale d'assistance aux fronteires pour l'etrangers (ANAFE) v. Ministre de l'Interieur, de L'Outre-mer, des Collectivites territoriales et de l'Immigration (Case C-606/10).

Issue 3: Whether the FTT was wrong to hold that HMRC had contravened EU principles

100. Since the FTT's decision on this issue is based on something that I have held to be a false premise, there is no necessity to say much about this issue. The false premise is that HMRC was not always entitled under the supposed policy or practice found by the FTT to undertake extended verification of the satisfaction of the duty paid condition in relation to Europlus's claims for drawback. HMRC was so entitled.

101. In these circumstances, the FTT fell into error, in my judgment, in finding that there had been breaches of EU law in relation to the withdrawal of the supposed policy or practice.

Issue 4: Whether the FTT was wrong to hold that HMRC had breached A1P1

102. For precisely the same reasons as I have just given under issue 3, the FTT was wrong to hold that HMRC had breached Europlus's rights under A1P1. The premise of the FTT's finding was that Europlus had a legitimate expectation of obtaining a duty refund so that it had a "possession" under A1P1 (paragraph 114). In fact, it had no such legitimate expectation for the reasons I have given under issue 1 above.

Issue 5: Whether the FTT was wrong to order the payment of the drawback claims

103. This issue is a free-standing ground of appeal based on the FTT's own finding that the duty paid condition was not satisfied, so that the drawback was not payable to Europlus under the applicable legislation.

104. Europlus argued that, since it had only to be shown to the "*satisfaction of*" HMRC that the goods were eligible goods (so that the duty paid condition had been satisfied), HMRC was able to find itself so satisfied even if in truth the duty had not been originally paid. It could not, therefore, be said that HMRC would have been acting *ultra vires* by paying the drawback. Europlus relied on paragraph 24 in the judgment of Stadlen J in the Huntingwood case, where he recorded that HMRC had accepted that it was open to them to indicate the kind of evidence they would require to be so satisfied, and thereby create a legitimate expectation.

105. These arguments once again miss the point. The point here is that the FTT's own decision was (i) on the one hand, that no drawback was payable, under the applicable legislation, to Europlus, because the duty paid condition was not satisfied, and (ii) on the other hand, that the duty should have been paid because of the withdrawal of a supposed policy or practice without notice. The FTT had no jurisdiction to decide on the consequences of the withdrawal of a supposed policy or practice outside the decision under review. Having decided that the reviewed

decision not to pay the drawback duty was correct as a matter of law, the requisite conditions not being satisfied, it was not open to the FTT to go on to review HMRC's conduct in relation to its policies or practices. That might have been open to other courts, but not to the FTT under section 16 of the Finance Act 1974.

Issue 6: Whether the FTT was wrong to decline jurisdiction to consider Europlus's claim based on legitimate expectation

106. HMRC initially consented to the Upper Tribunal dealing with the matter on the assumed basis (without concession) that the FTT had jurisdiction to consider the question of Europlus's legitimate expectations. It then retracted that consent and stated its position that the FTT did not have jurisdiction to consider the reasonableness or legitimate expectations arising from HMRC's conduct and decisions in relation to the supposed policy or practice and its withdrawal. I have already held that this submission is correct for the reasons given under issue 2 above.

Issue 7: If so, whether Europlus did have a legitimate expectation that HMRC would accept its claims for drawback

107. For the reasons given above, Europlus cannot have had a legitimate expectation that HMRC would accept its clams for drawback.

Conclusions

108. In the circumstances that I have described under the headings of the 7 issues before the Upper Tribunal, and for the reasons that I have tried shortly to give, I will allow the appeal, and restore HMRC's decision on the review to reject Europlus's claims for drawback.

MR JUSTICE VOS

UPPER TRIBUNAL JUDGE

Release Date: 01 March 2013