[2016] UKUT 330 (TCC)

Appeal number: UT/2015/0175

EXCISE DUTY – duty deferment – approval pursuant to Excise Duty (Deferred Payment) Regulations 1992 – HMRC refusing approval – FTT finding that refusal was unreasonable – whether FTT entitled to come to that conclusion – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Appellants**

- and -

BROBOT PETROLEUM LIMITED — **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JONATHAN CANNAN

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 16 June 2016

Ms Amy Mannion of counsel, instructed by the General Counsel and Solicitor of HM Revenue & Customs, for the Appellant

The Respondent did not appear and was not represented

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DECISION

Background

1. This is an appeal against a decision of the First-tier Tribunal ("FTT") (Judge Nicholas Aleksander and Ms Sandi O'Neill) released on 25 August 2015 in which the FTT allowed an appeal of Brobot Petroleum Ltd ("Brobot"). The Appellants before us are the Commissioners for HM Revenue & Customs ("HMRC").

2. Directions of the Upper Tribunal released on 23 February 2016 required skeleton arguments to be served by the parties. No skeleton argument was received on behalf of Brobot. Prior to the hearing date Brobot's representative notified the Upper Tribunal that he had not been able to obtain instructions from Brobot and there was no appearance on behalf of Brobot at the hearing. Ms Mannion, who appeared on behalf of HMRC, indicated on instructions that it appeared there had been a change in ownership of Brobot in 2015. For the purposes of rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we were satisfied that Brobot had been notified of the hearing date and that it was in the interests of justice to proceed.

3. The issues in this appeal concern what is known as excise duty deferment. Liability to excise duty on hydrocarbon oils including motor fuels arises when the motor fuel is imported or when it is produced in the UK and delivered for home use from relevant premises. In common with other excise goods, motor fuels can also be stored with duty suspended in an excise warehouse operated by an authorised warehousekeeper. There is no provision for duty suspended movement of motor fuels in the UK.

4. An owner of motor fuel which has been imported or produced can continue to hold it in an excise warehouse without having to pay the duty. When the fuel is removed from the excise warehouse in a road tanker an excise duty point arises. At that time there is an obligation on the owner to pay the excise duty on that fuel, unless the owner has been approved for excise duty deferment and requests deferment.

5. Brobot is an independent owner of petrol filling stations based in the East Midlands. It retails fuel under the Jet and BP brands from some 23 filling stations. At all material times it purchased fuel from suppliers which owned the fuel in excise warehouses. Brobot contracted to purchase fuel which was duty paid on credit terms giving Brobot between 10 and 21 days' credit from the date of supply. For reasons set out below Brobot considered that it would be financially advantageous if it were to purchase and take delivery of fuel duty free "in bond", in other words whilst it was still in the excise warehouse being held under duty suspension. If Brobot was approved for excise duty deferment it could then transfer the fuel out of the warehouse to its filling stations. The excise duty point would arise at the time the fuel was transferred to the road tankers but payment of the duty would be deferred for several weeks.

6. Brobot applied for approval for duty deferment in or about December 2013. The precise circumstances of the application process and the application made by Brobot

are set out below. HMRC refused the application and that decision was upheld on review. Brobot challenged the review decision by way of appeal and the FTT upheld Brobot's appeal.

The Law

7. We set out in this section relevant features of the statutory and regulatory framework for excise duty on motor fuels, including the provisions for duty deferment.

8. Motor fuels are subject to excise duty by virtue of the Hydrocarbon Oil Duties Act 1979. The duty applies to hydrocarbon oil which is imported into the UK or produced in the UK and delivered for home use. Section 21 of that Act provides for HMRC to make regulations to regulate the production, storage and warehousing of hydrocarbon oils and generally for securing and collecting excise duty chargeable on such oils.

9. The current regulations are the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations"). Regulation 3(1) of the 2010 Regulations defines certain terms which are relevant for the present appeal as follows:

> "duty suspension arrangement" – "a tax arrangement applied to the production, processing, holding or movement of excise goods … excise duty being suspended."
>
> "duty deferment arrangement" – "any provision made by or under the customs and excise Acts that permits the payment of excise duty to be deferred."

10. Regulation 5 provides that there is an excise duty point at the time when the excise goods are released for consumption in the United Kingdom. Regulations 6 and 7 then provide as follows:

> "6(1) Excise Goods are released for consumption in the United Kingdom at the time when the goods –
>
> (a) leave a duty suspended arrangement …
>
> 7(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when –
>
> (a) they leave any tax warehouse in the United Kingdom or are otherwise made available for consumption …"

11. The effect of these provisions for present purposes is that there is an excise duty point when motor fuels are loaded onto a road tanker from an excise warehouse. Regulation 8 then makes provision for the person who is liable to pay the duty:

> "… the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(a) … is the authorised warehousekeeper, the UK registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement."

12. The persons liable for the duty are effectively the authorised warehousekeeper, the UK registered consignee (the importer) or the owner.

13. Section 127A Customs and Excise Management Act 1979 ("CEMA 1979") makes provision for deferred payment of excise duties as follows:

5 "127A Deferred payment of excise duty on goods

(1) The Commissioners may by regulations make provision for the payment **(in accordance, where any requirement to pay the duty takes effect, with that requirement)** of any excise duty on goods of a prescribed kind to be deferred, in prescribed cases, subject to such conditions or requirements as may be imposed -

10 (a) by the regulations; or

(b) where the regulations so provide, by the Commissioners."

(emphasis added)

14. The highlighted words in section 127A(1) were added by Finance Act (No 2) 1992 and were focussed on by Ms Mannion in her submissions. Section 1 of that Act
15 provides as follows:

"1 Powers to fix excise duty point

(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to
20 take effect ("the excise duty point").

…

(4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision -

(a) specifying the person or persons on whom the liability to pay duty on the goods
25 is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed) …"

15. The Excise Duty (Deferred Payment) Regulations 1992 ("the 1992 Regulations") were made pursuant to section 127A CEMA 1979. In so far as relevant
30 they provide for approval for deferment as follows:

" **4 Approved persons**

(1) A person who wishes to be granted excise duty deferment under these Regulations shall apply to be approved for excise duty deferment purposes.

(2) When approving a person under this regulation the Commissioners may specify the maximum amount of excise duty which may be deferred by that person at any time under that approval.

(3) When approving a person under this regulation the Commissioners may limit the approval to deferment in respect of goods which are at specified places.

(4) A person may be approved separately under this regulation in respect of different places.

(5) The Commissioners may, for reasonable cause, at any time vary or revoke any approval granted under this regulation.

…

9 Conditions

The Commissioners may make any approval of a person or any grant of deferment of duty subject to any condition or requirement …"

16. Regulation 5 of the 1992 Regulations provides for duty to be deferred to a "payment day". For the purposes of hydrocarbon oils the payment day depends on when the oil was delivered for home use. Where it is delivered on or after the 15th day of one month and before the 14th day of the next month, the payment day is the last business day of that next month. In other words the period of deferment can be anything between 2 and 6 weeks.

17. HMRC have issued two public notices which refer to excise duty deferment. Notice 101 is headed "Deferring Duty, VAT and Other Charges". It sets out information about the duty deferment scheme and how to apply for approval under the scheme. Excise Notice 179 is headed "Motor and Heating Fuels – General Information and Accounting for Excise Duty and VAT". It provides guidance on accounting for excise duty and VAT charged on motor fuels.

18. Paragraphs 1.2 and 6.1 of Notice 101 read as follows:

"**1.2 Who can defer payment?**

You can defer payment if you are:

- an importer
- an owner of goods in warehouse or free zone
- an agent (including warehousekeepers) who enters goods for importers or owners
- approved and hold a DAN which identifies your duty deferment account."

“**6.1 Who can apply for deferment approval?**

You can apply if you are:

- an importer
- an owner of goods in warehouse or free zone
- an agent (including warehousekeepers) who enter goods for importers or owners
- you do not have to be VAT registered to apply for approval.”

19. Notice 101 also sets out certain deferment approval criteria which are applied by HMRC. The detailed criteria are not strictly relevant for present purposes but they concern matters such as financial standing and the provision of security. Applicants for approval agree to meet the criteria.

20. Section 10 of Excise Notice 179 deals specifically with deferment of excise duty. At 10.2 it identifies the relevant law, including s.127A and the 1992 Regulations. At 10.3 it refers to the scope of that part of the notice as follows:

“**10.3 What is the scope of this part of the notice?**

The conditions and requirements set out in this part of the notice apply to fuel … being delivered from a duty suspended warehouse or entered premises….

The conditions and requirements apply to all persons approved to defer the payment of duty.”

21. Section 10.4 then provides as follows:

“**10.4 Who can defer payment?**

You can defer payment if you are:

- an importer
- an owner of goods in warehouse or free zone
- an agent (including warehousekeepers) who enters goods for importers or owners, and are
- approved and hold a Deferment Approval Number (DAN) which identifies your duty deferment account.”

22. Section 10 also refers to the “Excise Payment Security System” or “EPSS”. A trader who is authorised under EPSS can be approved for duty deferment without having to give a guarantee for the deferred duty. At the time an application for authorisation under EPSS could have been made and granted before a trader was approved for duty deferment.

23. We should also say something about the jurisdiction of the FTT where approval is refused. There was no dispute before the FTT that the decision was an "ancillary matter" and that its jurisdiction arises under section 16(4) Finance Act 1994 as follows:

5 > " 16(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following…"

10 24. The question for the FTT therefore was whether the review decision of HMRC to refuse approval to Brobot was a decision which it could not reasonably have arrived at.

The FTT's Decision

25. The FTT made what were essentially undisputed findings of fact at [19] to [43] 15 of its decision and there is no challenge to those findings in this appeal. We can summarise the facts as follows:

(1) Brobot purchased motor fuel from supplies which held fuel under duty suspension arrangements in excise warehouses. Brobot was given between 10 and 21 days' credit by its suppliers but also had to give a first charge over some 20 of its premises by way of security. The effect was to limit Brobot's access to capital and adversely affected its business.

(2) Brobot suffered stock losses on delivery of motor fuel for various reasons including the escape of fuel vapour during the filling of road tankers. The warehouses operated vapour recovery systems which returned fuel vapour to the 25 suppliers' tanks. Brobot was charged for the fuel vapour, including duty, whereas the supplier was able to recover the vapour and HMRC also refunded the duty on the vapour to the supplier. Brobot estimated its stock losses as being more than £120,000 per annum.

(3) Brobot wished to obtain approval for duty deferment in order to remove 30 the requirement to give security to its suppliers and to reduce or eliminate the stock losses. It wished to purchase motor fuel in bond so that it would be the owner of the fuel at the excise duty point when it was removed from the warehouse.

(4) Brobot's supply contracts were generally for periods between 1 and 5 35 years. In recent negotiations suppliers had refused to contemplate supplying Brobot with fuel in bond until it had been approved for duty deferment and had obtained a Deferment Approval Number or "DAN".

(5) Brobot received its EPSS authorisation on 19 December 2013 and on 3 January 2014 it applied for a DAN. Procedurally the application for a DAN was 40 effectively Brobot's application for approval for duty deferment.

(6) On 14 February 2014 HMRC referred Brobot to Section 10.4 of Notice 179 which, it was said, stated that to be approved the applicant had to be an importer, an owner of goods in a warehouse or an agent of an importer or owner. Brobot was subsequently asked to provide evidence in the form of agreements or proposals between Brobot and any supplier or evidence of negotiations. Brobot informed HMRC in reply that it had not at that stage decided on a supplier.

(7) Officer Greener was dealing with Brobot's application. His evidence which the FTT appears to have accepted was that HMRC's policy was that a DAN would not be issued unless an applicant owned fuel in an excise warehouse. However, he had been prepared to relax the policy following discussions with HMRC's unit of expertise if Brobot could show that it would be supplied with motor fuel in a tax warehouse.

(8) Brobot had discussed supply "on a duty deferred basis" face to face with its suppliers but they were "not willing to give up their duty deferment arrangements" until Brobot had its own DAN. There was nothing in writing in relation to those discussions. The suppliers were not willing to enter into meaningful negotiations with Brobot unless it had a DAN.

(9) On 2 May 2014 HMRC informed Brobot that they were unable to proceed with the application for a DAN because Brobot had not demonstrated that there was a commercial agreement in place with a supplier or warehouse for motor fuel to be transferred in bond. The effect was a refusal of Brobot's application for approval for duty deferment.

(10) The decision of Officer Greener to refuse the application for approval was confirmed in a review by Officer Marshall. Although the date of the review decision does not appear in the FTT's decision we understand it was 8 July 2014. The reasoning of the review officer does not appear in the FTT's decision even though it is the review decision which was appealed to the FTT.

26. In its conclusions the FTT began by stating at [53] that Brobot's application for deferment was not speculative and that Brobot had good reasons for wanting to purchase fuel "on a duty deferred basis". Those reasons were effectively to mitigate the stock losses and to remove the need to give security to suppliers.

27. Counsel for HMRC had submitted to the FTT that it was reasonable not to issue a DAN unless it was needed, and the FTT accepted that submission. However, it referred to Brobot as being faced with a "chicken-and-egg situation". Suppliers would not enter into meaningful negotiations until Brobot had a DAN but HMRC would not issue a DAN until Brobot had a supply agreement, or at least an agreement in principle. The FTT also noted the possibility of HMRC initially issuing a DAN that would expire after a certain period of time, giving time for Brobot to conclude negotiations with suppliers. At [56] the FTT held as follows:

> " We find that it was unreasonable (in a 'Wednesbury' sense) for HMRC to place Brobot in such a position by refusing to issue Brobot with a DAN."

28. On that basis the FTT allowed Brobot's appeal and directed that the decision refusing approval for duty deferment should cease to have effect. It directed that there should be a further review of the original decision taking into account that it is unreasonable for HMRC to refuse to issue a DAN to an established petrol retailer in circumstances where it can demonstrate a bona fide intention to enter into negotiations to purchase fuel on a duty deferred basis from a supplier.

Grounds of Appeal

29. The FTT (Judge Aleksander) granted HMRC permission to appeal in a decision released on 4 November 2015. The grounds on which permission was granted and on which the present appeal has been pursued may be summarised as follows:

(1) The finding that HMRC must take into account assertions of intention to negotiate contracts for the purchase of oil within a warehouse or other bonded premises is not supported by the 2010 Regulations, and

(2) The refusal to grant a DAN does not prevent a person from becoming an owner of fuel in a warehouse. In finding that HMRC's decision was unreasonable (for the reasons that it gave) the FTT posed itself the wrong questions and thereby fell into error.

30. HMRC submitted in its grounds of appeal to this Tribunal that s.127A(1) provides that duty can only be deferred by a person who is required to pay excise duty. Further, regulation 9 of the 1992 Regulations provides that the Commissioners may approve a person for duty deferment subject to any condition or requirement. HMRC contended that generally applicable conditions were contained in paragraph 6.1 of Notice 101, which required a person to be an importer, owner or agent in order to apply for approval.

31. Ms Mannion's skeleton argument asserted that the error of the FTT was in considering firstly whether Brobot had good reason to apply for approval and having found that it did, to then consider whether HMRC had unreasonably refused approval. She submitted that the starting point ought to have been whether Brobot satisfied the conditions to apply for duty deferment. That was a matter of law and did not engage any question as to the reasonable application of a policy. The agreed fact that Brobot was not an owner of motor fuel in bond at the time of the application for approval meant that the *only* decision which could have been reached was to refuse approval.

32. In essence HMRC's case before us was that the FTT failed to identify that it was a condition for approval that an applicant had a legal liability to pay duty either as an importer, owner or agent thereof. The fact that Brobot had a good reason for wanting duty deferment was irrelevant in circumstances where it had no liability as owner. In the alternative, the refusal to grant approval did not prevent Brobot from becoming an owner of motor fuel in bond and once it became an owner it could apply for duty deferment. The FTT fell into error in its approach to the question of reasonableness.

Discussion and Decision

33. We can deal quite briefly with the argument that as a matter of law Brobot was not entitled to apply for approval because it was not an owner of duty suspended goods. HMRC's case was to the effect that a decision to approve Brobot for deferment of duty would have been ultra vires and not a matter of discretion.

34. It is axiomatic that the only persons entitled to defer payment of duty are the persons who are liable to pay the duty at the excise duty point pursuant to Regulation 8 of the 2010 Regulations. Where goods leave duty suspension arrangements the persons liable for the duty include the owner of the goods at that time, being a person on whose behalf the goods are released.

35. Ms Mannion submitted that the effect of the highlighted words in section 127A CEMA 1979 was that HMRC could not under that section make regulations which changed the underlying liability to pay duty or the time at which that liability arose. That must be right; however it does not support an argument that only persons who are owners of goods and therefore presently liable for duty at the excise duty point can be approved for duty deferment.

36. Ms Mannion did not submit that paragraph 6.1 of Notice 101 had the force of law. We consider that she was right not to do so. There is nothing in Notice 101 itself to indicate that it was intended to have the force of law. It might have been open to HMRC to impose a condition under Regulation 9 of the 1992 Regulations that an applicant for approval must be an existing importer or owner of hydrocarbon oils, but it has not done so. In the absence of any legal condition, approval of Brobot's application would not have been ultra vires, and accordingly HMRC's refusal of the application in the present circumstances was an exercise of discretion. Indeed, that appears to have been the approach of Officer Greener when asking for evidence that Brobot would be supplied with motor fuel in a tax warehouse.

37. We turn therefore to second ground of appeal. Broadly HMRC contend that the FTT took a wrong approach in considering the question of reasonableness.

38. It is clear that the benefits of duty deferment to an owner of motor fuel are the cashflow benefits associated with the period of deferment and the administrative benefit of accounting for duty by way of one monthly payment. There is also an administrative benefit to HMRC in receiving monthly payments rather than individual payments on each occasion motor fuel leaves duty suspension.

39. We can see that there could be a commercial benefit to Brobot buying in bond. It may be of course that suppliers would wish to continue supplying from bond because they retained the benefit of Brobot's stock losses. That would be a matter for commercial negotiations. In any event, the FTT accepted that Brobot might have been able to reduce stock losses by buying in bond.

40. We accept Ms Mannion's submission that approval for duty deferment should not in principle affect the ability of Brobot to purchase motor fuel in bond. In that case Brobot would itself pay the duty to HMRC when motor fuel left the excise

warehouse. The suppliers would not charge or give credit for the excise duty. Brobot could only obtain credit for the excise duty on the motor fuel if it was approved for duty deferment.

41. Ms Mannion submitted that the error of the FTT was as follows:

(1) The FTT did not clearly identify the statutory context in which decisions on approval are made and it confused duty suspension and duty deferment.

(2) The FTT approached the question of reasonableness from the wrong starting point. It considered firstly whether Brobot had a good reason to apply for approval when it should have addressed the question of whether Brobot was an owner of goods or was capable of becoming an owner.

(3) Addressing the question from its proper starting point and in its proper context it could not be said that the decision to refuse approval was unreasonable.

42. The FTT set out regulations 4 and 9 of the 1992 Regulations and referred to section 127A CEMA 1979. It also referred to Notice 101 and Excise Notice 179. It is clear from Officer Greener's correspondence and from paragraph 6.1 of Notice 101 that HMRC approaches decisions on approval by first considering whether the applicant falls within a category of persons who can apply for approval. Hence Officer Greener requested evidence from Brobot to show that it would be supplied with motor fuel in a tax warehouse. His purpose must have been to establish whether Brobot was capable of becoming an owner.

43. When the FTT came to set out reasons for its decision it did so without identifying this first stage of the application process. The material parts of the FTT's decision are as follows:

"53. We find that Brobot's application for deferment approval was not speculative. We find that they had good reasons for wanting to be able to purchase fuel on a duty deferred basis. In this regard we find that the evidence as to the stock losses that they suffered, the credit terms of their suppliers (including the security that suppliers required over their assets) are all relevant.

54. We also find that HMRC's policy not to issue DANs unless they are needed is reasonable. However we find that Brobot had a legitimate reason for needing a DAN. Mr Bright is the managing director of a substantial petrol retailer, and has had many years' experience of negotiating with suppliers of fuel. Notwithstanding Mr Hays' submissions, we believe Mr Bright when he says that suppliers were not prepared to engage in detailed or substantive negotiations for supply on a duty deferred basis unless and until Brobot had been issued with a DAN.

55. Brobot were therefore faced with a chicken-and-egg situation. They were not able to enter into meaningful negotiations with fuel suppliers for a supply agreement on a duty deferred basis without having been issued with a DAN – and on the other hand, HMRC would not issue them with a DAN until they had such an agreement (or at least such an agreement in principle).

> 56. We find that it was unreasonable (in a "Wednesbury" sense) for HMRC to place Brobot in such a position by refusing to issue Brobot with a DAN."

44. It is not clear to us that the FTT failed to have regard to the statutory context. We accept that the FTT used certain loose terminology in its references to purchasing and supplying fuel on "a duty deferred basis". The FTT was no doubt referring to purchasing fuel held under duty suspension arrangements with a view to deferment of duty when it left those arrangements.

45. However, in our judgment the FTT did focus too heavily on whether there was a good reason for Brobot to want approval, and it failed to consider whether it was realistically capable of becoming an owner of duty suspended goods. It seems to us that HMRC is entitled to approach its discretion in this area by first considering whether an applicant is capable of becoming an owner of goods.

46. The FTT did not refer in its reasons to Notice 101 or Excise Notice 179. It did record a submission of counsel for HMRC referring to paragraph 10.4 of Excise Notice 179 that it was reasonable for HMRC only approve a person if the applicant has need for approval. Notice 179 deals with requests for deferment of excise duty once a trader has been approved for duty deferment. It is paragraph 6.1 of Notice 101 which concerns the prior step of applying for approval for duty deferment.

47. We agree with Ms Mannion to the extent that it is a relevant question for the decision maker, in the exercise of his discretion, whether an applicant is capable of becoming an owner of goods. There will be a spectrum of cases where that discretion will fall to be exercised. At one end is a person who is and has been an owner of duty suspended goods and who has been paying duty when motor fuel leaves an excise warehouse. At the other end is a person who has no real means of ever becoming an owner of duty suspended goods.

48. The question whether applicants at each end of the spectrum should be approved will, we apprehend, normally be clear, and no question of reasonableness is likely to arise. However, there is an area in the middle where it will be a matter of judgment. Ms Mannion accepted that there must be an allowance in the approval process for persons who, whilst not owners of duty suspended fuel for the time being, have a real prospect of becoming owners of such fuel. The issue for the FTT will be whether in the exercise of that judgment HMRC's decision refusing approval fell outside reasonable limits.

49. The FTT stated that HMRC's decision was unreasonable in a "Wednesbury sense" because it placed Brobot in a "chicken and egg situation".

50. The Wednesbury test derives from *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223. Where a decision maker has applied the law correctly and taken into account all matters that are relevant to the decision and only those matters, the only circumstances in which a court or tribunal can interfere are where the decision maker has "come to a conclusion so unreasonable that no reasonable authority could ever have come to it".

51. On the facts as found by the FTT there was no evidence before HMRC as to how realistic it was that Brobot would be able to purchase motor fuel in bond. The FTT did find that Brobot had not been able to enter into meaningful negotiations, but that supports HMRC's position that it could not be satisfied that Brobot was at the stage of the application capable of becoming an owner of goods in duty suspension.

52. On those facts, and in light of the statutory context, we are satisfied that the FTT was wrong to find that HMRC's decision refusing Brobot's application was unreasonable. In deciding that Brobot had been put in a "chicken and egg" situation, and that accordingly it would be unreasonable for it to be denied duty deferment status, the FTT fell into the error of substituting its own judgment for that of HMRC. It was not unreasonable for HMRC to take the view that the evidence provided by Brobot did not suffice to show that there was a real prospect that Brobot would become the owner of duty suspended fuel. That was a relevant question, and the decision to refuse approval for duty deferment on that basis could not properly be impugned as a decision that no reasonable HMRC officer could have taken.

53. Having found that the decision was unreasonable in a *Wednesbury* sense the FTT went on to direct a further review of the decision. That review was to take into account what the FTT described, at [61], as one of the particular terms of its decision, namely that:

> " … it is unreasonable for HMRC to refuse to issue a DAN to an established petrol retailer in circumstances where it can demonstrate a bone fide intention to enter into negotiations to purchase fuel on a duty deferred basis from a supplier." (sic)

54. That approach to the further review is a further demonstration of the error of law made by the FTT. We do not consider that there can be any rule that HMRC must approve an applicant who satisfies it that the applicant is an established fuel retailer with a genuine intention to enter into negotiations to purchase fuel held in a duty suspension arrangement. Such an intention is a relevant factor, but it is open to HMRC, without exceeding the bounds of reasonableness, to decide that a mere intention to enter into negotiations is insufficient to warrant the granting of duty deferment status at that stage.

55. Whether Brobot had a realistic prospect of becoming an owner of the fuel in bond, including the contractual position and the state of any negotiations, including the willingness or otherwise of counterparties to enter into such negotiations, and the prospective outcome, are all relevant considerations for HMRC and are matters upon which HMRC is entitled to exercise a discretion. It cannot be said, in our view, that on the facts of this case a decision to refuse approval was one that could not reasonably have been arrived at.

56. Nor do we consider that it can be said that HMRC was unreasonable to focus on eligibility to apply for duty deferment, or that could in any way be regarded as an irrelevant consideration. That was the first stage of the process, but it does not appear to have been recognised as such by the FTT. Ms Mannion fairly acknowledged that it does not appear that HMRC's case before the FTT itself clearly focussed on the first stage of the process.

57. It was not necessary or relevant at the first stage for HMRC consider the question of whether the applicant would satisfy any other criteria for approval. Nor was it necessary or relevant, as the FTT thought, for HMRC at that stage to consider whether any approval should be limited in time. Those questions did not relevantly arise unless HMRC was satisfied, acting reasonably, that Brobot was realistically capable of becoming an owner of fuel in duty suspension arrangements.

58. Taking all these considerations into account, we are satisfied that the FTT erred in law and that it was not entitled to conclude that HMRC's decision was unreasonable. In our judgment HMRC's decision on the review was within the bounds of reasonableness.

Decision

59. For the reasons given above we allow the appeal and set aside the decision of the FTT.

JUDGE ROGER BERNER
JUDGE JONATHAN CANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 21 July 2016