TC02691

Appeal number: TC/2011/01910

Excise Duty - reclaim of excise duty on export of alcohol - whether claim for Drawback relief valid - No - whether denial of claim disproportionate - No - whether decision unreasonable -No - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON PILSNER LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE DR K KHAN
MICHAEL BELL ACA CTA

Sitting in public at Bedford Square, London on 13 March 2013

Mr Oliver Powell, Counsel for the Appellant

Mr David Yates, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This Appeal relates to some 16 consolidated appeals against decisions made by HMRC ("the Respondents") between 8 July 2010 and 2 December 2011.

2. The 16 decisions are the subject of some 10 appeals made by the Appellant. All 10 appeals are made pursuant to s.16(1B) and 16(1C) of the Finance Act 1994.

3. The 10 appeals are as follows:

(1) **TC/2011/01910:** 6 decisions dated 8 or 28 July 2010. The conclusion of a review of these decisions under FA 1994 s.15C was set out in a letter dated 12 January 2011. The Notice of Appeal is dated 4 March 2011. With the consent of HMRC, the Tribunal on 12 May 2011 granted the Appellant permission to lodge its appeal out of time.

(2) **TC/2012/00014:** a decision dated 28 February 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 July 2011. The Notice of Appeal is dated 25 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(3) **TC/2012/00015:** a decision dated 10 May 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 August 2011. The Notice of Appeal is dated 25 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out f time.

(4) **TC/2012/00016:** a decision dated 10 May 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 July 2011. The Notice of Appeal is dated 24 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(5) **TC/2012/00017:** a decision dated 17 May 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 July 2011. The Notice of Appeal is dated 24 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(6) **TC/2012/00018:** a decision dated 1 May 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 July 2011. The Notice of Appeal is dated 24 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(7) **TC/2012/00019:** a decision dated 28 February 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 July 2011. The Notice of Appeal is dated 25 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(8) **TC/2012/00020:** a decision dated 14 June 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 August 2011. The Notice of Appeal is dated 14 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(9) **TC/2012/00011:** a decision dated 14 June 2011. The conclusion of a review of this decision under FA 1994 s.15C was set out in a letter dated 11 August 2011. The Notice of Appeal is dated 14 November 2011. With no opposition from HMRC, the Tribunal on 24 February 2012 granted the Appellant permission to lodge its appeal out of time.

(10) **TC/2012/06062:** 2 decisions dated 2 September 2011. There was no review. The Notice of Appeal is dated 29 May 2012. To date the Tribunal has not expressly granted the Appellant permission to lodge its appeal out of time.

4. The appeals stated above concern the following claims from drawback of excise duty in relation to exported goods under Regulation 5(2)(a) of the Excise Goods (Drawback) Regulations 1995 ("EGDR" 1995).

Appeal Number	Claim Number	Notification Date and Time	Date of Release	Amount of duty
2011/01910	DR82483	Fri 4 Jun 2010 16:16	Wed 9 Jun 2010	£16,460.93
2011/01910	DR82484	Fri 4 Jun 2010 16:17	Wed 9 Jun 2010	£16,460.93
2011/01910	DR82511	Tue 8 Jun 2010 11.20	Thur 10 Jun 2010	£16,460.93
2011/01910	DR82512	Tue 8 Jun 2010 11:26	Thur 10 Jun 2010	£16,460.93
2011/01910	DR82513	Tue 8 Jun 2010 11:27	Thur 10 Jun 2010	£16,621.88
2011/01910	DR82514	Tue 8 Jun 2010 11:27	Thur 10 Jun 2010	£11,851.87
2012/06062	DR85973	Tue 8 Nov 2010* No AEA	Fri 11 Nov 2010	£14,165.07
2012/00024	DR87112	Mon 24 Jan 2011 13:22	Wed 26 Jan 2011	£15,866.34
2012/00017	DR88422	Tue 5 Apr 2011 Original: 15:57 Amended: 16:50	Fri 8 Apr 2011	£22,278.87
2012/00018	DR88421	Tue 5 Apr 2011 Original: 15:59 Amended: 16:48	Fri 8 Apr 2011	£22,278.87
2012/06062	DR88423	05/04/2011 4.04 pm	08/04/2011	£39,710.08

2012/00019	DR88424	05/04/2011 4.05 pm	08/04/2011	£39,710.08
2012/00016	DR88425	05/04/2011 4.10 pm	08/04/2011	£22,061.16
2012/00015	DR88426	05/04/2011 4.30 pm	08/04/2011	£31,175.56
2012/00020	DR88777	27/04/2011 4.15 pm Amended 4.22 pm	03/05/2011	£17,827.20
2012/00021	DR88776	27/04/2011 3.57 pm	03/05/2011 *(two Bank Holidays so only 1 day notice)	£39,513.47

Matters in Dispute

5. The core issue concerns the Appellant's failure to comply with the requirements of Regulation 8 of the Excise Goods (Drawback) Regulations 1995 ("EGDR 1995"). The Appellant accepts that they failed to give the requisite two clear business days notice to HMRC provided for under Regulation 8(2) (d), read with Notice 207 Excise Duty: Drawback April 2010 ("Notice 207"). The Notice is given the legal effect by Regulation 7(1) (b) of EGDR 1995.

6. The Appellants accept that they failed to comply with the Regulations in that they failed to submit a Notice of Intentions ("NOIs") giving HMRC the requisite two clear business days notice required under the regulations.

7. In the remaining one claim (DR85973) the Respondents assert that the Appellant failed to operate in accordance with an Acceptance of Alternative Evidence Agreement ("AEA Agreement"). The Appellants were authorised to operate for drawback of excise duty in relation to the brand "Montana Wine" which was re-branded as Brancott Estate ("Brancott Estate"). Brancott Estate was not a brand of wine that was included in the AEA Agreement.

8. HMRC denied the Appellant the sum of £358,904.17 in respect of drawback claims.

Findings of Facts

(1) It is accepted that all claims (excluding DR85973) failed to comply with the requirements for claiming drawback relief.

(2) Mr Chetan Dayal, the Managing Director of the Appellant and Mr Satyam Popat were familiar with making drawback claims and the documentation required.

(3) In the period between April 2012 and October 2012 the Appellant made 441 drawback claims totalling some £13.1 million and only three claims (worth £90,000) were subject to extended verification.

(4) It is accepted by all parties that all relevant duties were paid by the Appellant and there was no irregularity in relation to the movement of goods.

(5) There will be no loss of revenue to HMRC or to another EU Member State.

(6) Of the 15 appeals relating to the failure to comply with the Regulations, six were submitted within 30 minutes of the 4.00 p.m. deadline, two were submitted prior to the 4.00 p.m. deadline but were amended after the 4.00 p.m. deadline and in seven cases there were breaches that exceeded the 4.00 p.m. deadline by more than 30 minutes. In fifteen of the sixteen cases all conditions for drawback were satisfied save the two clear business days notice. The Appellant makes a distinction between the 6 "near misses" together with the two amended claims and the remaining seven "clear" breaches claims.

Witness Statement of Mr Chetan Dayal

(1) The Witness Statement is dated 15 November 2012 and comprises some 23 pages.

(2) Mr Dayal is the managing director of London Pilsner and was appointed on 22 July 2004 and worked there until 8 March 2012. He left the company to devote more time to another business venture.

(3) He explained that the company, London Pilsner, was formed in 1994 and trades in non-duties suspended goods.

(4) His responsibilities were:

(a) procurement of goods;

(b) making the necessary logistic arrangements for the goods;

(c) pricing and costing of goods;

(d) identifying protective markets; and

(e) general claims processing with HMRC

(5) He was familiar with drawback claims and was involved in verifying all documentation pertaining to all drawback claims up to and including the point of submitting the claims to HMRC and its final settlement.

(6) As a result of personal issues and a growing business Mr Satyam Popat was given the responsibility in October 2011 of preparing, processing and dealing with all drawback claims documentation in readiness for the approval and submission to HMRC. He worked closely with Mr Popat.

(7) He had ultimate responsibility for ensuring the NOIs were processed correctly and submitted within the requisite timeframe. In practise his job was largely reviewing the documentation.

(8) He understood that several of the drawback claims were filed very near or after the deadline for their submissions. He said that the 4.00 p.m. deadline

only came into force in April 2010 and there were some claims made around that time by the Appellant where the deadline was breached, HMRC initially denied those drawback claims. HMRC subsequently allowed the claims. HMRC explained that if the claims in future were late they may be rejected unless there were exceptional circumstances.

(9) The company continued to trade in spite of the loss of approximately £317,000 in drawback duty.

(10) He confirmed that he had made an application to change the name of Montana Wine to Brancott Wine but HMRC were not informed of the name change prior to the export.

Legislation and Cases Referred to

(1) Finance Act 1994 sections 13A–16;

(2) The Excise Goods (Drawback) Regulations 1995;

(3) Notice 207 (as at April 2010);

(4) *Lindsay v HMCE* [2002] STC 588;

(5) *Pierhead Purchasing Ltd* [2010] UKFTT 122 (TC) (18 March 2010);

(6) *Hammonds of Knutsford Plc* [2011] UKFTT 544 (TC) (11 August 2011);

(7) *The Co-operative Group Ltd* [2012] UKFTT 600 (TC) (24 September 2012);

(8) *HMRC v Total Technology (Engineering) ltd* [2012] UKUT 418 (TCC);

(9) *HMRC v Noor* [2013] UKUP 71 (TCC);

(10) *Europlus Trading Ltd* [2013] UKUT 108 (TCC)

Appellant's Submissions

(1) The Appellant submits that HMRC's decision to deny their claim for drawback was disproportionate and not one that could have been reasonably arrived at.

(2) In support of this argument the following points are made:

(a) Out of 480 consignments only 16 claims for drawback have been denied and are subject to appeal;

(b) There is no evidence of any irregular movements pertaining to the goods, duties have always been fully paid;

(c) Six of the NOIs in respect of the consignments were sent within 30 minutes of the 4.00 p.m. deadline set by HMRC;

(d) The original NOI in respect of DR88422 were submitted at 15:57 but then an amendment was made at 16:50 to reflect the fact that the consignment of beer did not relate to 500ml cans but was in fact

568ml cans. Save for the fact that the size of the cans had been changed; the brand of beer was identical.

(e) The original NOI in respect of DR88421 was submitted at 15:59 but amended at 16:48. The amendment was to reflect the fact that the consignment of beer did not relate to 500ml cans but was in fact 568ml cans. The remaining information was correct.

(f) The definition of "Business Day" in the EGDR 1995 includes a day appointed by Royal proclamation as being a bank holiday. One of the company's normal "business days" fell on the day of the Royal Wedding. It is incumbent upon the Respondents to apply the domestic legislation in a way that conforms to the general principles of proportionality found in EU law; and

(g) The Appellants have sought to further enhance their compliance procedure with the implementation of a more robust system which involved the Appellant seeking "third party advice". In the period April to October 2012, the Appellant made 441 drawback claims totalling £13.1million and only 3 of those claims were subjected to extended verification.

9. The Appellants draw reference to various cases dealing with proportionality and submit that since excise duty is an area of law that falls within the scope of the application of EU law, questions of proportionality of the imposition of excise duty will arise for consideration. They refer to domestic courts which have stated that principles such as proportionality fall to be considered in the application of the exercise duty regime.

10. In particular the Appellant draws reference to the power HMRC to waive compliance with conditions (to give two business days notice) and submits that when dealing with an appeal under sections 16(1B) and 16(1C) the Tribunal's jurisdiction under section 16(4) and 16(5) is only exercisable where the Tribunal "is satisfied that the Commissioners or other persons making the decision could not have reasonably arrived at it". The Appellant contends that HMRC's denial of the Appellant's claim for drawback of excise duty is not proportionate and not one that could have been reasonably arrived at. The Tribunal is invited to make a finding to that effect and to allow the appeal.

11. The Appellants make this submission particularly with regard to the six NOIs which were submitted only shortly after the 4.00 p.m. deadline and the two which were submitted prior to the deadline were amended after the deadline.

12. In summary, the Appellant's main case is that it was disproportionate for HMRC to refuse to exercise their statutory power to waive the relevant breaches.

Respondent's submissions

13. The Respondents' core submission is that the Tribunal has no jurisdiction to review the conduct of HMRC in refusing a claim where the conditions for making a

claim were not otherwise met. The Respondents rely on the Upper Tribunal decision in *HMRC v. Europlus Training Ltd* [2013] UKUT 108 TCC.

14. The second submission is that because EU law is potentially applicable to the conduct of public authority, this does not of itself give jurisdiction to the Tribunal to consider such conduct unless it is afforded under statute. In the case of a refusal to exercise a power, a claim for judicial review in the Administrative Court is the appropriate venue.

15. If the Appellant's interpretation of proportionality is correct, this would mean that all the time limits in all cases should be waived. The Respondents say that this reveals a fundamental misunderstanding of the application of the principle of proportionality.

16. On the claim DR85973, the Respondents say that the Appellants were entitled to operate drawback with regard to the Montana Wines not with regard to Brancott Estates Wine, which was the re-branded name of Montana Wines. HMRC was not informed of the name change prior to the export, which was a requirement for the Acceptance of Alternative Evidence ("AEA"). Consequently in the absence of the AEA applying the claim would fail. The key time at which the AEA has to be in force is the time of the submission of the NOI and there was no relevant AEA in force at the time.

Discussion

17. The Tribunal should start by stating that the parties agree that there should be compliance with all the conditions imposed by the EGDR 1995. It is accepted that for export claims, the claimant has to make goods available for inspection for not less than two clear business days following the day upon which the NOI was given to HMRC, before removing the goods to an export warehouse. This is a requirement under Regulation 8(1) (c) of the EGDR 1995. A "Business Day" is defined by the Bills of Exchange Act 1882 ("BEA") and excluded any Saturday or Sunday and certain Bank Holidays. This is stated in Regulation 4 of the EGDR 1995.

18. The parties do not dispute that where an NOI was given after 4.00 p.m. it would be deemed to have been received the following business day. This is stated in section 7.5 of Notice 207. It is a legal requirement. There is a discretion given to HMRC where there has been non-compliance with the conditions for drawback relief which would allow the waiving of any such non-compliance. This is provided for in Regulation 7(1) (a) of the EGDR. The parties accept that the claims in question had failed to comply with the relevant rules and were in fact late.

19. The issue for determination by the Tribunal is whether it is disproportionate and unreasonable for HMRC to refuse to exercise their waiver discretion.

20. The claims concern excise duty drawback. This is a refund of UK excise duty. It is made when excise goods have not been and will not be consumed in the UK, and if certain conditions and requirements are met. To make a claim for drawback relief a

party must be eligible and the goods must be eligible goods for the purposes of drawback. It is required that an NOI to claim drawback form is completed and sent to the Drawback Processing Centre ("DPC").

21. It is required that all relevant documentation relating to goods and in particular export and warehouse documentation be included with the claim. It is then required that the goods and the accompanying documents be available for inspection for a period of two business days. At the end of that period, the goods can then be exported or despatched or sent to warehouses. The process is simple and clearly laid out in Notice 207 dealing with Excise Duty Drawback. It should be noted that parties are eligible not entitled to claim drawback relief. It is important then that conditions for claiming the relief are all met.

22. Let us start by looking at the concept of proportionality. The concept has its roots in European law. It looks to see whether there is a balance between State intervention and the protection of private rights and interests in the implementation of legislation. Proportionality allows the Court to examine the lawfulness and reasonableness of a public authority's justification for infringing rights. The principle of proportionality was described as one:

> "… under which citizens may only have imposed on them for the purposes of the public interest, obligations which are strictly necessary for those purposes to be obtained." (*Internationale Handelsgesellschaft v. Einfuhrund Vorratsstelle* [1970] ECR 1125 at 1126).

It is recognised that the domestic courts should only apply the principle of proportionality in exceptional cases.

23. The core argument raised by the Appellant focuses on whether the Tribunal has jurisdiction to consider whether HMRC contravenes EU law in appeals against HMRC's denial of drawback claims. This matter was considered in the recent Upper-tier Tribunal ("UTT)" decision of *HMRC v. Europlus Trading Limited* FTC/38/2012. In this case HMRC rejected or partly rejected the majority of Europlus' claims for drawback of excise duty on beer warehoused for export. The rejected claim for drawback totalled £1,225,943.05. HMRC rejected the claims on the grounds that the drawback conditions were not met. It was required to be shown, if the drawback claims were to be paid, that the duty on the beer warehoused for export has been paid to HMRC and has not been remitted, repaid or drawn back. If was a condition for reclaim that evidence must show the duty was paid.

24. As in *Europlus*, this appeal is a "relevant decision" for the purpose of section 13A FA 1994 which is:

> "Any decision by HMRC as to whether or not any persons entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No.2) Act 1992, or the amount of the drawback to which any person is so entitled"

25. The EDGR 1995 were made pursuant to Finance (No.2) Act 1992. Section 16(1) of the Finance Act 1994 provides that an appeal lies to an appeal tribunal with respect to any decision by the Commissioners on a review of a decision. Section 16(4) and (5) provides for the powers of the Tribunal as follows:

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

26. In the *Europlus* case, Vos J, stated that the First Tier Tribunal

> "… was wrong to consider that it has jurisdiction to decide upon breaches of general principles of EU law, certainly so far as those breaches were in respect of a supposed policy or practice that was entirely distinct from the entitlement to drawback that the sole subject of the statutory appeal." (para.97)

The party in that case had not satisfied various conditions for claiming drawback. Similarly, our Appellants had not given the requisite two clear business days before export. In *Europlus* case, as here, the Appellant requires the Tribunal to hold that the conduct of HMRC was unreasonable because there was a failure to exercise an administrative discretion in refusing to allow a claim. This raises the question as to whether the Tribunal has jurisdiction to consider a matter where a public authority has failed to exercise discretion in such circumstances.

27. The review of administrative action is normally a matter for judicial review.

28. The Tribunal has power to review the Commissioners' decision only if it can be shown that the Commissioners have acted in a way no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have considered.

29. The Appellants refer to the case of *Lindsay* where they say the court have found that EU principles such as proportionality fall to be considered in the application of the excise duty regime. They cite the Court of Appeal in *John Mills v. HMRC* [2002] EWCA Civ 267. This case concerns the non-restoration of a car seized after cigarettes and alcoholic drinks were imported into the UK without paying duty. The argument in this case was that the decision was disproportionate given the value of the car in relation to the amount of duty payable.

30. The Court of Appeal, Lord Philips MR LP said at para.40:

> "However, the principal issue before the Tribunal was whether HMRC's decision not to restore Mr Lindsay's car to him was one that "could not

reasonably have been arrived at" within the meaning of those words in s.16(4) of the 1994 Act."

31. The Judge went on to say that the question of the proportionality should be considered in each case on its own particular facts.

32. In the *Lindsay* case the Tribunal was considering a pure discretionary decision. There were no statutory conditions to be satisfied. When the question of reasonableness is applied to drawback appeals, the Tribunal is only concerned with the decision as to whether or not the conditions for drawback were or were not satisfied. They are not concerned with whether HMRC should or should not have exercised discretion to waive those conditions. Such a question remains one for judicial review. A distinction is drawn between cases where one has simply to meet conditions under the law, simple compliance, and cases which formulate a proposition as to the proportionality of the quantity of duty paid. In the decision in *Europlus* Vos J, alluded to this distinction when he said at paragraph 93:

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

33. In other words the fundamental question as to whether or not one is entitled to claim drawback relief is a much simpler question of compliance

34. The Tribunal therefore is of the view that it has no power to review the reasonableness of HMRC's decision as to exercise their discretion to waive breaches of the drawback relief provisions on grounds of proportionality. To do so would be to interpret the doctrine of proportionality in such a way that it could be used to allow taxpayers not to be compliant with the law. This is not correct.

35. The Upper Tribunal in the case of *HMRC v. Total Technology (Engineering) Limited* [2010] UKUT 418 (TCC), looked at the question of proportionality. The Court looked at the penalty system and held that neither the default surcharge regime nor the penalty imposed on the taxpayer, infringed the principle of proportionality. The Court looked at the penalty regime as a whole and concluded that it did not suffer any flaw which rendered it non-compliant to the principle of proportionality which required it to be shut down. At the taxpayer level, the amount of penalty had been arrived at by applying a rational scheme of calculation. There was no breach of the principle of proportionality. The Court was very aware that "the amount of the penalty had been arrived at by applying a rational scheme of calculation which involved no breach of the principle of proportionality". Similarly in our case, the facts do not lend itself to an argument based on proportionality. The taxpayer has simply breached or not fulfilled the requirements for claiming drawback relief and in such circumstances cannot use the argument of proportionality to get around the rules

of compliance. The Court in *Total Technology* indicated clearly that a penalty can be legitimately imposed by the system since the system was no "devoid of reasonable foundation" or one which was "not merely harsh but plainly unfair".

36. The Tribunal finds that the fact that HMRC were not disproportionate in their actions in refusing to waive non-compliance. It would have been simple for the Appellant to delay their exports by one day where they had been unable to satisfy the two clear business days requirement. The HMRC cannot be responsible for the Appellant's lateness or indeed if they choose to export their goods before the required two clear business day period have expired and choose not to delay their export by one day which would have satisfied those requirements.

37. The Appellant draw a distinction between cases which were "just late", by a few minutes and those which were late by virtue of an amendment being made to the NOI after the deadline had passed and other cases where there was "clear lateness". These distinctions are artificial. It is no good the Appellant saying "in 15 of the 16 claims, save for the two clear business days' notice requirement, all the conditions for drawback were satisfied". The fact is the conditions were not satisfied in 15 of the 16 cases. The Tribunal cannot be asked to intervene in such cases.

38. In the case of *HMRC v. Noor* [2013] UKUT 71 (TCC) the Tribunal had no jurisdiction over the taxpayer's claim to a credit in respect of VAT on invoices where that claim was based on legitimate expectation. In so concluding, the decision disagrees with the decision in *Oxfam v. Revenue & Customs Commissioners* [2010] STC 686. The case identified a simple point which is that the questions of administration are really questions for judicial review and the Tribunal does not have jurisdiction to entertain public law questions of legitimate expectations. In spite of the wide wording of s.16 (4)-(5) of FA 1994, there is nothing in the wording there which allows the Tribunal to look at the question of proportionality. The review power has to be read in the light of the provisions which specify the decision under review which in this case concerns drawback relief only.

39. In looking at the reasonableness of the decision itself, it should first be said that the law requires strict compliance with the Regulations and satisfaction of the conditions for claiming drawback relief. If the Regulations are not complied with no relief is available. The drawback relief provisions require that the goods be available for inspection for two business days. The Appellant were experienced exporters who conducted closed to 500 consignments claiming drawback duty of approximately £13.1million. This is confirmed in the witness statement of Mr Dayal. He explained that he was familiar with the law, the procedure for claiming relief and had himself personally overseen the filing of several claims. He was aware that there were previously breaches of the requirement to have two clear business days and that previously HMRC had denied drawback relief, although the denial had been subsequently waived by HMRC. It was clearly indicated at the time of the waiver that if there were further breaches it is possible the drawback relief would not be possible. In a letter dated 22 June 2010, HMRC stated:

> "On reviewing this additional information, I have decided under exceptional circumstances to withdraw my decision to reject the above claim and steps will be taken to pay this claim to you as soon as possible.
>
> However, I take this opportunity to remind you that any future claims submitted without a correct notice period would be rejected."

40. The Appellant therefore knew, because of the denial of drawback relief, that late notification would be rejected. They had received a warning from HMRC. The Appellant has emphasised the fact that the claims were only marginally late in at least 8 cases. This however is not the point. The point is that they actually exported the goods too early. Having failed to meet the 4.00 p.m. NOI deadline, the remedy was straightforward, if they wished to be within the two business day inspection period requirement, they simply should have delayed their export. They choose not to do this.

41. When Dayal handed over the drawback claims to Mr Popat it was clear that he was not as experienced as Mr Dayal. However Mr Dayal in evidence clearly explained that he supervised Mr Popat. Either way, it was the responsibility of the Appellants to get this right. They worked in an industry where drawback claims were made all the time and they were familiar with the procedure. No business wants to lose in excess of £300,000 since this comes off the bottom line, however in this case the Appellants' business was sufficiently large to absorb such a loss. They are in a fortunate position.

42. In summary, the Tribunal does not have jurisdiction in cases of breaches of drawback relief provisions to allow a waiver of those conditions or indeed to vary the time limits in those cases for making claims. This is not the purpose of the doctrine of proportionality and to apply it in this way would be unfair to other traders who were unable to claim drawback relief because of lateness.

43. As regards the claim DR85973 the Appellant has sought to rely on an AEA despite the product name being changed and HMRC not being informed of this change prior to the export. The Tribunal finds that in the absence of the AEA applying there can be no claim for the drawback relief. The Brancott Wines were not covered by the agreement at the time. The key time at which the AEA was in force is the time of the submission of notice of intention. The wording of the AEA itself confirms paragraph

> "The Claimant acknowledges that any further drawback claims that are sourced from any other supplier or by transactions not identified in this letter will be subject to the normal evidence of original duty payment documents … unless a separate agreement or alternative evidence is reached with HMRC prior to the submission of the Notice of Intention of that claim. Any alteration to the detail in this AEA must be notified to DCAT immediately. Failure to provide notification may invalidate the AEA causing the rejection of drawback claims."

44. The fact that, subsequent to the Notice of Intention on 8 November 2010, HMRC entered into a new AEA, is not relevant.

45. For these reasons and the absence of the AEA applying, there is no basis for allowing the Appellant's appeal in this matter.

46. In conclusion, for the reasons given above, the Appeal is accordingly dismissed.

47. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 1 May 2013