TC01477

Excise Duty - reclaim of excise duty on exportation of beer - whether the Appellant had satisfied the condition of demonstrating that the beer that it had exported had been "eligible beer", namely beer in respect of which duty had been paid and not previously refunded – whether the First-tier Tribunal had jurisdiction to hear a legitimate expectations argument - whether the Tribunal could and should consider whether the way in which HMRC was applying the drawback Regulations breached any principle of European law - whether the manner of applying the drawback Regulations offended the European principle of the free movement of goods - whether the conduct of HMRC breached the Appellant's human rights - Appeal allowed

FIRST-TIER TRIBUNAL **Reference no: LON/2007/8067**

TAX

EUROPLUS TRADING LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
GILL HUNTER

Sitting in public at Field House, Breams Buildings, Chancery Lane in London on 4,5,6 and 27 May and 25 and 26 July 2011

Christopher Convey and (for the hearing on 25/26 July) David Yates, counsel, on behalf of the Appellant
Garrett Byrne, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was a hard-fought case, which commenced by raising two points for our decision, and ended up raising five distinct contentions. Since several of the resultant points raised multiple issues (such as whether we had jurisdiction to deal with the issues in question, whether principles of European law and Human Rights law had any bearing on this case, even before considering what that bearing might be), there are a number of different matters for us to decide and record in this decision.

2. We should say at the outset that, whilst we would have preferred to have arrived at a conclusion that we felt confident might close the litigation in this dispute, there are two reasons why we fear that this might not be so. We record first that standing behind this case, and awaiting its outcome, there is a pending judicial review action. The Appellant may or may not wish or need to proceed with that, and may or may not obtain leave to do so, but that at least is one issue. The other more material point is that we are conscious that HMRC may very well appeal against our decision. We consider it better to be straightforward about the point that some of the matters relating to our jurisdiction to hear European arguments, and the extent to which European law might have direct effect on the outcome of this case, are matters where others will, we accept, have more expertise than we have, and others may indeed alone have jurisdiction. In view of these reservations on our part, we consider that the most constructive course for us to adopt is to summarise as clearly as possible our findings of fact, and approaches to all issues. This should at least assist, rather than hamper, should this case have to go further.

The brief subject matter of the Appeal

3. The case relates to the topic that has been before the courts on several recent occasions, namely claims that HMRC has wrongly refused to refund Alcoholic Liquor Duty, when reclaims, or drawback claims, have been submitted by a trader claiming to be exporting "duty paid" beer, the ground for refusal being that the claimant has failed to demonstrate to the reasonable satisfaction of HMRC that the reclaimed duty was paid in the first place. This Appeal relates to the refusal of HMRC to meet claims for duty repayments totalling £1,225,943.05, those refusals being notified initially in various letters (relevant to the different claims) issued in the last half of August 2006.

The first issue

4. The first issue is whether the Appellant has made out its case, the burden of proof plainly being on the Appellant, that it has satisfied the strict conditions prescribed in the relevant statute law, Regulations and recorded in Customs Notice 207, that had to be satisfied before duty should be refunded, following the export of the Appellant's beer. The contentious condition was the fundamental one that required the Appellant to demonstrate to the satisfaction of HMRC that the reclaimed duty had been paid in the first place.

5. The answer to this question is that the critical condition has not been satisfied. Although the Appellant's immediate supplier was a highly reputable "cash and carry" supplier, and the beer was said to have been purchased at the price at which any of the supplier's customers could buy the identical beer for domestic consumption (it then being implicit that duty would, or at least certainly should, have been paid), it

emerged that the beer had been purchased by that supplier from a chain of traders. Sometimes the chain was traced by HMRC to defaulting and missing traders. Sometimes it proved impossible for HMRC to trace the supplies back. Certainly the Appellant itself never succeeded in tracing its supplies back to a trader that had accounted for duty. Since the phrasing of the condition in relation to original payment of the duty required the Appellant to demonstrate payment of duty, these facts made satisfaction of that condition impossible, such that the Appellant's claim was rightly rejected, when applying the strict legal test.

The second issue

6. The second issue relates to the way in which, until about July 2006 HMRC had been testing the entitlement of exporting traders to duty refunds under what was described as "a relaxed system". Under this system, the existence of which was not disputed by HMRC, 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.

7. Under this relaxed system, the Appellant had recovered all duty reclaimed for a period of at least 18 months. Occasionally claims had been subjected to extended verification, but that process had always culminated in the claims being met. Although Mr. Fennell, the HMRC officer in direct contact with the Appellant, was about to grant all the claims made by the Appellant for the month of July and the first two weeks of August, at the last moment Mr. Fennell was ordered by his superiors to indicate that all the claims would be subjected to extended verification. In that process, from July onwards, HMRC undertook their own tracing exercise to see whether they could verify the original payment of duty. If they failed to do so, either by finding that a chain led to a defaulter, or by finding further tracing impossible, they rejected the claim. Whilst this more onerous test only required the Appellant to satisfy requirements plainly laid down in the statute, the Regulations and Notice 207, the Appellant claimed that it was wrong for HMRC to change the basis of testing claims from the relaxed system that had previously been operated without giving traders any notification of the intended change in procedures. The Appellant also claimed that no such notice had been given.

8. In the light of the change of system, the Appellant claimed that it had been denied its legitimate expectations, and accordingly sought to bring a judicial review action in the High Court. We understand that the preliminary application to bring that action was rejected, though a right of appeal against that decision was made. A decision was apparently then made that that appeal should be deferred, pending the outcome of the hearing before us. In the event, following the decision of Sales J. in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), the Appellant contended that we had jurisdiction to deal with the legitimate expectations issue ourselves.

9. The majority of the hearing, during the period 3 to 6 May was dedicated to the facts and to arguments concerning the first issue, those arguments being largely based on a misunderstanding that we will explain below. When there was no further time to consider the judicial review issue, the Appeal was adjourned to 27 May, with an indication that we be given full argument in relation to whether or not we had jurisdiction. We ourselves indicated that we rather doubted whether we did have jurisdiction, principally because sections 15-18 of the Tribunals, Courts and Enforcement Act 2007 had transferred judicial review functions to the Upper Tribunal

and not the First-Tier Tribunal and because Warren J. and Mr. Avery-Jones had, we believed in two cases, refrained from following the suggestions that the First-tier Tribunal did have judicial review jurisdiction.

The third issue

10. Although we commenced the hearing on 27 May, preparatory papers made it clear that the Appellant wished, instead of pursuing arguments before us in relation to the domestic judicial review issue, to advance the European argument that had admittedly been referred to even in the initial grounds of appeal, namely that we as a Tribunal were bound to apply directly applicable elements of European law, and that the refusal to pay duty in the present case constituted an unlawful interference with the free movement of goods. After considerable discussion, we adjourned the hearing again, and required the parties to submit skeleton arguments in relation to the European point, prior to, and with a view to the hearing being re-convened on 25 and 26 July. Without success on this count, the Directions indicated that the Appellant should confine its submissions to that point, and should raise no further new points.

The third, fourth and fifth issues

11. When the hearing re-convened on 25 July it was clear that the Appellant had essentially raised three arguments, albeit that in substance they amounted to one issue in somewhat different guises.

12. To quote the skeleton argument, it said:

> *"Following the Tribunal's ruling of 27 May that it would not accept jurisdiction on English public law issues in the manner suggested by Sales J in Oxfam v. HMRC,* (a slight exaggeration of the tentative intimation that we had given), *the Appellant submits that its appeal should still be allowed because:*
>
> 1. *HMRC's altered requirements for proof of duty under Notice 207, pursuant to the Excise Goods (Drawback) Regulations 1995 amounted to an infringement of what are now TFEU Articles 34 and 35* (in other words the Treaty provisions requiring free movement of goods);
> 2. *The retroactive application of such altered requirements in any event contravened the EU law principles of proportionality and/or of protection of legitimate expectations and legal certainty;*
> 3. *Equally the retroactive application of such altered requirements is in breach of the European Convention on Human Rights and in particular Article 1 of Protocol 1 of the Convention".*
>
> *The Appellant accepts that the argument under (3) has not been identified previously. It is raised in response to the points raised by HMRC at paragraph 22 of their skeleton to the effect that the EU principles relied on by the Appellant only apply to national authorities enacting legislation as opposed to their administrative acts. This contention by HMRC is incorrect but in any event is no answer to an argument under the Convention".*

13. Notwithstanding that the Appellant had again raised new points, the Respondents intimated that they were prepared to deal with them, and since in our view the Appellant had at the very least a grievance that it should have every chance of trying to remedy, we permitted the Appellant to raise the additional points.

14. Towards the end of the hearing, it was clear that the Appellant had not formally abandoned what we have termed the second issue, namely the domestic judicial review issue. We will give some observations in relation to this issue, in case they might be of any assistance, were the possible application to the High Court for judicial review to be re-activated. Our decision on this issue, however, is that we decline jurisdiction.

15. We 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. Perversely when a public notice was eventually issued, on 21 March 2007, indicating the changes that would be made to the way in which traders would be expected to present drawback claims, not only was notice then given, but the new arrangements were not to commence until 1 April.

16. We are particularly influenced by the fact that, by withdrawing the regime without notice, the people adversely affected appeared not to be the fraudsters and the people who had made large profits by selling beer at inflated prices equivalent to duty-paid prices when they had in fact failed to pay the duty. The people potentially disadvantaged appeared to be innocent victims of the fraud. In the case of the present Appellant, all purchases had been made from an entirely reputable supplier, and the Appellant's evidence was never disputed when it claimed that it had purchased the beer at exactly the prices at which others could buy the beer for domestic consumption in the relevant "cash and carry" warehouse. Recouping the lost cash from a party that appeared to have been innocent, such that in terms of justice the tax avoided was being recovered from the wrong person, seems manifestly unjust when no advance intimation was given of the change to the whole basis of administering the drawback regime. Had such notice been given, potential drawback claimants could either have taken risks with their eyes open or could have changed their procedures. Without that opportunity, they were being called upon to demonstrate something that would be almost inherently impossible to establish. They were also presented with different requirements than those that they understood (and understood rightly) to have been operated.

17. Our decision is that these features, which we will amplify below, contravened the points addressed in the second and third of the contentions mentioned in paragraph 12 above; that on this ground the drawback claims should have been allowed in full, and that the Appeal is thus allowed.

The basic facts and the law

18. The Appellant trades in beer. A considerable proportion of its trade involved, at the time material to this Appeal, and doubtless still involves, the sale of beer, often, but not always, from the UK, and usually to Calais and surrounding areas of North-West France. Much of the trade was, and is, presumably feeding "own consumption" imports of beer, sold at the considerably cheaper French duty rates, to returning UK holidaymakers and day-trippers.

19. The Appellant's only witness was Mr. John Porter ("Mr. Porter"), the Managing Director of the Appellant. Mr. Porter was an entirely honest witness. Mr Porter and his principal associate, Mr. Green, the company secretary, had founded the company and each owned half of the share capital. They had traded together in one or two similar ventures prior to forming the Appellant in July 2000.

20. From the Appellant's formation until September 2004, the Appellant traded solely in "duty suspended" or "bonded" product, generally beer. "Duty-suspended" product was, as the name implies, product where UK duty had not yet been paid, albeit that it would become payable on being released from the required bonded warehouse for domestic consumption. If instead "duty suspended" beer was to be exported (such that UK duty was not then owed), and despatched necessarily then to another bonded warehouse, the exporter was uninvolved with UK duty. None would be owed because the product was being exported, and none would be reclaimed or refunded because no duty had been paid in the first place.

21. The Appellant's business expanded and, in September 2004, the Appellant started to trade in "duty-paid" product. This form of trading involves buying product in respect of which duty has been paid, and then reclaiming the duty when the product is exported. Trading in duty-paid product was said by the Appellant to be much more profitable. The apparent reason for this is that whilst UK rates of duty are very high, supermarket and other competition drives down the margins at which beer is sold in the UK market place, so that if duty-paid beer is purchased at the best available price, and the duty then reclaimed, a greater profit can be made on selling the product to France than if the sale was of "duty-suspended" product. The price of the latter, as we understood matters, would not have been driven down so fiercely by market competition and would thus be traded at somewhat higher prices. The resultant profit on selling duty-paid beer and recovering the duty was accordingly much more than the profit in dealing in duty-suspended beer.

22. Whilst it has no great bearing on the facts relevant to the Appellant's trading (albeit that it will be relevant in a different context), we should mention that in 2006, the period material to this Appeal, duty could be reclaimed either under the "Warehouse for Export", or "WFE" scheme, or under the "Direct Export" arrangement. Under both, the claimant had to demonstrate that duty had been paid and not previously recovered. Under the WFE scheme, the intending exporter gave notice of its intention to export to HMRC, then shifted the beer to the "non-duty-paid" side of the warehouse where it was held, where it had to remain for a 48-hour period to facilitate HMRC's checking procedure if required, and then an immediate claim could be made for the refund of duty. This was then generally available even if there might be quite a long period prior to actual export.

23. Under the Direct Export arrangement, duty was re-claimed after export, and it had to be shown that the beer had been exported, that duty had been paid in the jurisdiction to which it had been exported, and of course that UK duty had initially been paid on the beer and not previously refunded.

24. The Appellant reclaimed duty in respect of its duty-paid purchases under the WFE system. Whilst this system may have initially been targeted at traders who would reclaim the duty well before the point of export, in the case of the Appellant the beer was generally exported immediately the 48-hour holding period had expired. We rather imagine that as beer was said to have only a 12-month shelflife, and sometimes only 9 months of shelf life remaining at the point of purchase, the WFE system was probably not targeted principally at beer exports.

25. The critical requirement of both systems for reclaiming duty was that the duty should have been paid in the first place (in fact within a three-year period) and should not already have been refunded. As a legal matter it was clear that the burden of proof in demonstrating that duty had initially been paid fell on the claimant. There were at least two reported cases from the late 1990's dealing with cases where claimants sought judicial review remedies when HM Customs & Excise had refused

to give refunds, in the belief that there had been a fraud by virtue of which the duty being reclaimed had not in fact been accounted for in the first place. Neither of these actions had been successful for the claimants.

26. It seems, however, reasonable to suppose that by about 2003 to 2004, little fraud was suspected. This led to 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. At the point when HMRC presumably suspected little fraud in the industry, this was a convenient way of operating, certainly for claimants, in that the alternative (of tracing back possibly through a chain of suppliers to the trader that initially paid, or supposedly paid, the duty) would have often been difficult or impossible. HMRC themselves referred to this approach to the practical and less onerous requirements that they expected traders to satisfy, and that they indicated to traders would be sufficient when reclaiming duty, as "the relaxed approach".

27. There thus emerged a striking similarity between HMRC's approach to this topic, and HMRC's approach, and plainly correct approach, to vetting claims for VAT input tax in suspected MTIC or Missing Trader cases.

28. In fact of course, the technical position as between the requirements for recovering duty and claiming input deductions for VAT purposes on exporting product were completely different. In the case of the duty, the burden was entirely placed on the claimant, and ignoring HMRC's relaxed approach, the requirement would plainly have been for the claimant to do whatever was necessary (raking back through a chain or suppliers, or perhaps finding it impossible to do that), and only recovering the duty if the claimant could show the payment of duty to HMRC's reasonable satisfaction. By contrast, in the case of VAT, the fundamental requirement of the structure of the tax (that businesses could claim credit for input tax invoiced to them) meant that such credit was only forfeited if the claimant "participated in the fraud", by virtue of the conclusion being reached that the claimant "knew or ought to have known that there could be no other reasonable explanation for its transaction than that it was connected to a fraudulent evasion of VAT". Notwithstanding those wide technical differences, when HMRC was operating the "relaxed" approach to duty refunds, the tests in fact operated, and recommended to claimants, were virtually identical to the tests that are in fact appropriate, and properly appropriate, in relation to input claims for VAT purposes.

29. Where procedures were discussed with HMRC whilst the relaxed approach to duty reclaims was in operation, it seems that the further indication that HMRC gave was that traders should be wary of buying beer at too cheap a price. The level of duty was such that if a trader failed to account for duty and then sold the beer (directly or perhaps through a chain of companies) as if it was duty-paid, either the fraudster or the intermediate traders could make large profits, or the company trying to reclaim the duty might have been offered beer at a suspiciously cheap price.

30. It seems that by mid-2006 HMRC had realised that duty fraud must have become more common and, as with MTIC fraud in relation to VAT, it appears that the companies initially said to have accounted for duty would have disappeared, and product would have been passed through a number of traders, so as to make it more difficult to trace the original supplier, and the question of whether duty had or had not been paid.

31. This concern on the part of HMRC led to the issue in June 2006 of a Consultative Document in relation to the reform of the excise duty drawback system. The first two paragraphs of this document read as follows:

> *"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* (our emphasis).
>
> *1.2 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."*

32. The document went on to suggest two possible ways of changing the system. It made no mention whatsoever of any immediate change to the so-called *"relaxed evidence requirements that currently apply to drawback claims in respect of goods warehoused for export"*. It canvassed instead just two possible changes. One was to abolish the WFE system altogether and provide that all claimants should seek to recover duty under the alternative Direct Export system. The other was to extend the period from 2 days to 20 working days, during which goods should be held in the non-duty-paid side of warehouses under the WFE system, following the issue of the Notices of Intended Export.

33. When the document referred to the required reasons for change, it again mentioned the increase in traders using the WFE system, and then exporting product very shortly after the expiry of the 2-day period. In this paragraph, there is no need to quote it again, but there was again a reference, in identical terms to those that we highlighted in paragraph 31 above, to the "relaxed evidence requirements that currently apply".

34. In mid-August 2006, Officer Fennell was about to sanction all the rebate claims made by the Appellant for July and the first two weeks of August, but at the last moment he was called to a meeting by his superiors and told to delay the claims and subject them to extended verification. As already mentioned, claims in the approximate amount of £1.25 million were in due course rejected.

35. We should mention a few additional facts about the Appellant's business.

36. Some of the traders in beer had no warehouse and usually sold on a matched purchase and sale basis. By contrast the Appellant had a sizeable warehouse. We were shown a picture of the warehouse, with the Appellant's liveried full-size Mercedes curtain-trailer truck outside it. We were also told that both before and

after the incident that occasioned this Appeal, the Appellant had always been up to date and correct in all its tax filings.

37. The Appellant was aware that there was fraud in relation to non-payment of duty, and one of the precautions that it always took was to purchase product (generally beer) from a highly reputable supplier. All the beer in respect of which the Appellant's drawback claims were refused was Belgian Stella Artois beer and a modest amount of Fosters beer, all purchased from the Makro "cash and carry" business. We were told that Makro is an extremely well regarded cash-and-carry operator. The German government is one of the company's shareholders. It has numerous "cash and carry" outlets in the UK, of which the warehouse from which the Appellant bought its beer and collected its beer in its own lorries, namely the one in Charlton, was the biggest in the country. We were told that the purchases from Makro commenced when Mr. Green saw the Stella Artois, relevant to the disputed claims, available on the shelves of Makro at a price that Mr. Green realised would offer the Appellant the decent profit that it was looking for. We were also told that the Appellant paid exactly that shelf price, and even received no discount for bulk purchases.

38. We were also told that purchases of Stella Artois from Makro back in February 2005 had been subjected to "extended verification", but that the Appellant derived further confidence in the relevant supply route, because the claims were all paid within a fairly short period. We were also told that the Appellant bought Grolsch, Kestrel Super, Tennants Super, Miller, and Carling Black Label from Makro and none of the claims in respect of those purchases were disputed. We were also told that the other suppliers that the Appellant used were Costco, Bookers and Wine Cellar, all of which we were told were very well-known reputable chains.

38. We will refer in due course to some of HMRC's evidence in relation to Makro's operation.

39. The only remaining points that we need to summarise at this stage relate to the Appellant's reaction to the refusal to refund the £1.25 million. In stark contrast to the common way in which mobile phone traders that are denied VAT repayments on exporting mobile phones and other MTIC-favourite products cease trading when challenged by HMRC, the Appellant did not shut up shop and cease business. It was plain to us that, whilst the denied refund placed a very great strain on the Appellant's business, and whilst it was markedly less profitable for the Appellant to revert for some period to purchasing only duty-suspended beer and exporting that, the Appellant did continue in business. We were told that Mr. Porter obtained borrowings on the security of his own house, and his parents' house (one of his parents suffering from Alzheimer's disease) and that Mr. Green negotiated further bank loans. We were told that, by virtue of having materially reduced profit in dealing in duty-suspended beer, whilst having largely unreduced overheads, it was a considerable struggle for the business to survive, but it just managed to do so. It was certainly still trading at the date of the hearing.

40. We will need to give some further facts that will be material to all issues other than the first, but it is more convenient now to deal with the law, and in particular our conclusion in relation to the first issue.

Our decision in relation to the first issue

41. The first issue was the question of whether the Appellant had satisfied the burden of proof in establishing that it had a strict right, pursuant to the statute and the Regulations, to the refund of duty claimed.

42. It was absolutely clear that the European Directive on which the domestic legislation was based required domestic duty to be refunded if duty-paid beer and other alcoholic products were exported, and that the refunds should be made only if, and then only to the extent that, the duty had been paid in the first place. It was equally clear that the Directive left it to Member States to provide the various rules for dealing with refunds of duty.

43. There is no need for us to summarise the UK domestic rules, because they were not in fact in contention. The statute, and the Regulations, and also Customs Notice 207 (which summarised the requirements) all consistently made it clear that duty was only to be refunded if duty had originally been paid, and the burden of proof in establishing this was plainly placed on the claimant. The claimant had to show, to the reasonable satisfaction of HMRC, that duty had originally been paid, and not refunded. The Regulations made it clear that whilst the best and preferred method of establishing that duty had been paid was to produce evidence from the trader that had actually paid the duty, other ways of demonstrating duty payment might be accepted. Everything simply revolved around the requirement that in one way or another the claimant had to demonstrate to the reasonable satisfaction of HMRC that duty had been paid. Naturally there were other requirements but they are currently irrelevant, and in any event the most fundamental was almost certainly the one in relation to original duty payment.

44. HMRC obviously concluded that duty had not been paid in this case In order presumably to make it clear that their denial of duty refund was not just based on speculation, or indeed on the simple assertion that it was not for them to prove anything and that it thus remained simply for the Appellant to demonstrate original duty payment to the satisfaction of either HMRC, or on appeal ourselves, HMRC undertook very considerable work to trace the origin of the beer that the Appellant had acquired from Makro.

45. During our hearing, no evidence was given by Mr. Green, secretary of the Appellant, because he was ill. Accordingly Mr. Green was neither examined nor cross-examined, albeit that Mr. Porter said that it was Mr. Green who had seen the exact type of Stella Artois that the Appellant acquired from Makro on Makro's shelves. As we have indicated, this assertion was neither confirmed nor undermined, nor was the further statement that the beer was bought at the same price as the shelf price at which the same beer was available to all other customers.

46. One of the senior HMRC officers, Mr. Andrew Stowe, made the following statements in his Witness Statement, about the investigation into the supplies made through Makro:

> *"Investigation of the Supply Chains: Makro*
>
> *36. My officers were responsible for investigating the suppliers from Checkprice backwards through the supply chain, but I was aware and kept informed of investigations undertaken in relation to Makro by members of the Stratford Excise team, led by Adrian Dobson (who is on long term sick leave from HMRC).*
> *37. Makro is a very large cash and carry, with outlets across the UK, and which sources goods nationally. For such large businesses, HMRC*

allocates a Client Relationship Manager ("CRM") who operates as the dedicated tax person for that company, working quite closely with the business and visiting on a regular basis. Sue Green was the CRM for Makro and she undertook checks on the goods in question along with Adrian Dobson.

38. *All the supplies in the Europlus supply chain had been made by the London Makro, which is situated in Charlton Kings. Initially, when Adrian asked where the goods came from that had been sold to Europlus, Makro's response was that they must have come from its various usual suppliers. However, when Adrian visited the premises, it emerged that the goods came from another Cash and Carry – Checkprice – rather than any of Makro's usual suppliers. Adrian reported this information to one of the Drawback Project team meetings when I was present. I have never visited the London Makro myself.*
39. *When Adrian visited the London Makro, it emerged that the company was buying some goods from Checkprice rather than its usual suppliers. The CRM was quite surprised by this as she was under the incorrect impression that they were sourced from a different supplier."*

47. Susan Green, the CRM just referred to, provided a Witness Statement in which she summarised the findings of one of her visits to Makro, and more particularly her e-mail questions to Makro's head office in Manchester. It emerged from these various contacts that once HMRC's enquiries had commenced, Makro's head office required the supplies from Checkprice to cease, and it was then said that the store manager of the Charlton branch was annoyed because terminating these supplies would mean that he would miss some of his sales targets. It also emerged that the supplies destined for the Appellant were dealt with somewhat differently than Makro's normal supplies in that they were allocated to a different place in the warehouse, and were not used to stock the normal shelves. We were told in Susan Green's evidence that Makro had indicated that the Belgian sourced Stella Artois was not stocked in the normal stores, though no-one sought to reconcile, and certainly no-one succeeded in reconciling, this statement with the statements attributed to Mr. Green of the Appellant to the effect that he had seen the exact Stella Artois that the Appellant was interested in buying on the Makro shelves.

48. What is absolutely clear is that the beer sourced by the Appellant from Makro had in fact been acquired by Makro from Checkprice, an entity that HMRC treated as a somewhat high-risk trader so far as HMRC's interests were concerned, and thereafter HMRC sought to trace the supplies back from Checkprice.

49. There was then a great deal of evidence about tracing by HMRC, and assertions on the part of the Appellant that HMRC had failed to establish their case because in some instances there was said to be some doubt as to whether HMRC's tracing was reliable. One of Checkprice's sub-contracted warehouses was said to keep chaotic records, such that it was impossible to say where some of Checkprice's supplies had come from. There was also a suggestion that some consignments of beer might have been attributed simultaneously both to the Appellant and to Huntingwood Trading Limited ("Huntingwood"), to which we will need to refer at some length in due course. It was also claimed that when some identified stocks of beer in the hands of earlier suppliers had relatively short remaining shelf lives that it was clear that these stocks could not have been correctly traced to the Appellant, because the Appellant's drivers all had instructions never to collect beer with shorter shelf lives than nine months.

50. All of this evidence, and these disputes about the reliability of the evidence were, however, almost entirely irrelevant, this being a conclusion amply demonstrated by two arguments advanced on behalf of the Appellant. It was contended on behalf of the Appellant that because supply chains had broken down, and because at least in some cases HMRC had allegedly failed to trace supplies to defaulters that had in fact never paid the duty in the first place, HMRC's case failed. Secondly it was asserted that if HMRC, with all their resources, and ability to trace supplies, could not trace the origin of the beer and establish whether or not duty had been paid (at least in some cases), how much less likely was it that the Appellant would be able to trace the original source of the beer, and establish whether duty had been paid or not?

51. These two assertions might have undermined HMRC's case if that case had, for some odd reason, actually been advanced on the basis that HMRC would only sustain their denial of the refund of duty if they positively established that the duty had not been paid. Once, however, it became absolutely clear that HMRC were not basing their case on any such extraordinary reversal of the normal, and the correct, respect in which the burden of proof was placed on the claimant to demonstrate that the reclaimed duty had in fact been paid in the first place, the Appellant's case that it was entitled to the duty refunds in accordance with the strict application of the law and the Regulations immediately collapsed. Not only did the overall case on these points collapse, but we were unable to conclude in relation to any particular supplies (including those where the Appellant had advanced arguments to occasion doubt in relation to HMRC's tracing exercise) that the Appellant 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. The Appellant's case, thus, on the first point (the point on which we most obviously had jurisdiction) is not made out.

The respective contentions in relation to the second issue

53. The second issue was the claim by the Appellant that following Sales J's remarks in *Oxfam* we had jurisdiction to hear a judicial review claim geared to legitimate expectations, and that the Appellant's legitimate expectations in this case had been breached. This was because various representations, and conduct, on the part of HMRC led the Appellant to be confident that duty would be refunded if it produced an invoice indicating that duty had been paid, and had verified the credibility of the supplier and shown that the purchase price was in the right range. This had been the case for at least 18 months, during which numerous earlier claims had been satisfactorily verified and granted. It was thus unacceptable for the rules to be changed, with no notice, and for the Appellant, having bought beer from an eminently respectable supplier (all its other suppliers being similarly very well established) to be denied a £1.25 million refund, which would come close to putting the Appellant out of business.

54. The Respondents' first contention was that we had no jurisdiction to hear the judicial review complaint, and that, not least because there was a pending action in the High Court to deal with this issue, we should decline jurisdiction. It was then contended that, in contrast to the situation in *The Queen on the application of Huntingwood Tradng Limited v. HMRC* [2009] EWHC 209 (Admin) *("Huntingwood")* where Stadlen J. had rejected the claim for relief, that the present

Appellant had received far less of an unequivocal representation in relation to the relaxed method of making and vetting drawback claims than Huntingwood, such that the present Appellant's claim was weaker than the one that had already been rejected by a High Court judge on otherwise very similar facts. It was also contended that there was nothing retrospective in the way in which HMRC withdrew the relaxed practice of vetting drawback claims since they only then applied the tests that had always been clearly set out in Notice 207, all based on the undisputed legal tests which had not been changed. Furthermore the issue of the June 2006 Consultative Document put the Appellant on notice that the relaxed practice was under review, and was effectively thus withdrawn.

55. In response the Appellant contended that Stadlen J. had only decided the *Huntingwood* case as he had done because a later letter from HMRC gave Huntingwood notice of the withdrawal of the relaxed practice prior to Huntingwood's disputed claims being made. It was suggested that, but for this later letter, the outcome of the case would have been different. Accordingly, since the present Appellant had received no such indication that the relaxed practice was to be withdrawn, and the present Appellant was relying on the same relaxed practice that had been so confirmed by the evidence in the *Huntingwood,* relief should be granted in the present case.

Our observations in relation to the second issue

56. We have decided not to deal with the domestic law judicial review claim. The position in relation to this is rather unsatisfactory because, whilst we concede that during the hearing in early May we indicated that we thought that it was rather doubtful that we had jurisdiction to hear this matter (for the reasons that we mentioned at paragraph 9 above), we had heard little argument by either party in relation to the issue of jurisdiction at that stage. We had supposed that one of the main topics to be addressed when the hearing re-convened at the end of May would have been the issue of whether we indeed had jurisdiction. As we indicated at paragraph 10 above, it became clear that the Appellant wished to raise a European argument when the hearing shortly re-convened at the end of May, and when the hearing then re-commenced in July, it became clear that the Appellant had chosen not to pursue the point about jurisdiction in relation to judicial review, but advanced instead two arguments based on European principles and one on the Human Rights Act.

57. Whilst we were later told that the Appellant had not formally abandoned the judicial review point, and the contention that we indeed had jurisdiction, since there was no argument in relation to it; since there is anyway a pending action before the High Court on precisely this issue, and since it was our expectation that the First-tier Tribunal was not intended to hear judicial review matters, we will base no part of our eventual decision on this matter.

58. We will, however, add some observations in relation to it, in part in case this might be of any assistance if the point is pursued before the High Court, and in part because some of the evidence in the *Huntingwood* case is of some relevance to the issues that we will deal with as the third, fourth and fifth issues.

59. It seems to us that there were two grounds on which Stadlen J. refused to grant relief to the claimant in the *Huntingwood* case. First, discussions, followed up by a letter in April 2006 fairly clearly put Huntingwood on notice that it could no longer rely on earlier indications that a supplier's invoice indicating "duty-paid", plus due diligence, would be sufficient to entitle Huntingwood to duty refunds. We say

"fairly clearly", because the letter at least slightly indicated that the new approach might only apply to subsequent action by HMRC to claim back duty when duty had initially been refunded. Common sense prevailed, however, and the letter was read to apply to the initial consideration of rebate claims as well as, and not just to, later actions to recover duty that HMRC considered had been wrongly refunded to Huntingwood.

60. Stadlen J. also suggested that, even if the earlier representations by HMRC had not been reversed by the April meeting and the follow-up letter, he might have still concluded that the earlier advice and representations had not been absolutely unequivocal, such that he might in any event have denied Huntingwood a remedy. The respect in which the earlier advice had been slightly ambiguous was rather akin to the way in which Notice 206 was amended in 2004. We will refer to this below, but the common defect of HMRC guidance was to say simultaneously that it was sufficient for a drawback claimant to produce the appropriate supplier's invoice, and demonstrate due diligence, only then to turn round and say that it was for the claimant to demonstrate original payment of duty. It seems slightly curious that HMRC is able to support the feature that its representations were perhaps not quite unequivocal by pointing to manifestly confused statements.

61. Whilst it is true, as the Appellant pointed out, that the present case is quite different from the *Huntingwood* case because no earlier advice was countermanded and written advice did not contain the same ambiguities, the other very marked difference is that there was far less evidence of clear statements by HMRC that the Appellant could rely on the so-called relaxed approach. To illustrate the comparison, we will quote some extracts from an exchange between Huntingwood and HMRC, and then indicate the much vaguer basis on which the Appellant had to advance its claim.

62. One of many exchanges between HMRC and Huntingwood was illustrated by the following 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 MAK* (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 HM C & E or Drawback Processing to provide additional evidence of duty payment, and if so what evidence will be required?*
>
> *Answer 1. C & E /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 Huntngwood had been offered a case price of £7.00 – C & E 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 C & E 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. C & E 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."

63. We have quoted the above fairly typical passage to illustrate the reasonably unequivocal statements that HMRC officers were giving when drawback was granted in accordance with the relaxed approach. Some of the representations made to Huntingwood contained the type of muddled approach by HMRC that we referred to in the second half of paragraph 60 above. In this context it is noteworthy that this particular extract that we have just quoted, and there were other similar representations, appeared to indicate that, provided Huntingwood had satisfied the "relaxed requirements", then even if it later emerged that duty had not been paid, there would be no recourse against Huntingwood. By way of contrast, however, not only was there nothing recorded in writing by the present Appellant, but even when Mr. Porter recorded the discussion when he and Mr Green were taken through the drawback procedures by the officer, Theresa Jolly, when the Appellant began to deal in duty-paid product in 2004, no statement by Theresa Jolly appeared to have been anything like so clear as those just quoted.

64. 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.

65. One point that we feel that we should add in relation to the merits of the judicial review contention relates to the suggestion on behalf of HMRC that the issue of the Consultative Document in June 2006 put the Appellant on notice of the effective revocation of the relaxed approach. A related contention was that there was in any event nothing retrospective in the feature of subjecting the Appellant's August claim to extended verification, and to an insistence that the Appellant demonstrate the original payment of duty by tracing back along the supply chain to the original payment of duty, because such an approach was merely in conformity with the undisputed view of the then existing, and unchanged, law.

66. We certainly reject both those contentions.

67. The June 2006 Consultative Document could have been worded in a way, that we will volunteer in due course, that would have eliminated all legitimate complaints by duty rebate claimants, and that would have undermined all the Appellant's arguments in this case. In fact, however, it was definitely not so worded. Not only did it not terminate the "relaxed evidence requirements", but it actually specifically said that they "currently applied to drawback claims on the WFE basis". It did not refer to them in the past tense or give any indication that they were to cease to apply. It referred to them as being currently applicable, and it then canvassed views from traders about two possible changes that might reduce the risk of fraudulent claims. One was to extend the 48-hour period during which product had to remain in the duty-free side of warehouses, after Notification had been given of a proposed export on the WFE basis, to 20 working days, and the other was to repeal the whole WFE procedure. No suggestion was made that any other feature of the "relaxed evidence requirements" would be changed, or that in future claimants would be put to proof, by tracing back through supply chains, that some entity had originally paid the duty. It is therefore even fair to conclude that, far from putting traders on notice that the current procedures, or the procedures of the recent past, were to be terminated, the Consultative Document actually gave the most general official confirmation of "the relaxed evidence requirements", and indicated that until the consultation exercise had been completed, changes would not be made. And the only changes canvassed were two that did not impact on the critical issue of what evidence was required to demonstrate original duty payment.

68. We also reject the suggestion that there was nothing retrospective in the requirement that the Appellant demonstrate the original duty payment by tracing back through the supply chain, on the contention that this was anyway the legal requirement. We entirely accept that it was the legal requirement. 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 when it is remembered that:

- the withdrawal of the relaxed requirements **after** a claimant had purchased beer or other product would have very likely rendered it impossible for the claimant to obtain the newly-required further evidence even indeed if duty had originally been paid;
- the claimants were manifestly denied their original expectations; and
- the financial consequence of the denial of the refunds was (as least on the facts as we understand them in relation to this present Appeal) likely to disadvantage, or possibly bankrupt the entity that appeared to have derived little or no benefit from the original fraud.

69. We are not saying that these considerations would have led us to decide a judicial review case in favour of the Appellant. We would have had to weigh up the issue of whether the Appellant had received sufficient unequivocal representations, or whether it could have relied on the established practice as to how all its claims had

been dealt with, before reaching any overall conclusion. The only reason we are dealing with the June Consultative Document is that we consider that the Respondents' argument that it put the present Appellant on notice of the termination of the relaxed approach was simply untenable. It was not this Appellant's equivalent of Huntingwood's April meeting and HMRC's follow-up letter.

The third, fourth and fifth issues

70. We will initially comment generally on our attitude to the three remaining issues.

71. The Appellant's contention in relation to the third issue was that the drawback regime constituted a restriction on export trade, and so was objectionable under Article 35 of the Treaty for the Functioning of the European Union ("TFEU"). The contention was advanced on the dual basis that either the whole regime was in contravention of the free export of goods, or that the particular way in which the relaxed approach was withdrawn was in contravention of Article 35.

72. For various reasons that we will summarise below, we find it extremely difficult to accept that the drawback regime itself, or indeed anything in the EU Directive in relation to drawback, the UK statute or Regulations or indeed in Notice 207, contravened the principle of the free movement of goods.

73. Insofar as the argument in relation to Article 35 was advanced on the more limited ground that it was simply the way in which the relaxed evidential procedures were withdrawn that was offensive, we find it far more appropriate to deal with this argument in the context of the fourth issue. In other words, there is a European principle that where national legislation enacts the principles enshrined in European Directives, domestic legislation must achieve that objective in a way that is certain; in a way that confines any retrospective application to extraordinary situations that manifestly justify such an approach, and in a way that is proportionate. In other words detriment inflicted on citizens must be proportionate to the objective sought to be achieved by the enactment.

74. It is accepted that the European principle just mentioned does not extend to challenging administrative acts of officers of HMRC and other public bodies, but it is contended by the Appellant, we consider with justification, that where HMRC adopts administrative policies at a high level that have an overall effect on how Community principles are adopted and administered (in contrast just to isolated acts of administration), HMRC remains subject to the principles mentioned in paragraph 73. We think that that is correct, and we consider that, insofar as the Appellant wishes to challenge the way in which the relaxed evidential requirements were withdrawn, it should be done in accordance with what we have termed the fourth, rather than the third, issue in this Appeal. That is the more straightforward approach.

75. The Respondents have pointed out very properly that if we have jurisdiction to rule on the point raised in paragraphs 73 and in particular 74, the Respondents still contend strongly that all of the actions of HMRC were justified in terms of stopping widespread avoidance, and that the Appellant had either adequate notice of the change of policy, or the best notice that was compatible with stopping the avoidance. For clarity, we should say immediately that we consider that HMRC made a major mistake in the way it dealt with changes to the drawback regime between July 2006 and March 2007. A course was open to HMRC to stamp out avoidance without inflicting unnecessary and quite unfair detriment on companies which so far as this Appeal is concerned may very well have been entirely *bona fide*. As we will suggest

in paragraph 90 below, an approach was open to HMRC that would have had a more immediate effect on stemming the fraudulent avoidance and that would have precluded any legitimate complaint that any trader could have made in relation to the action taken.

76. We rather suppose that HMRC is actually aware of the summary that we have just given, though we will revert to this in more detail below. We make this remark because, whilst from about mid-2006 onwards some duty rebate claimants were denied rebate payments if they were unable to provide evidence that had been thought unnecessary when the product was bought, and the claims made, when the rules were eventually formally changed in March 2007, there was a pre-announcement of the change, and the change was not due to take effect until 1 April 2007.

77. We comment shortly now on the fifth issue, namely the claim that HMRC breached the Appellant's human rights by the way in which it withdrew the relaxed evidential requirements. The argument runs that that action was an infringement of the Appellant's property right, and that a legitimate expectation that a person would have a right ranks as a property right for this purpose. Where a public body acts to contravene a person's property rights, a balance must obviously be struck as to whether the act is justified as being in the public interest. In this regard, we repeat the point in paragraph 75 above. There was an entirely fair way in which HMRC could have acted in June 2006 when it made its announcement of the Consultative Document into the drawback regime, and had that approach been followed, no company could have complained. As it was, the route in fact adopted inflicted highly material harm on this Appellant, and when similar policy objectives could have been secured in a way that would have avoided this offensive result, we consider that HMRC's conduct cannot be justified on public interest grounds.

78. The further attribute of the contention, advanced as the fifth contention, by the Appellant is that it is clear that this Tribunal does have jurisdiction to deal with whether HMRC's actions breached the Appellant's human rights.

79. We could deal with the remainder of this decision in one of two ways. We could either expand on what we understand the requirements to be in relation to each of the third, fourth and fifth issues first, and then explain why we consider that HMRC's action was in some way unacceptable. Alternatively, and we consider that this will be clearer, we could, and thus will, deal first with why we consider that HMRC's approach in this case has been challengeable. We will then obviously deal with the consequences of that, and why we consider that there has been no breach of the Article 35 point, but nevertheless breaches of the fourth and fifth principles.

Our summary of the various changes to the drawback regime during the relevant period, and the actions on the part of HMRC

80. It is not particularly material for us to identify when the so called "relaxed evidential requirements" were adopted as policy by HMRC, but it does seem that that approach must have been adopted as far back as 2004.

81. The reason we say this is that a rather curious change was made in 2004 to the terms of Notice 206. Notice 207 was the more fundamental Notice that identified all the requirements in relation to drawback, whereas Notice 206 was the Notice that told traders what documents they required, and what documents they needed to retain in order to substantiate their claims.

82. Prior to August 2004, one of the paragraphs of Notice 206, dealing with the documents that traders should retain, had stated that:

> *"If 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."*

The above text was amended on 1 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".*

83. The earlier part of the inserted passages clearly reflects the relaxed evidential approach in that it refers specifically, and only, to the supplier's invoice. If in 2004 HMRC was going to require traders claiming drawback to trace back through a supply chain and to demonstrate original payment of duty by the entity that actually paid the duty, the opening words of the inserted section just quoted would have omitted all the documents that would have been required and would have been most misleading. The last sentence of the inserted section does however reveal the confusion on the part of HMRC, because it still refers to the potential forfeiture of goods where it emerges that duty had not been paid, which is clearly in conflict with the suggestion that duty would be refunded simply by providing the immediate supplier's invoice, coupled with due diligence.

84. The evidence in the *Huntingwood* case is then of very great significance because this reveals firstly the way in which Huntingwood was quite clearly being told that suppliers' invoices, plus due diligence, plus a realistic (and not over-low) purchase price was all that the claimant had to demonstrate. The advice given to Huntingwood went even further and specifically confirmed that if these elements were demonstrated, but it nevertheless transpired that the duty had not originally been paid, then this would neither affect Huntingwood's claim, nor occasion any recapture of repaid duty if the revelation that duty had not been paid in the first place only emerged after the rebate claim had initially been met.

85. We obviously heard none of the evidence in the *Huntingwood* case ourselves, but we do think it worth observing that the repeated reassurance that Huntingwood sought, and the confirmations that it was then given, suggest that it was worried about the existence of fraud in the supply chains. Accordingly, Huntingwood sought its protection by putting these very clear questions to HMRC. By contrast, while Mr. Porter admitted quite frankly that he, and the present Appellant, were also aware of the existence of duty fraud, they relied for their protection on only ever sourcing their beer from highly reliable "cash and carry" operators, and at prices at which the same product was said to be on offer to any customers. It is difficult to weigh up one form of protection against the other, but if anything we consider that Mr. Porter's approach (of only buying from supposedly impeccable sources) was perhaps the better approach, because at least it was aimed more obviously at avoiding the risk of

fraud than of just precluding HMRC from challenging a claim if there did happen to be fraud in the chain.

86. 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 the Appellant'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 the Appellant's claims immediately after he had just made a satisfactory assurance visit to the Appellant, 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 the Appellant'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".

87. The most obvious evidence of the existence of the relaxed evidential requirements that prevailed until about mid-2006 was the acceptance in the wording that we have already quoted and highlighted in the June 2006 Consultative Document which referred specifically to ***"the relaxed evidence requirements that currently apply to drawback claims in respect of goods warehoused for export".*** That reference, coupled with the fact that the Consultative Document gave no indication that those requirements were about to be changed in some way, and coupled with the fact that the only changes canvassed in the Document were in two different areas, gives the clearest indication or acceptance on the part of HMRC that the policy up to mid-2006 was to demand just the limited evidence that has now been mentioned many times.

88. There is little relevance to whether the 2004 to 2006 policy was a reasonable one or a sensible one, but it is fair to comment that it reflected two quite realistic concessions on the part of HMRC. One was that it would indeed be very difficult and impractical for traders to provide evidence at earlier points in a supply chain, of which they would probably have no knowledge. The other was that, whilst the technical structure of the duty rebate machinery was quite different from the rules relevant to input VAT claims in MTIC cases (see paragraph 28 above), there was something excessively onerous in the duty rebate scheme denying a claim to a trader who was entirely honest, and who had not derived any financial benefit from the earlier failure by some trader, that had disappeared, to account for duty. We are not questioning for a moment that the duty rebate scheme does operate in this slightly draconian manner. We are simply acknowledging why it is understandable that HMRC at one point operated the regime in a very similar way to the VAT regime, where the critical question is whether the entity exporting and reclaiming input VAT was "a participant in the fraud".

89. Our interim conclusion, thus, is that between 2004 and mid-2006, the policy on the part of HMRC was 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". The *Huntingwood* evidence seems to confirm that this would remain the case even if it transpired that duty had not originally been paid, and there was every indication that that position applied generally.

90. It seems to us that the right, and only right, course for HMRC to have adopted in mid-2006 was to insert wording along the following lines in the Consultative Document that was issued:

> *"The strict legal requirement, incumbent on those reclaiming excise duty on exporting beer and other alcoholic products, is to demonstrate that duty had originally been accounted for to HMRC, and not previously reclaimed. The burden of proof in relation to demonstrating this is clearly placed on the party claiming a refund of duty. We accept that this may often be difficult for a claimant to demonstrate, particularly where alcoholic product has been transferred on several occasions following the claimed, or assumed, payment of duty.*
>
> *For some time, HMRC has acknowledged these practical difficulties for exporters, and HMRC has thus been applying some "relaxed evidential requirements" for exporters to satisfy before conceding duty rebate claims. In short, claims have been conceded provided the claimants could produce a supply invoice from its immediate supplier indicating that the product was "Duty paid", provided that the claimant had satisfied itself of the integrity of its supplier and had purchased the product at a price that was consistent with duty having been paid.*
>
> *Recent investigations by HMRC have revealed that many duty rebate claims are now being conceded when there is every indication that duty was not originally paid to HMRC at all. This is often because the party originally liable to account for the duty will have been a fraudulent defaulter, that has disappeared, and the fraud may have been concealed from later buyers by virtue of the product having passed through several intermediate parties.*
>
> *In view of the widespread nature of this fraud, and the clear requirement under both the relevant European Directive and domestic UK legislation and regulation that the burden of proving original duty payment falls on the party reclaiming duty, HMRC has decided that from [1 August] the relaxed evidential requirements will no longer be applied to claims for duty repayment. The best evidence, but not the only possible evidence, of duty payment is evidence from the party that actually paid the duty. Claimants may be able to rely on other evidence, for instance evidence that their supplier purchased directly from the brewery, or from the brewery via a short chain of intermediate companies where each in turn will be able to satisfy HMRC of the integrity of its supplier. Companies may be able to take warranties from their supplier, when prepared to rely on the credit standing of the supplier, to the effect that duty has been paid where it is represented that it has been paid.*
>
> *The further purpose of this Consultative Document is to engage with participants in the trade in order to identify arrangements that will be practical and convenient for traders, and that will eliminate the risk to HMRC of duty frauds, and of having to repay duty that has not been paid in the first place. With this objective in mind, we invite representations in relation to*
>
> …….
>
> …….
>
> *Unless and until the consultative process identifies arrangements that will achieve the dual benefits of convenience to traders and security to HMRC, all*

traders must note that from [1 August] onwards, they will face the task of demonstrating original payment of duty in whatever way that they consider will achieve this to the reasonable satisfaction of HMRC. Traders who buy alcoholic product in the expectation that they will recover duty and who are not confident that they can produce the required evidence to establish original duty payment must realise that for claims made after [1 August], their claims are likely to be subjected to extensive verification and may well be rejected."

91. We will now compare the effect that a statement along roughly the lines of the above would have had in terms of stopping the avoidance with the effect of the route actually chosen. We will also speculate as to whether HMRC would have perceived any objection to the clear type of warning to traders that we have suggested should have been issued.

92. The Respondents have made the point that one of their justifications for withdrawing the relaxed evidential requirement procedure, effectively without notice, was that this was required in order to stem the flow of fraudulent evasion as quickly as possible. It seems to us that the text that we have suggested in paragraph 90 above would in fact have achieved that legitimate and entirely desirable result more swiftly than the route actually chosen by HMRC.

93. Ignoring the detail of the date of 1 August that we inserted in our suggested text, it appears to us that the effect of the announcement that we suggested would have been to render it impossible, or at least very much more difficult, for fraudsters to sell product at anywhere near duty-paid prices, if they had not in fact accounted for duty. After all, if potential claimants of duty refunds would have realised that they would not receive such payments if they could not establish the fact of original duty payment they would be exceptionally unlikely to pay a duty-paid price for alcoholic product. Therefore fraudsters would no longer have been able to sell at the enhanced price at which they must have been selling when everyone expected the exporter to be able to recover the duty on the relaxed evidential procedures.

94. The only respect in which the approach actually adopted by HMRC might have benefited the exchequer more rapidly than the one that we suggested is that, whilst it might have allowed fraudsters to go on evading duty and receiving higher prices from intermediate traders for some period, at least the lost duty would not be repaid to the claimants who were actually challenged. Where however the claimants might very well have been entirely honest; they might well have bought at realistic duty-paid prices, and they would have been relying on the continuance of a policy that they had been led to expect, it seems to us that the effect of HMRC's actual approach was not to stem the fraud at origin, but to inflict unfair detriment on potentially honest and innocent traders. Counsel for HMRC accepted that it had been no part of his case in this Appeal that the Appellant had been anything but an honest trader. We entirely understand that the strict legal position is that the exporting trader should not have recovered duty if none had originally been paid, but where the exporting trader paid a full price for what it took to be duty-paid product and relied on a practice promoted by HMRC and found that without notice it had been withdrawn, we reach the following conclusion. That is that, insofar as HMRC's approach to the problem in mid-2006 achieved results more swiftly than the one that we have suggested, this would only be because it unfairly recovered the lost duty from the wrong party, whilst allowing the original frauds to continue. This was an unacceptable result.

95. HMRC has not been called upon to comment on the type of announcement that we have suggested should have been issued, and they have certainly not been able to criticise any aspect of our suggestion. We do appreciate, however, that one of the

objectives of the wording of the actual June Consultative Document was to "tread softly", and to emphasise to traders that any changes would be designed to cause traders the minimum of inconvenience, and interruption to legitimate trading. In this context we have given thought to the possible concern that the suggested wording that we advanced might have had a rather more abrupt effect on the level of trade, and HMRC might have feared that it would amount to an over-reaction. Our answer to this is that it would still have been infinitely preferable to announce in advance the revised evidential requirements that we have mentioned than to do what HMRC did, which was to re-impose just such requirements but without notification.

96. In the event, what happened is that an edition of Excise News was issued on 21 March 2007, indicating the changes that would be introduced in relation to evidential requirements for making duty rebate claims. This document contained the following paragraphs:

> *"The presence of missing traders in supply chains prevents HMRC from tracing the supply of the goods past these missing traders and therefore from establishing whether the goods are eligible goods on which duty has been paid. As a result, a number of drawback claimants have been unable to show to the satisfaction of the Commissioners that the goods are eligible goods and claims for drawback have been rejected.*
>
> *At Budget 2007, the Government published a summary of responses to the 2006 consultation "Reform of the Excise Duty Drawback System"* (i.e. the June 2006 document) *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)."*

97. The rules that were then announced were very much along the lines that had in fact prevailed for companies like the Appellant from July 2006, rather than merely prospectively from 1 April. Where duty reclaims were to be made from April onwards by companies that had not been the original payers of the duty, claimants had to provide their purchase invoice, the name and VAT registration number of the business that had paid the duty, the duty payment date and amount, the reference number of the relevant duty payment document, and the name, address and VAT registration number of any intermediate traders who had taken ownership of the goods between duty payment and the claimant.

98. These rules were therefore substantially the same as the requirements imposed on the present Appellant, following the refusal of the duty reclaim made in August 2006. It is noteworthy that HMRC thought it appropriate to make a formal announcement that these rules would be brought into operation, and particularly significant that they thought it right to defer the so-called introduction of the new rules until 1 April 2007.

99. Our conclusions in relation to the evidential requirements prevailing over the period 2004 to 2007 are therefore 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 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.

The third issue, namely the restraint on the movement, or export, of goods

100. We will deal with this issue very shortly. If we initially ignore the unacceptable way in which the relaxed evidential requirements were withdrawn, we cannot detect anything in relation to duty drawback that is in conflict with the European principle of the free movement of goods.

101. The machinery for drawback is all based on a European Directive, and we can see no legislative or regulatory aspect of the way in which the drawback scheme has been introduced into UK law that conflicts with the fundamental principle relating to the free movement of goods. Indeed of course the requirement that domestic UK duty in respect of alcoholic product should be refunded if such product is exported is entirely consistent with fostering the free movement of goods. It is then a fundamental requirement of the European directive that duty should only be refunded where it has been accounted for in the first place. That rule is obviously coherent, and anything else would provide improper state subsidies to exports.

102. There also appears to us to be no discrimination against export sales if a company is improperly holding non-duty-paid alcoholic product. Without considering the full detail, it appears that such product should always be held in a bonded warehouse, and should not be in free circulation in the domestic market. If it is then whoever holds it is at risk that the product will be seized and destroyed, and if they export it the strict position is that they should not recover duty. It therefore seems that the consequence of improperly holding non-duty-paid product is not that it is easier to dispose of it in the domestic market than to export it.

103. Article 36 in any event qualifies the ban on restrictions on free movement of goods where restrictions are justified on public policy grounds. Once again, ignoring the specific complaint about the way in which HMRC withdrew the relaxed evidential requirements, we consider that all aspects of the legislative framework in relation to the drawback of duty are entirely justified on public policy grounds.

104. As we indicated in paragraph 73 above, we accept that the Appellant advanced its "free movement of goods" contention on the alternative basis that all that was improper was the particular way in which the relaxed evidential requirements were reversed by HMRC, but we consider it more straightforward to deal with this issue in relation just to the fourth and fifth issues.

The fourth issue, namely the requirement that Member States should promote legislation to bring Community Directives into effect in a manner that is clear, not retrospective and proportionate

105. There were competing contentions between the Appellant and the Respondents 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.

107. We adopt the Appellant's contentions in relation to the nature, extent and terms of the European principle in relation to the protection of legitimate expectations and legal certainty. According to the ECJ in *Stichting 'Goed Wonen' v. Staatssecretaris van Financiën* [2006] STC 833:

> *"The principles of the protection of legitimate expectations and legal certainty form part of the Community legal order. They must accordingly be observed by the Community institutions (Comptoir National Technique Agricole SA (CNTA) v. EC Commission (Case 74/74 [1975] ECR 533) but also by the Member States when they exercise the powers conferred on them by Community directives (the Gemeente case [2004] ECR I-5337).*
>
> *Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."*

108. We accept that the reference to "the Member States exercising powers conferred on them by Community directives" does not apply to individual acts of administration and claimed mal-administration. We consider, however, that the

Appellant is right and that it does apply to decisions by the government in relation to the policy to be followed in applying Community measures such as the drawback regime. Whilst we entirely accept that the Community Directive required duty only to be refunded where it had been paid in the first place, the Directive did delegate to Member States the choice as to how to monitor the whole system regarding drawback of duty. When, in or before 2004, or whenever the relaxed evidential requirements were introduced and when, in July 2006, that practice was withdrawn, and when full notice of their so-called prospective withdrawal was given on 21 March 2007, HMRC was effecting high level policy choices as to how drawback was to be monitored and policed. As the Appellant drew to our attention, the ECJ stated in *Mulligan v. Minister of Agriculture* [2002] ECR 1-5719 that:

> *"where a Community regulation allows the Member States a choice between various methods of implementation, they must exercise their discretion in accordance with the general principles of Community law, including the principle of legal certainty.*
>
> *According to the case law on this principle, the Member States must implement their obligations under Community law with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements flowing from that principle. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under Community law, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights in an area governed by Community law."*

109. It should be clear from our observations and conclusions in paragraphs 80 to 99 above that we conclude that:

- prior to mid-2006, a firm and official policy had prevailed, whereunder drawback claims were vetted under a relaxed procedure;
- as regards various companies, and certainly the Appellant, that policy was changed from some point in mid-2006;
- affected claimants were not notified of this policy change in advance;
- the terms of the Consultative Document issued in June 2006 constituted no form of notice, let alone clear notice, of the change;
- no fundamental policy objective was achieved by the very feature of effecting the change without proper notice;
- had notice in the form that we suggested in paragraph 90 above been issued in June 2006, such notice would have had a swifter effect in stemming fraudulent evasion than the unannounced changes in fact introduced;
- the only exchequer effect of denying duty refunds to the present Appellant, which refunds would have been granted under the pre-July 2006 regime, as confirmed by Officer Fennell, was to recover the lost tax from an honest trader, frustrating that trader's legitimate expectations, and nearly driving the present Appellant into insolvent liquidation. It was not legitimate action that justified introducing the changed policy without any notice.
- Finally, it is noteworthy that when the policy was formally changed, by the edition of Excise News issued on 21 March 2007, with an operative date of 1 April 2007, this change purportedly introduced at that point evidential requirements broadly equivalent to those imposed on the present Appellant without prior notice in August 2006.

110. Our decision in relation to the fourth issue is that the denial of duty refunds to the present Appellant 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 the Appellant. 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 the Appellant 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.

The fifth issue

111. The Appellant's final claim was that the denial of its anticipated recovery of excise duty breached its human rights.

112. The contention based on the Human Rights Act 1998 is that the First-tier Tribunal has jurisdiction to grant various remedies where a public authority acts in a way which is incompatible with a Convention right. This proposition is based on sections 6(1) and 8 of the Act. The Convention right of which there is alleged to have been a breach is the right to peaceful enjoyment of possessions, granted by Article 1 of the First Protocol to the Convention. The phrasing of this right raises the issue of whether in this case the Appellant, having, arguably, a legitimate expectation of obtaining a duty refund, is to be treated as having "a possession". If that condition is met, the next point is that the right is qualified by the fact that interference with "peaceful enjoyment" can be justified "in the public interest", and that the right is said not to "impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes". Reverting then to section 6 of the Act itself, the final point is that the provision (section 6(1)) that makes it unlawful for a public authority to act in a way that is incompatible with a Convention right does not apply if the authority could not have acted differently on account of some provision of primary legislation, or "*in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*"

113. The first question therefore is whether, because the Appellant had no strict legal entitlement to a refund of duty, the Appellant can be said to have had "a possession".

114. We accept the conclusion of the European Court of Human Rights in *Stretch v. UK* (2004) 38 EHRR 12, to the effect that *""Possessions" can be existing possessions or assets, including claims in respect of which the applicant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right"*. We decide that the Appellant did have a legitimate expectation of obtaining a duty refund, and that therefore the Appellant had "a possession". The reasons why we conclude that the Appellant had a legitimate expectation of receiving the duty refund, when, in paragraph 69 above, we merely referred to the factors that we would have had to weigh up had we considered that we had jurisdiction to hear the domestic judicial review claim, are as follows:

- The Appellant certainly believed that the evidential requirements that it was meeting met HMRC's requirements;
- That conclusion was confirmed by countless earlier and identical claims having been granted, even when subjected to extended verification;
- The Appellant's expectation that it would recover the reclaimed duty was plainly shared, until the major change of policy, by Officer Fennel who was about to sanction all the Appellant's July and August 2006 repayments;
- The *Huntingwood* evidence, the terms of the June 2006 Consultative Document, and the terms of the 21 March 2007 edition of Excise News all supported the proposition that the Appellant's view of HMRC's relaxed practice between 2004 and 2006 was an "industry understanding", fostered indeed by HMRC, and not just something vaguely indicated to the Appellant;
- It followed from the point just made that the withdrawal of the practice was not just an isolated matter of administrative malpractice but a high policy decision to withdraw a widely known manner of verifying duty rebate claims, made without notice and thus with retrospective effect, so infringing a very fundamental principle of both European law and elementary fairness.
- In contrast to the facts in the *Huntingwood* case, there was no remote respect in which the Appellant received any notice of the withdrawal of the relaxed practice, and no equivalent of the April letter sent to Huntingwood.
- Finally, the way in which the Appellant only ever sourced its beer from Makro and other highly reputable suppliers, the integrity of none of which has remotely been questioned, reinforces the proposition that in the most straightforward way possible the Appellant was seeking to avoid the risk of being a victim of fraud.

We might add that we find it particularly offensive that an Appellant, in relation to whom the Respondents' counsel confirmed that the Respondents' case involved no remote suggestion of dishonesty, should be placed on the threshold of insolvent liquidation simply by acting within known HMRC guidelines, when unknown to it those guidelines had been withdrawn.

115. The next two related questions are whether it was in "the public interest" for HMRC to reject the Appellant's claim to recover duty, and more specifically whether HMRC can say that it was in any event simply enforcing law that it deemed necessary to secure the payment of taxes.

116. We do not think that it can be right that HMRC can simply assert subjectively that HMRC "deemed it necessary" to deny the Appellant's claim to rebate in order to secure the payment of taxes, and that we as a Tribunal have no jurisdiction to consider whether such action was reasonably regarded as necessary. We note in passing the first point which is that the entity liable to have paid the taxes was the defaulter that has disappeared, and that whilst no criticism of HMRC for having failed to secure the payment of taxes by that entity may be appropriate, it was still that defaulter, and not the present Appellant, that should have "paid the taxes". Ignoring that point, and considering the issue of whether denying the refund to the present Appellant was at least a mechanism for recovering the lost taxes (admittedly in many senses having regard to the facts of this case, **from the wrong person**), we still consider that HMRC's action was far from necessary. Had HMRC issued a Press Release, or an edition of Excise News in roughly the form that we suggested in paragraph 90 above, it is our view that the effect of that would have been to remove the end market in the illegal sale of non-duty-paid beer from the fraudsters far more quickly and effectively than the route actually chosen. Moreover our suggested route would have avoided the offensive feature of throwing the cost, without warning or notice, on a party that

had a clear expectation of recovering the duty, under the **then conceded current practice** for dealing with duty refunds. Another benefit of the wording that we have suggested in paragraph 90 is that had HMRC proceeded in the way we suggested, and then subsequently denied refunds to a claimant that had received the notice that we suggested, we are at a loss to identify any conceivable ground on which such a disappointed claimant could have complained. Accordingly considerable litigation would have been avoided.

117. It is our view in this case that in July 2006, HMRC did not do the only thing necessary to secure the payment of taxes. It did the wrong thing.

118. We deal finally with the last hurdle that we summarised in paragraph 112, in other words the point that if HMRC were compelled by primary legislation to act as they did, or were forced to act as they did under secondary legislation that could not be read so as to comply with the Convention principles, then we would again be precluded from protecting the Appellant's Convention human rights.

119. It would be particularly strange for the Respondents to advance any contention along the lines that they were utterly tied in their actions and could do nothing other than apply the rules in accordance with the strict law and the Regulations. After all this case arises only because, for a considerable period, HMRC had deliberately ignored the rules, and conceded drawback claims on evidence that fell well short of what was required. For HMRC to argue, at the point when they chose to revert to something close to the strict rules, that they had to do this in one particular way, rather than another, indeed in a way that was unannounced and manifestly unfair, would seem to be a rather extraordinary argument. It is clear to us that HMRC could have made an announcement along roughly the lines that we summarised in paragraph 90. That is what HMRC should have done, and they should not have done what they actually did do. That dispenses with any possible contention by the Respondents in relation to this last condition referred to in paragraph 112.

120. Our 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.

Reconciliation with other cases

121. Each case is determined on its own facts and on the arguments advanced on behalf of the parties, but we feel that we should make some observation on the implicit argument on the part of the Respondents that this Appeal should most obviously have been dismissed because all earlier similar cases, pursued on judicial review grounds, had been pursued unsuccessfully by the relevant appellants. If the High Court had rejected those appeals, then obviously we should do the same. Furthermore, if the arguments raised before us had not been advanced in other cases, then they were obviously poor arguments that should be rejected in this case.

122. The answer to those points is as follows. This case, and possibly the same might have applied in the case of *Huntingwood*, happened to occur at precisely the point, and simply because, HMRC effected a marked change of practice. Furthermore this case has not, in the event, been decided by considering the judicial review features affecting the expectations of just the Appellant. It 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. Those arguments had not been raised in other cases, and would most likely have been irrelevant to any cases other than those relating to just this window period between July 2006 and 1 April 2007, during which the new approach to providing full evidence of original duty payment was applied prior to the 21 March notification of that practice.

Costs

123. The Appellant requested an order for its reasonable costs, were it to be successful, and that order is granted.

Right of Appeal

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

HOWARD M. NOWLAN (Tribunal Judge)

Released: 28 September 2011