Case No: C3/2016/2398

Neutral Citation Number: [2018] EWCA Civ 135
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
(Mrs Justice Whipple and Judge Roger Berner)
[2016] UKUT 195 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2018

Before :

LADY JUSTICE ARDEN
and
LORD JUSTICE NEWEY

- -

Between :

The Queen on the application of HAMMONDS OF KNUTSFORD PLC	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Michael Firth (instructed by **Morrisons Solicitors LLP**) for the **Appellant**
Mr James Puzey (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 12 and 13 December 2017

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Judgment

Lord Justice Newey:

1. Where goods on which excise duty has been paid in the United Kingdom are exported to another Member State of the European Union, the exporter may be entitled to "drawback" of the duty. However, the Excise Goods (Drawback) Regulations 1995 ("the 1995 Regulations") provide for goods on which drawback is claimed to have been made available for inspection by HM Revenue and Customs ("HMRC") for not less than two business days after they had been given notice of the intended export. Where that requirement, which the Upper Tribunal termed the "inspection facility rule", is not met, HMRC will not normally allow a drawback claim unless it is the first occasion that the claimant has breached it. This appeal raises issues as to the lawfulness of that approach.

2. The appellant, Hammonds of Knutsford plc ("Hammonds"), is an alcohol wholesaler selling to customers in both the United Kingdom and other countries. The present proceedings arise out of HMRC's refusal of drawback claims made in 2010 and 2011 on the basis that Hammonds had not complied with the inspection facility rule. The 2010 claims related to two consignments of beer held to Hammonds' order by a third party. Hammonds faxed "Notices of Intention" to HMRC in respect of the consignments and instructed the third party not to export the goods before 24 March. In the event, however, without Hammonds' knowledge, the beer left storage at about 5 pm on 23 March, some seven hours before the end of the period required by the inspection facility rule. Similarly, the three consignments of beer which were the subject of the 2011 drawback claims left storage on 28 June (and so earlier than was permissible under the inspection facility rule) even though the third party holding the goods to Hammonds' order had been instructed not to export them until 29 June.

3. Following the decision of the Court of Justice of the European Union ("the CJEU") in Case C-663/11 *Scandic Distilleries SA v Direcţia Generalã de Administrare a Marilor Contribuabili* [2014] STC 1, Hammonds alleged that HMRC had not been entitled to refuse its drawback claims. In 2015, Hammonds was granted permission to apply for judicial review and the matter was subsequently transferred to the Upper Tribunal pursuant to section 31A of the Senior Courts Act 1981. In a decision released on 20 April 2016, the Upper Tribunal (Whipple J and Judge Roger Berner) dismissed the application, but Hammonds now appeals.

The legislative framework

EU Directives

4. Two EU Directives are relevant.

5. Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ("the 1992 Directive") applied to the 2010 claims for drawback. Article 6 provided for excise duty to become chargeable at the time of release for consumption and to be "levied and collected according to the procedure laid down by each Member State". Article 7 stated that, in the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty was to be levied in the Member State in which the products were held (see Article 7(1)). Where, accordingly, products already

released for consumption in one Member State were delivered, intended for delivery or used in another Member State for the purposes of a trader carrying on an economic activity independently or for the purposes of a body governed by public law, excise duty was to become chargeable in that other Member State (Article 7(2)), while the excise duty paid in the first Member State was to be reimbursed in accordance with Article 22(3) (Article 7(6)). Under Article 7(5), a trader was to comply with the following requirements:

> "(a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;
>
> (b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
>
> (c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid."

6. Article 22 of the 1992 Directive read as follows:

> "1. In appropriate cases, products subject to excise duty which have been released for consumption may, at the request of a trader in the course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not intended for consumption in that Member State.
>
> However, Member States may refuse request for reimbursement where it does not satisfy the correctness criteria they lay down.
>
> 2. In the application of paragraph 1, the following provisions shall apply:
>
> (a) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid. However, the competent authorities may not refuse reimbursement on the sole grounds of non-presentation of the document prepared by the same authorities certifying that the initial payment had been made;
>
> (b) movement of the goods referred to in (a) shall take place under cover of the document specified in Article 18(1);
>
> (c) the consignor shall submit to the competent authorities of his Member State the returned copy of the document referred to in (b) duly annotated by the consignee which must either be

accompanied by a document certifying that the excise duty has been secured in the Member State of consumption or have the following details added:

- the address of the office concerned of the tax authorities in the Member State of destination,

- the date of acceptance of the declaration by this office together with the reference or registration number of that declaration;

(d) products subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them has established that such markings or marks have been destroyed.

3. In the cases referred to in Article 7, the Member State of departure is required to reimburse the excise duty paid only where the excise duty was previously paid in the Member State of destination in accordance with the procedure laid down in Article 7(5).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.

…

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

(Emphasis added.)

7. The CJEU explained the different roles of, on the one hand, Article 22(1) and (2) and, on the other, Article 22(3) in the *Scandic* case. It said (in paragraph 27 of its judgment):

> "The reimbursement scheme set out in art 22(1) and (2) of [the 1992 Directive] applies to situations in which the products subject to excise duty in a member state, where the excise duty has been paid, are transported under suspension arrangements to another member state where the products are also subject to excise duty, without it being necessary that the excise duty have been paid in that latter member state already. By contrast,

> in situations falling within art 22(3), excise duty is reimbursed only where it is paid in both the member state of departure and in the member state of destination."

8. Article 22(1) and (2) allowed the United Kingdom to introduce "warehousing for export" (or "WFE") arrangements under which a trader could claim drawback in respect of goods which had not been exported but which had been returned to duty suspension by being placed in an excise warehouse. WFE was, however, withdrawn in 2009.

9. By the time the 2011 claims for drawback were made, the 1992 Directive (which, as Advocate General Sharpston observed in the *Scandic* case, was "not the easiest of directives to read") had been superseded by Council Directive 2008/118/EC concerning the general arrangements for excise duty ("the 2008 Directive"), which took effect from 1 April 2010. Chapter II of the 2008 Directive, headed "Chargeability, Reimbursement, Exemption", encompasses Article 9, which includes this:

> "Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State."

10. Article 33 of the 2008 Directive, which is to be found in Chapter V, dealing with "Movement and Taxation of Excise Goods after Release for Consumption", provides:

> "1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> …
>
> 6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State."

The 1995 Regulations

11. The 1995 Regulations implemented the reimbursement provisions of the 1992 Directive. They were not altered materially when that Directive was replaced by the 2008 Directive.

12. Regulation 7 of the 1995 Regulations, headed "General conditions", states:

> "(1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the Act [i.e. the Customs and Excise Management Act 1979], every eligible claimant shall—
>
> (a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and
>
> (b) in addition to those conditions, comply with such other conditions as the Commissioners see fit to impose in a notice published by them and not withdrawn by a further notice.
>
> (2) If the Commissioners consider it necessary for the protection of the revenue they may, by a notice in writing delivered to a revenue trader, require him to comply with such additional conditions as they think fit to impose…."

13. Regulation 8 of the 1995 Regulations, headed "Conditions to be complied with before export", provides so far as relevant as follows:

> "(2) Where an eligible claimant intends to claim drawback after export he shall, before export, comply with the following conditions—
>
> (a) he shall deliver to the Commissioners at such address as they shall specify a notice in writing stating that he intends to claim drawback and containing the following particulars—
>
> (i) his name and address,
>
> (ii) the address of the premises at which the goods may be inspected prior to their export,
>
> (iii) the description of the goods, including their nature and quantity,
>
> (iv) the amount of duty paid in respect of the goods, and
>
> (v) the address of the premises to which the goods are being exported;
>
> (b) if the export is a dispatch he shall complete an accompanying document;
>
> (c) if the export is not a dispatch he shall complete a single administrative document; and

> (d) the goods and the accompanying document or single administrative document shall be available for inspection by the Commissioners, at any reasonable time, for not less than two clear business days following the day upon which the notice mentioned in sub-paragraph (a) above was received by the Commissioners."

14. The inspection facility rule is laid down by regulation 8(2)(d). The purpose of the rule was explained in evidence from Ms Amy Burgess of HMRC. She said in a witness statement that the requirement for at least two clear days' notice "allows HMRC officers to inspect the stock, to check that it exists, that UK duty has been paid and it is as described in the subsequent claim" and that "[d]uring the visit, officers may also stamp the stock, allowing HMRC to ascertain that it is the same consignment if it later re-enters the UK". She exhibited internal guidance which included this:

> "The period of inspection allows Assurance Officers to verify that goods described on the NOI [i.e. Notice of Intention] document exist and confirm that they will be eligible goods once the drawback event takes place.
>
> The principal risks are:
>
> • documentation is not correctly completed
>
> • goods do not exist
>
> • goods do not match the declaration on the NOI
>
> • goods presented at premises where a number of similar goods are stored may be substituted ones and not those which supporting documentation relates
>
> • substitution of low ABV goods when higher ABV goods are declared
>
> • goods are allowed to leave the storage site before the period of inspection has expired; and
>
> • a claimant may quickly submit a second NOI for the same goods, to use a single set of goods to make multiple claims….
>
> Objectives of the visit are to:
>
> • confirm that the goods exist
>
> • confirm that the goods are as described on the form
>
> • mark the goods
>
> • obtain unique marks and detail recorded on the goods

> • react to when you suspect that the goods are not duty paid."

15. The internal guidance also included this:

> "The inspection period is an important assurance tool. Where a business does not allow HMRC the full inspection period by exporting, despatching or destroying goods before the expiry of the inspection period, then the subsequent claim may be rejected.
>
> …
>
> There are two occasions where we may consider a claim when the two … day inspection period has been breached. These are when:
>
> • the NOI period has been breached for the first time
>
> • it would be unfair or unreasonable to disallow the claim.
>
> If the NOI period has been breached for the first time you should normally allow the claim, but issue the claimant with a written warning giving a clear direction that a further failure to comply with this condition will normally result in that further claim being rejected….
>
> Where there is a further breach, then the facts of this breach should be carefully considered. Normally the claim should be disallowed, however it may be allowed where it would be unfair or unreasonable to disallow; for example, where the event was beyond the control of the person holding the goods."

16. Ms Burgess commented in her statement that any scheme which refunds tax (as the drawback regime does) is likely to be a target for fraud. She went on to say that in 2009 HMRC estimated the level of drawback-related fraud to be about £25 million a year, while the total value of drawback claims was £73.4 million in 2008-2009 and £84.7 million in 2009-2010.

The key issues

17. Although there are seven grounds of appeal, Mr Michael Firth, who appeared for Hammonds, advanced, as I see it, two main arguments. These were to the following effect:

    i) While Article 22(3) of the 1992 Directive referred to Member States being able to refuse reimbursement where "correctness criteria" laid down by them had not been satisfied, the wording was not carried forward into the 2008 Directive. It follows that the 2008 Directive provides no authority for Member States to refuse reimbursement on the basis of additional conditions ("the Directive Interpretation Point");

ii) Principles of EU law mean that a claim for repayment of excise duty cannot be denied where the substantive requirements of the right are satisfied, and they were in the present case ("the Substantive Requirements Point").

18. I shall take these points in turn.

The Directive Interpretation Point

19. As can be seen from paragraph 6 above, Article 22(1) and (3) of the 1992 Directive each stated that Member States "may refuse" a request for reimbursement "where it does not satisfy the correctness criteria they lay down". Article 22(5) required the tax authorities of each Member State to "determine the monitoring procedures and methods applying to reimbursement made in their territory".

20. The 2008 Directive does not speak of either "correctness criteria" or "monitoring procedures and methods". Neither does it specify that a Member State can deny reimbursement if requirements it has laid down have not been met. It provides, in general terms, for excise duty to be levied, collected, reimbursed or remitted "according to the procedure laid down by each Member State" (see Article 9, quoted in paragraph 9 above).

21. Mr Firth attached importance to the changes in wording. The "clear removal of the possibility of Member States denying a right to reimbursement on the basis of additional conditions that they impose" meant, he maintained, that there was no such power in the 2008 Directive. Under the 2008 Directive, he said, a Member State cannot impose a procedural rule that carries the possibility of a claim for reimbursement being refused. If such a power existed when the 1992 Directive was in force, it disappeared when the 2008 Directive took effect.

22. Mr Firth sought support for his contentions in two decisions of the CJEU, Case C-310/11 *Grattan plc v HMRC* [2013] STC 502 and Case C-495/12 *HMRC v Bridport and West Dorset Golf Club Ltd* [2014] STC 663. The *Bridport* case, on which Mr Firth particularly relied, concerned the interpretation of Article 133(1)(m) of Council Directive 2006/112, which provided for the exemption from VAT of "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education", and Article 134(b) of that Directive, which excluded some supplies from the exemption. The CJEU had to consider whether Article 134(b) should be interpreted as excluding from the exemption in Article 132(1)(m) a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body. In the course of its judgment, the CJEU said this:

> "28. In addition, it must be borne in mind that, unlike the exemption in art 132(1)(l) of Directive 2006/112 that is expressly limited to supplies of services and goods by the bodies referred to therein 'to their members', the exemption for supplies of services closely linked to sport in art 132(1)(m) of that directive is not so limited, even though under the European Commission's original proposal for the Sixth Directive the latter exemption was also restricted to supplies of services and

> goods to members of the bodies concerned, as is apparent from art 14A(1)(j) of the Proposal of 20 June 1973 for a sixth Council Directive on the harmonisation of legislation of member states concerning turnover taxes—common system of value added tax: uniform basis of assessment (COM(73) 950 final).
>
> 29. Accordingly, the term 'additional income' within the meaning of art 134(b) of Directive 2006/112 cannot be construed in such a way as to lead to a restriction of the scope of the exemption in art 132(1)(m) of that directive on the basis of the status of the recipients of the supply in question as members or non-members, a criterion that was deliberately excluded when the exemption was defined."

Mr Firth submitted that, by the same logic, the removal of the 1992 Directive's reference to Member States refusing reimbursement (on the basis of "correctness criteria") is inconsistent with the implication of the same power into the 2008 Directive.

23. While, however, the 2008 Directive does not reproduce the 1992 Directive's references to reimbursement being refused, neither does it speak of either "correctness criteria" or "monitoring procedures". Whereas, moreover, the 1992 Directive addressed such matters in Article 22 and, hence, in the specific context of reimbursement, the 2008 Directive provides more generally for excise duty to be levied, collected, reimbursed or remitted "according to the procedure laid down by each Member State". Wording found in Article 6 of the 1992 Directive has thus been transferred into Article 9 of the 2008 Directive and extended to reimbursement and remission of duty. In short, the drafting of the 2008 Directive has been undertaken in a somewhat different way from its predecessor.

24. Like the Upper Tribunal, I do not think the changes mean that Member States were to lose any right to refuse reimbursement that they had previously enjoyed. The provision for excise duty to be reimbursed "according to the procedure laid down by each Member State" would, I think, naturally be understood as allowing for the possibility of reimbursement being refused if the procedure were not complied with, and the 2008 Directive says nothing at all to the contrary. It is also, as it seems to me, inherently unlikely that the 2008 Directive was intended to remove a pre-existing entitlement to deny reimbursement for failure to follow the procedure imposed by the Member State in question. As for the loss of the explicit reference to refusing reimbursement that had been found in the 1992 Directive, that can fairly be explained by the differing structure of the 2008 Directive and, in particular, the decision to address levying, collecting, reimbursing and remitting excise duty in a single provision (viz. Article 9 of the 2008 Directive).

25. In short, I have not been persuaded that the fact that the 2008 Directive, unlike its predecessor, does not contain any express reference to reimbursement being refused means that any power that had previously existed was lost.

The Substantive Requirements Point

26. It is Hammonds' case that, for reasons of proportionality and fiscal neutrality, a Member State may not deny a right to reimbursement of tax or duty where the substantive requirements of that right are satisfied. Those requirements are, exclusively, those defining the scope of the right and so, in the present context, that excise duty has been paid in both the Member State of departure and that of destination. Any other requirement (including an anti-avoidance measure) is formal or procedural and non-compliance with it cannot justify refusal of reimbursement if the substantive requirements are met.

27. Mr Firth sought support for these contentions in CJEU cases relating to VAT. The VAT authorities to which we were referred seem to me to warrant the following propositions:

    i) "[T]he right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation" (Case C-101/16 *SC Paper Consult SRL v Direcţia Regională a Finanţelor Publice Cluj-Napoca*, at paragraph 35 of the judgment; see also e.g. Joined Cases C-95/07 and C-96/07 *Ecotrade SpA v Agenzia delle Entrate* [2008] STC 2626, at paragraph 66 of the judgment, and Case C-272/13 *Equoland Soc coop arl v Agenzia delle Dogane* [2014] STC 2487, at paragraph 41 of the judgment);

    ii) "[T]he fundamental principle of VAT neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements" (*SC Paper Consult*, at paragraph 41 of the judgment; see also e.g. *Ecotrade*, at paragraph 63 of the judgment). Similarly, "the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements" (Case C-24/15 *Plöckl v Finanzamt Schrobenhausen* [2017] STC 379, at paragraph 39 of the judgment);

    iii) "[T]he substantive requirements for the right to deduct are those which govern the actual substance and scope of that right", while "[t]he formal requirements for that right … regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as obligations relating to accounts, invoicing and filing returns" (Case C-590/13 *Idexx Laboratories Italia Srl v Agenzia delle Entrate* [2015] STC 735, at paragraphs 41-42 of the judgment). "With regard to the substantive requirements or conditions, it is apparent from the wording of Article 168(a) of Directive 2006/112 that, in order to have a right to deduct, it is necessary, first, that the interested party be a 'taxable person' within the meaning of that directive and, second, that the goods or services relied on to confer entitlement to that right be used by the taxable person for the purpose of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person" (*SC Paper Consult*, at paragraph 39 of the judgment). In contrast, an obligation physically to place imported goods in a tax warehouse has been held to be a formal requirement (*Equoland*, at paragraph

36 of the judgment), as have "holding an invoice showing the details mentioned in art 226 of Directive 2006/112" (Case C-518/14 *Senatex GmbH v Finanzamt Hannover-Nord* [2017] STC 205, at paragraph 38 of the judgment) and an obligation to provide a VAT number (*Plöckl*, at paragraphs 40-41 of the judgment);

iv) Failure to meet a formal requirement may, however, result in the loss of entitlement to an exemption from VAT where the person concerned has "intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT" (*Plöckl*, at paragraphs 43-44 of the judgment). Likewise, "the right to deduct may be refused when it is established, in the light of objective evidence, that that right is being invoked fraudulently or abusively" (*SC Paper Consult*, at paragraph 43);

v) In addition, "non-compliance with a formal requirement may lead to the refusal of an exemption from VAT if that non-compliance would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied" (*Plöckl*, at paragraph 46 of the judgment) and the right to deduct may similarly be lost if non-compliance with formal requirements "effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied" (*SC Paper Consult*, at paragraph 42); and

vi) Member States may impose obligations beyond those provided for by Directive 2006/112 itself "if they consider such obligations necessary to ensure the correct collection of VAT and to prevent evasion", but "the measures adopted by the Member States must not go beyond what it necessary to achieve the objectives pursued" and "cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT" (*SC Paper Consult*, at paragraphs 49-50 of the judgment). More specifically, "where the tax authority has the information necessary to establish that the substantive requirements have been satisfied, it cannot, in relation to the right of that taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes" (*Idexx*, at paragraph 40 of the judgment; see also e.g. Case C-284/11 *EMS-Bulgaria Transport OOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" Plovdiv* [2012] STC 2229, at paragraph 62 of the judgment).

28. Mr Firth argued that the principles seen in the VAT cases also apply in the context of excise duty. He relied in this connection on the recent decision of the CJEU in Case C-151/16 *"Vakarų Baltijos laivų statykla" UAB v Valstbinė mokesčių inspekcija prie Lietuvos respublikos finansų ministerijos*. In that case, Advocate General Kokott observed (in paragraph 46 of her opinion) that, since VAT is a general excise tax, it was reasonable to apply principles from VAT to the special law of excise duty. While, however, points made in the VAT cases could be said to find an echo in some of the Court's analysis, it did not voice any support for the Advocate General's comment or itself refer to VAT authorities. In the course of its judgment, the Court said this:

> "44 [T]he Court has held that the unconditional nature of an obligation to grant an exemption cannot be affected at all by the

> degree of latitude afforded to Member States by introductory wording such as that contained in Article 14(1) [of Directive 2003/96], according to which exemptions are granted by those States 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse' (judgment of 17 July 2008, *Flughafen Köln/Bonn*, C-226/07, EU:C:2008:429, paragraph 31).
>
> 45 Furthermore, the Court has also held that when exercising their power to lay down the conditions for the exemption from excise duty provided for in Article 14(1) of Directive 2003/96, the Member States must comply with the general principles of law which form part of the legal order of the European Union, including, inter alia, the principle of proportionality (judgment of 2 June 2016, *Polihim-SS*, C-355/14, EU:C:2016:403, paragraph 59).
>
> 46 Thus, the refusal by the national authorities to exempt energy products from excise duty on the sole ground that certain conditions that must be complied with under national law in order to obtain that exemption are not fulfilled, without it being checked, on the basis of the evidence provided, whether the substantive requirements necessary for those energy products to be used for purposes giving entitlement to exemption are met, goes beyond what is necessary to ensure the correct and straightforward application of those exemptions and to prevent any evasion, avoidance or abuse (see, by analogy, judgment of 2 June 2016, *Polihim-SS*, C-355/14, EU:C:2016:403, paragraph 62)."

The cases mentioned in this passage each involved excise duty.

29. There was a good deal of discussion before us of the *Scandic* case, which concerned the 1992 Directive. There, the Romanian tax authority had rejected requests for reimbursement on the basis that the trader had not requested reimbursement before the goods were despatched, as was required under Romanian domestic law. The CJEU concluded that reimbursement could not properly be refused for this reason, holding (in paragraph 39 of the judgment) that Article 22(1) and (2) of the 1992 Directive:

> "must be interpreted as meaning that, when products, which are subject to excise duty that has been paid and which have been released for consumption in one member state, are transported to another member state where those products are subject to excise duty, which has also been paid, a request for reimbursement of the excise duty paid in the member state of departure may not be refused on the sole ground that that request was not made before those goods were dispatched, but must be assessed on the basis of art 22(3) of [the 1992 Directive]."

30. The Court's decision was founded on the fact that Article 22(2)(a) of the 1992 Directive, which required a trader to make a request for reimbursement before the goods were despatched, applied only to duty suspension cases and not to situations governed by Article 22(3). Having regard to this feature, it concluded (in paragraph 36 of the judgment):

> "The concept of 'correctness criteria' may not be interpreted in such a way which would allow for the imposition of a condition laid down by [the 1992 Directive] solely in relation to a different request for reimbursement scenario and which would therefore contravene the first sub-paragraph of art 22(3) thereof."

31. While agreeing on the outcome, Advocate General Sharpston had approached the matter somewhat differently. She said this:

> "38. Can art 22(3) … be read so as to permit member states to require traders to request reimbursement before the goods are dispatched? It certainly allows them to refuse requests for reimbursement which do not satisfy 'the correctness criteria they lay down'. Moreover, art 22(5) provides that member states are to 'determine the monitoring procedures and methods applying to reimbursement made in their territory'.
>
> 39. In my view, nothing in art 7 or art 22(3) of [the 1992 Directive] specifically prevents a member state from laying down, in cases to which those provisions apply, a procedure under which the initial request for reimbursement is to be lodged before the goods have been dispatched….
>
> 41. The difficulty in the present case lies, however, not with the procedure for lodging a request as such but with the refusal of a request which, although substantively complete in all respects, did not formally comply with that procedure. Can such a refusal be justified on the ground of a failure to satisfy the 'correctness criteria' laid down by the member state?
>
> 42. I agree with the Commission that in the present case such a result would be disproportionate and inconsistent with the provisions of [the 1992 Directive] as a whole. Whatever 'correctness criteria' a member state lays down must seek to ensure that the scheme of the directive is respected, in particular with regard to guaranteeing fiscal neutrality, as well as preventing fraud or evasion of duty.
>
> 43. Romania in its observations states that the relevant 'correctness criteria' comprise all the provisions of art 192–6 of the Tax Code and point 18–4 of the implementing rules.
>
> 44. I cannot agree, however, that all those provisions (which, in conformity with art 22(5) of the directive, lay down the

> procedure for requesting reimbursement) constitute 'correctness criteria' within the meaning of art 22(3). A distinction must be drawn between failure to comply with procedural rules imposed for reasons of administrative expediency, which may no doubt give rise to a proportionate penalty, and failure to satisfy 'correctness criteria', which can entail refusal of the request for reimbursement. Such refusal, involving as it does an exception to the member state's obligation to reimburse duty pursuant to arts 7(6) and 22(3), can be justified only where there is a plausible risk that duty will not be correctly collected in the final event. No such risk is apparent where a consignor has fulfilled all the requirements of arts 7(5) and 22(3). A requirement involving advance lodging of a provisional request for reimbursement may be justified for administrative reasons but failure to comply with it cannot, on its own, justify a refusal of reimbursement."

32. The Advocate General thus considered that "correctness criteria" had to be distinguished from "procedural rules imposed for reasons of administrative expediency" and thought that, in the context of Article 22(3) of the 1992 Directive, the domestic requirement for reimbursement to be requested in advance of despatch fell into the latter category. As I understand it, the Advocate General took the view that "correctness criteria" "must seek to ensure that the scheme of the directive is respected, in particular with regard to guaranteeing fiscal neutrality, as well as preventing fraud or evasion of duty" (paragraph 42 of the opinion) and had to be related to a "plausible risk that duty will not be correctly collected in the final event" (see paragraph 44).

33. Neither the Advocate General nor the Court doubted that reimbursement could be denied where "correctness criteria" had not been complied with. To the contrary, the Advocate General said that Article 22(3) of the 1992 Directive "certainly allows [Member States] to refuse requests for reimbursement which do not satisfy 'the correctness criteria they lay down'" (paragraph 38 of the opinion) and that failure to satisfy "correctness criteria" "can entail refusal of the request for reimbursement" (paragraph 44). It is also noteworthy that the Court appears to me to have accepted that, in a duty suspension case within Article 22(1) and (2), failure to make a request for reimbursement prior to despatch (as required by Article 22(2)(a)) would mean that reimbursement could be refused. It stated (in paragraph 37 of the judgment):

> "where the request for reimbursement has been lodged before the excise duty in the member state of destination has been paid, art 22(1) and (2) of [the 1992 Directive] would apply, meaning that the member state of departure may require that the request for reimbursement be lodged before the goods concerned have been dispatched. In this case, an important condition explicitly laid down in art 22(2)(a) thereof would be at issue, the failure to comply with which could result in the reimbursement being refused."

A little earlier (in paragraph 28), the Court had said:

> "It seems reasonable for the European Union legislature to have provided for stricter requirements in situations where the reimbursement is requested before the excise duty has been paid in the member state of destination. One such requirement is that the request for reimbursement must be lodged before the goods concerned have been dispatched."

34. It is perhaps worth noting, too, that neither the Advocate General nor the Court made any reference to the VAT cases on which Mr Firth relied. The principal focus was on the terms of the 1992 Directive.

35. Mr Firth stressed the sentence of the Advocate General's opinion in which, having referred to the need for "a plausible risk that duty will not be correctly collected in the final event", she said (in paragraph 44), "No such risk is apparent where a consignor has fulfilled all the requirements of arts 7(5) and 22(3)". Mr Firth said that this must raise a case-specific question. His thesis, I think, was that the Advocate General was indicating that reimbursement could not be refused unless, on the facts of the particular case, there was a risk that duty would not be collected and that no such risk could exist where Articles 7(5) and 22(3) of the 1992 Directive had been complied with. As I read the Advocate General's opinion, however, she was not saying that reimbursement could be denied only if there was a risk of lost duty in the individual case, but rather that a requirement could not fall within "correctness criteria" (failure to satisfy which could entail refusal of reimbursement) unless it related to a risk that duty would not be duly collected.

36. It was the CJEU's decision in *Scandic* that prompted Hammonds to challenge HMRC's right to refuse its drawback claims in 2014. I have not, however, been persuaded that that case, or the others cited by Mr Firth, sustain his submissions. My reasons include these:

i) The present case is not concerned with VAT, but excise duty. The VAT authorities are not, therefore, directly in point. While, moreover, the principles seen in them may be relevant, regard must be had both to the terms of the particular Directives at issue here (viz. the 1992 and 2008 Directives) and to differences between VAT and excise duty. With regard to the former, the CJEU focused on the wording of the 1992 Directive in *Scandic*, and neither in that case nor in *"Vakarų Baltijos laivų statykla" UAB* was there any reference to VAT cases in the judgment. As for differences between VAT and excise duty, Mr James Puzey, who appeared for HMRC, pointed out that excise duty concerns ascertained goods whereas VAT is a transaction-based tax, where the means of proving the right to deduct are primarily paper-based;

ii) The 1992 Directive, which governs Hammonds' 2010 claims for drawback, specifically stated that a request for reimbursement could be refused if it did not satisfy a Member State's "correctness criteria" and, as I have said, in *Scandic* neither the Advocate General nor the Court doubted that that was the case. Further, the Court's apparent acceptance in *Scandic* that failure to comply with Article 22(2)(a) in a duty suspension case could result in refusal of reimbursement must also be inconsistent with Mr Firth's contentions;

iii) The inspection facility rule is, I think, appropriately classified as a "correctness criteri[on]". The evidence mentioned in paragraphs 14-16 above shows that it is designed to reduce fraud in an area in which it is all too common and thus relates to a "plausible risk that duty will not be correctly collected in the final event" (to quote from the Advocate General in *Scandic*). Further, there is no suggestion that the rule is as such disproportionate. In this connection, Mr Puzey stressed that regulation 7(1)(a) of the 1995 Regulations gives HMRC a discretion to excuse non-compliance with the rule;

iv) While Article 9 of the 2008 Directive did not refer to a Member State being able to refuse reimbursement where the procedure it had laid down had not been followed, neither did it indicate that a Member State could not impose conditions (such as, in particular, would have constituted "correctness criteria" for the purpose of the 1992 Directive) failure to comply with which could justify denial of reimbursement. As I have already said, it seems to me that Article 9 would naturally be understood as allowing for the possibility of reimbursement being refused if a procedure laid down by a Member State were not followed;

v) Even with VAT, failure to comply with formal requirements can potentially lead to a deduction or exemption being lost. That may be the case if the taxable person has not otherwise demonstrated that the substantive requirements are satisfied. The point can be illustrated by Case C-271/12 *Petroma Transport SA v Belgium* [2013] STC 1466, where the Belgian tax authority had disallowed deductions on account of deficiencies in invoices. The CJEU observed (in paragraph 34 of the judgment) that "the common system of VAT does not prohibit the correction of invoices", but went on to say (at paragraph 36):

> "the provisions of the Sixth Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the right to deduct VAT may be refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced after such a refusal decision was adopted".

Further, the passages quoted in paragraph 27(v) above show that deduction/exemption can be denied in the context of VAT where failure to meet a formal requirement "prevents the production of conclusive evidence that the substantive requirements have been satisfied";

vi) In the present case, HMRC were, as it seems to me, entitled to take the view that Hammonds' failure to comply with the inspection facility rule meant that it could not prove that the substantive requirements of a claim for drawback had been satisfied (or, in the words of the CJEU, "prevents the production of conclusive evidence that the substantive requirements have been satisfied"). The Upper Tribunal said (in paragraph 63 of the decision) that HMRC "do not have all the information which is necessary to establish that the Claims are

valid, because of [Hammonds'] non-compliance with the inspection facility rule". I agree. Paperwork such as Hammonds relies on is no substitute for the opportunity to inspect for which the inspection facility rule provides. As the Upper Tribunal noted (at paragraphs 59 and 62), the inspection facility rule "goes to the very heart of any claim for drawback, because it enables the taxing authorities of the Member State to establish that the particular claim for drawback is valid" and it is "qualitatively different" from the requirements at issue in the VAT cases;

vii) With respect to paragraph 27(vi) above, the inspection facility rule has evidently been imposed to prevent fraud, and it does not appear to me either to "have the effect of systematically undermining" the right to drawback or to "have the effect of rendering that right ineffective for practical purposes". In fact, Mr Firth explained in his skeleton argument that Hammonds "took no issue with the imposition of an obligation to give 48 hours' notice" and "can understand perfectly how such an inspection window may assist in monitoring the excise duty regime";

viii) As regards fiscal neutrality, I would endorse this comment of the Upper Tribunal (at paragraph 67 of the decision):

> "There is no breach of fiscal neutrality where a claim is refused for failure to meet basic conditions designed to establish the claim substantively. The claim has quite simply not been made out";

ix) There is also, as it seems to me, considerable force in this passage from the Upper Tribunal's decision (at paragraph 64):

> "[Hammonds'] argument ... would leave Member States in the forlorn position of not being able to prevent evasion and abuse through a robust system which incorporated generic anti-avoidance measures; they would be able to invoke anti-avoidance rules only as and when there were grounds for suspicion arising out of a particular claim. [T]here is extensive evidence that the United Kingdom perceives there to be a risk of tax loss in relation to drawback generally. Whether such a risk attaches specifically and individually to [Hammonds'] claims is beside the point. The United Kingdom's rules are designed to enable the correct amount of tax to be collected from (and repaid, as necessary, to) the whole body of taxpayers …".

In my view, neither the terms of the 1992 and 2008 Directives nor general principles of EU law produce the "forlorn position" posited by the Upper Tribunal.

37. Mr Firth criticised the Upper Tribunal for mistakenly treating the inspection facility rule as a substantive requirement. He referred in this context to paragraph 60 of the Upper Tribunal's decision, in which it said:

> "We conclude that the inspection facility rule is a substantive requirement, which attaches to the first condition for making a claim under Article 22(3) (or its successor under the 2008 Directive) …. It is a measure which permits the Member State to establish that the substantive requirements have been satisfied, adopting the language of the *Ecotrade* cases. It is not merely procedural, formal, or implemented to achieve administrative convenience."

Mr Firth argued that the Upper Tribunal here recognised that the inspection facility rule merely "permits the Member State to establish that the substantive requirements have been satisfied", but nevertheless (in the first sentence) treated the rule as itself a substantive requirement.

38. Mr Puzey said that it might have been better for the Upper Tribunal not to describe the inspection facility rule as a "substantive requirement". I agree. The Upper Tribunal observed in paragraph 58 of its decision that a claim of this type has "two substantive elements or conditions, namely (i) the payment of duty in the Member State of departure and (ii) the payment of duty in the Member State of destination". These were evidently the "substantive requirements" that the Upper Tribunal had in mind in the fifth line of the passage quoted in the preceding paragraph of this judgment. Earlier in the passage, however, the Upper Tribunal had used the words "substantive requirement" to refer to something other than those two elements, viz. the inspection facility rule. The Upper Tribunal thus appears to have used a single term for two different things.

39. However, I also agree with Mr Puzey that the point is not significant. What matters is that the United Kingdom can properly refuse a claim for drawback where the inspection facility rule has not been complied with. The label attached to the rule is unimportant.

40. In the circumstances, I cannot accept Mr Firth's argument on the Substantive Requirements Point.

Other matters

Refusal of reimbursement in the present case

41. As already mentioned, regulation 7(1)(a) of the 1995 Regulations gives HMRC a discretion to excuse non-compliance with the inspection facility rule. The internal guidance quoted in paragraph 15 above indicates the approach that HMRC take. As the Upper Tribunal noted (in paragraph 70 of the decision), Hammonds' problem in the present case was that even the failure to comply with the inspection facility rule giving rise to the 2010 claims "was not an isolated incident; there had been previous, recent violations of the inspection facility rule in relation to other claims".

Other arguments

42. The grounds of appeal criticise the Upper Tribunal for concluding that HMRC did not have all the information necessary to establish that Hammonds' drawback claims were valid and for refusing itself to make any finding of fact on the duty paid status of

the relevant goods. If, however, the views I have expressed earlier in this judgment are correct, HMRC were entitled to consider that the paperwork supplied by Hammonds was not an adequate substitute for compliance with the inspection facility rule and that its failure to comply with the rule was a sufficient reason to reject its claims. In the circumstances, there can have been no question of the Upper Tribunal having been required to decide whether duty had been paid.

Reference to the CJEU

43. Mr Firth's fall-back position was that there should be a reference to the CJEU. In my view, however, the matter is sufficiently clear that we should not exercise our discretion to make such a reference.

Conclusion

44. I would dismiss the appeal.

Lady Justice Arden:

45. I am most grateful to Newey LJ for his careful analysis of the jurisprudence and I agree.

46. As I see it, the essential question on the second issue is whether the inspection facility rule, which applies in all cases, can properly be imposed in all cases. Relevant to that, I accept Mr Puzey's submission that the function of such a rule is to help guard against the risk of abuse or fraud. In the instant case, in my judgment, Mr Firth has not shown that that risk is met by the production of sales documentation. In my judgment, compliance with the inspection facility rule is essential to a duty paid claim being a valid claim for the repayment of duty.

47. VAT is paid on taxable events. Excise duty, by contrast, is paid in respect of specific goods made available for consumption in the jurisdiction in which it is paid. If the duty is paid but the goods are to be exported for consumption in another Member State, that duty may fall to be repaid (pending payment of any excise duty in the other Member State) under "duty suspension" arrangements.

48. Just as there is a risk that a claim may be made for the repayment of VAT in circumstances when it ought not to be repaid, so too there may be risks arising from the implementation of duty suspension arrangements. For example, it is possible that the goods are not in fact used for consumption in the other Member State (where rates of duty may be lower) but brought back into a jurisdiction where the rates of duty for consumption there are higher. (This may occur without any fault on the part of the exporter of the goods, but customs authorities may want to prevent any abuse occurring in any circumstances). Given the difficulties of tracking some goods, this risk would appear to be a "plausible" (using AG Sharpston's word), or understandable, risk which HMRC could seek to guard against.

49. Marking the goods with the mark of the customs authorities of the jurisdiction from which the goods emanated is likely to assist in deterring this type of abuse. On the other hand, HMRC cannot be expected to inspect every consignment of goods for which duty suspension is claimed. No doubt they have to take a view about goods

which give rise to a higher risk of abuse (eg goods that may not be popular in the country of destination), but they are entitled first to inform themselves as best they can about the risks, and to do this they may need to make enquiries, including cross-border enquiries, to evaluate the risk. They have only 48 hours in which to inspect and mark goods, and their actions should not be pre-empted by the removal of the goods at any time during that period.

50. It follows, in my judgment, that the inspection facility rule has a rational connection to the prevention or deterrence of abuse of the excise duty laws of a Member State. The sales documentation is not an adequate alternative for the obvious reason that it does not definitively identify the specific goods.

51. The fact that HMRC are not required to, and do not exercise, the right to inspect and mark goods in every case does not prevent the rule from being proportionate. The restriction of relief for charitable payments to overseas charities is another situation where HMRC are not required to exercise their rights in every case. Thus, in *Routier v HMRC* [2017] EWCA Civ 1584, this Court (Arden LJ, Lord Briggs JSC and Green J) considered that the CJEU had held that such relief may properly be limited to payments to charities established in countries with which the Member State has arrangements for sharing information so as to minimise the risk of improper claims for the exemption. This was so even in cases where there could be no question as to propriety in a particular case. In short, the point of the inspection facility rule is that the right to inspect is available to be exercised in any case.

52. For the reasons given in the judgment of Newey LJ and this judgment, I would also dismiss this appeal.