Permission given by F-tT to amend notice of appeal – appeal by HMRC – appeal allowed

[2014] UKUT 0489 (TCC)

Appeal number: FTC/126/2013

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and-

ASIANA LIMITED

Respondent

Tribunal: Mr Justice Warren, Chamber President

Sitting in public at the Rolls Building, London on 30 September 2014

David Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Andrew Trollope QC and Leon Kazakos for the Respondent, instructed by Mavin & Co

DECISION

Introduction

1. This is an appeal by the Appellants ("**HMRC**") against part of the directions made on 4 July 2013 by Judge Herrington ("**the Judge**") sitting in the Tax Chamber after a hearing on 27 June 2013. The Judge granted permission to the Respondent ("**Asiana**") to amend its grounds of appeal by the addition of the further grounds contained in an application notice dated 12 June 2013 (**"the Further Grounds**"). He gave his reasons in a short decision released on 4 July 2013 ("**the Decision**"). HMRC now appeal with the permission of Judge Bishopp sitting in the Tax and Chancery Chamber.

2. The underlying tax appeal by Asiana concerns two assessments dated 16 December 2009 and 9 March 2010 for customs and excise duty in respect of imports of Shaoxing cooking wine. The Further Grounds relate to the assessments of excise duty; they do not concern customs duty.

3. The assessments arose out of an audit of Asiana's affairs following the detention of an import of Shaoxing cooking wine by the UK Border Agency ("**UKBA**") in April 2009. The relevant detained goods were subsequently released by UKBA following payment of duties. The relevant assessments do not relate to the detained goods, save for one import in April 2009; in relation to that import, the only duty assessed was customs duty and not excise duty. Consequently for the purposes of the appeal before me, which relates only to the excise duty assessments, the detention by UKBA is irrelevant.

4. The assessments total over £874,000; of that, slightly under £22,000 relates to customs duty; the remainder relates to excise duty. The reason for the assessments in respect of customs duty was that the goods had been entered under

the wrong commodity code. I do not know the detail of Asiana's original grounds of appeal, but I understand that one of them is based on allegedly misleading advice given by HMRC about which code to enter. Quite apart from the assessments to customs duty (which are not a matter for the appeal before me), Shaoxing cooking wine fell to be subjected to excise duty as "made wine".

The legislation

5. The relevant EU legislation is Council Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages ("**the Directive**"). Following the decision in *Répertoire Culinaire Ltd v HMRC* (Case C-163/09) [2011] STC 465 (***"RCL CJEU"***), it is clear that a product such as Shaoxing cooking wine is subject to excise duty, falling as it does within the definition of "ethyl alcohol" in Article 20 of the Directive. Article 27(1) of the Directive provides for exemption from excise duty:

> "1. Member States shall exempt the products covered by this Directive from the harmonized excise duty 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:
>
> ……
>
> (f) when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does not exceed 8.5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products."

6. Article 27(6) provides that Members States "shall be free to give effect to the exemptions mentioned above by means of a refund of excise duty paid". This reflects recital 23 to the Directive which states that Member States "should be permitted to give effect to the exemptions required… by way of refund".

7. It is not mandatory to provide for exemption by way of refund; as recital 20 states, "it is possible to permit Member States an option to apply exemptions tied to end-uses within their territory".

8. The UK legislation implementing the exemption from excise duty is found in section 4 Finance Act 1995. It provides, so far as relevant, as follows:

> "(1) Subject to the following provisions for this section, where any person proves to the satisfaction of the Commissioners that any dutiable alcoholic liquor on which duty has been paid has been:
>
> (a) used as an ingredient in the production or manufacture of a produce falling within subsection (2) below, or
>
> (b) ……
>
> he shall be entitled to obtain from the Commissioners the repayment of the duty paid thereon.
>
> ……..
>
> (3) A repayment of duty shall not be made under this section in respect of any liquor except to a person who—
>
> (a) is the person who used the liquor as an ingredient in a product falling within subsection (2) above or, as the case may be, who converted it into vinegar;
>
> (b) carries on a business as a wholesale supplier of products of the applicable description falling within that subsection or, as the case may be, of vinegar;
>
> (c) produced or manufactured the product or vinegar for the purposes of that business;
>
> (d) makes a claim for the repayment in accordance with the following provisions of this section; and
>
> (e) satisfies the Commissioners as to the matters mentioned in paragraphs (a) to (c) above and that the repayment claimed does not relate to any duty which has been repaid or drawn back prior to the making of the claim.
>
> ……
>
> (5) Except so far as the Commissioners otherwise allow, a person shall not make a claim for a repayment under this section unless—
>
> (a) the claim relates to duty paid on liquor used as an ingredient or, as the case may be, converted into vinegar in the course of a period of three months ending not more than one month before the making of the claim; and
>
> (b) the amount of the repayment which is claimed is not less than £250."

9. It can be seen from this that the UK has adopted a refund system within the contemplation of Article 27(6).

RCL CJEU

10. *RCL CJEU* is a decision of the CJEU on a reference from the Tax Chamber. As well as holding that cooking wine fell within the definition of "ethyl alcohol" in Article 20, it also held that the relevant exempting paragraph is Article 27(f) which I have set out above. Those were its answers to the first and third questions answered by the Court. The fourth question related to the effect of an exemption being granted in one Member State on the availability of exemption in another Member State and is of no relevance in the present case. The second question is more significant. It related to the validity of two of the conditions laid down in section 4 namely the requirements under sections 4(3)(a) and (5)(a). In that connection, the Court noted at [47] that, in accordance with Article 27(6) of the Directive, read in conjunction with recital 18 and 23, Member States "are to be free to give effect to the exemptions… by means of a refund of excise duty paid". It went on, however, in [48], to observe that the objective of the exemptions "is, in particular, to neutralise the impact of excise duties on alcohol used as an intermediate product in other commercial or industrial products" which would include, I note, Shaoxing cooking wine subject to proof of use. And so, it went on in [49], it followed from Article 27(1)(f) and recital 20 that the application of the exemption "depends on the end-use of the products in question".

11. In [50], the Court noted that Article 27(1) read in conjunction with recital 22 provided for Member States to be able to "lay down conditions for the purpose of ensuring the correct and straightforward application of the exemption…". In [51] it recalled that exemption of products within Article 27(1) is the rule and refusal is the exception and that the power to lay down conditions for the purposes just referred to cannot detract from the unconditional nature of the obligation to grant

exemption. And so it followed, as stated in [52], that the exercise of that power (that is to say the power to lay down conditions for those purposes) requires the Member State to put forward concrete, objective and verifiable evidence of serious risk of evasion, avoidance or abuse and the conditions cannot go beyond what is necessary to obtain the objective. Then, in [53] and [54] one finds the following:

> "53. Consequently, although the member states may give effect to the exemption under art 27(1)(f) of Directive 92/83 by means of a refund of excise duty paid, depending on how the products in question are used, they cannot, on the other hand, make the application of that exemption conditional on compliance with conditions which are not proven, by concrete, objective and verifiable evidence, to be necessary to ensure the correct and straightforward application of such an exemption and to prevent any evasion, avoidance or abuse.
>
> 54. The evidence submitted to the court seems to indicate that the conditions laid down by the national legislation at issue in the main proceedings, that is to say, a restriction of the persons authorised to make a claim for recovery, a four-month period for bringing such a claim and the establishment of a minimum amount of repayment, are not necessary either to ensure the correct and straightforward application of the exemption under art 27(1)(f) of Directive 92/83 or to prevent any evasion, avoidance or abuse."

RCL F-tT

12. Répertoire Culinaire Ltd's tax appeal returned to the Tax Chamber following the decision of the CJEU: see [2013] UKFTT 278 (TC), [2013] SFTD 1071 ("***RCL F-tT***"). There were two appeals then before the Tax Chamber. The first was against a refusal to restore certain goods which fell within Article 27(1)(f) of the Directive. The second was against an excise duty assessment.

13. The tribunal held that excise duty was properly payable. It rejected the submission that, in order to obtain exemption, it was sufficient for the taxpayer to show that the goods in question were destined for culinary use. There could be no exemption at source without any reference to how the products were to be used.

The tribunal held that his was inherent in the CJEU's agreement that a Member State could give effect to the exemption under Article 27(1)(f) by way of refund and it also followed from the wording of Article 27(1)(f) itself. The tribunal was clearly correct in that respect. In other words, the nature of the goods was not enough, by itself, to attract exemption; there had to be more such as, under the UK system, evidence satisfactory to HMRC that the goods had been (not merely would be) used for the relevant purpose.

14. I do not understand that to be challenged by Mr Trollope QC (counsel for Asiana), his position being that, as a matter of the evidence which he wishes to adduce on the substantive appeal in the present case, it will shown that the Shaoxing cooking wine in question has in fact been used for such a purpose. Even if I have misunderstood his position, it is clear, in my view, that where a refund regime has been adopted by a Member State (as the Directive expressly permits), that regime can, consistently with the Directive, require that end use has to be demonstrated.

15. The tribunal also held that HMRC's decision to refuse restoration of the seized cooking liquors was flawed. This was principally because the review officer had failed to inform the taxpayer of the procedure it should follow, namely to pay the excise duty and to seek a refund once appropriate proof of use could be demonstrated. Of particular relevance in reaching that conclusion was the fact that the officer had thought that, as RCL was not itself involved in the production and manufacture of foodstuffs, it was ineligible to make a claim; but this was shown by *RCL CJEU* to be an impermissible condition for relief. The tribunal was also satisfied that it was likely that the cooking liquors would in fact have been used for manufacture of foodstuffs, a fact which played a part in its overall assessment of the reasonableness or otherwise of the decision not to restore.

16. The tribunal also observed, in a passage relied on by Mr Trollope, that it was intrinsically unfair and unjust to refuse restoration thereby rendering impossible the eventual use of the goods which would qualify for a refund of any excise duty paid.

The application to add the Further Grounds

17. I summarise the grounds of appeal set out in the application notice as follows (the paragraph numbers referring to those of the notice):

    a. Paragraph 6: it is submitted (as a result of the decision in *RCL CJEU*) that the product in question falls within Article 27(1)(f) and section 4(1)(a) and (2)(c) Finance Act 1995. HMRC do not seek to argue otherwise for the purposes of the present appeal.

    b. Reference is made in paragraph 7 to the conditions in section 4(3)(b) and to section 4(5)(a). Those conditions are said, in paragraph 8, to be non-compliant with Article 27(1)(f) and thus unlawful in that they do not satisfy the requirement that conditions may be imposed only if it is apparent from concrete, objective and verifiable evidence that those conditions are necessary to ensure the correct and straightforward application of the exemption and to prevent any evasion, avoidance or abuse. Again, HMRC do not seek to argue otherwise for the purposes of the present appeal.

    c. Attention is drawn in paragraph 9 to what the CJEU said in [48] of its decision in *RCL CJEU*, as to which see paragraph 10 above. I consider that the CJEU was here making only the most general, high level, observations about the rationale of the exemption. This is to be contrasted

with the precise language which it used when describing the nature of the conditions which a Member State may lay down in order for a taxpayer to obtain the exemption. Further, it cannot be taken as a qualification in any way of the ability of a Member State to give effect to the exemption by way of refund. I do not think that Mr Trollope gains any assistance from that paragraph.

d. In paragraph 12, reference is made to *RCL F-tT*. The focus of that paragraph is on the invalidity of the conditions laid down in section 4(3) and (5) FA 1995. And in paragraph 13, it is said that it is:

> "thus clear beyond peradventure that importers of products falling with the description of Article 27(1)(f) are themselves entitled to a repayment of any duty paid on importation of such products and that the restrictions contained in ss 4(3) and (5) are contrary to the terms of the Directive as found by the ECJ and are thus unlawful."

Paragraphs 12 and 13, it can be seen, are concerned with the conditions in paragraph 4(3) and (5); they are not concerned with the requirement under section 4(1) that duty should have been paid.

e. In paragraph 14, reference is made to the classification of Shaoxing cooking wine and to its description in a tariff information declaration. The conclusion drawn in paragraph 15 is that it is "thus beyond argument that this product is not for consumption as a beverage but is used for cooking purposes….". HMRC say two things about that. First, it has not been shown that the product has in fact been used for cooking purposes; and secondly, that even if it had been shown, that would provide no answer to the assessments to excise duty, for reasons which I will explain in a moment.

f. Paragraphs 16 and 17 are, again, directed at the conditions in section 4(3) and (5).

g. In paragraph 18, it is said that it would appear that in the light of the decision in *RCL CJEU*, HMRC no longer relies on the restrictions in section 4 FA 1995, a stance said to be confirmed by the decision of the tribunal. That is so for the purposes of this appeal (and was so for the purposes of the amendment application before the Judge) so far as concerns the conditions laid down in section 4(3) and (5). It is most definitely not HMRC's position in relation to the requirement laid down in section 4(1) which refers to duty "which has been paid".

h. Paragraph 19 then asserts that it is

> "thus inevitable that the same approach must be adopted in relation to the demands for unpaid duty made in respect of [Asiana]. Had any duty been paid in respect of importation [Asiana] would have been entitled to repayment therefore. However, given that no duty or back duty has been paid in response to the demands they must be withdrawn."

i. The words "the same approach must be adopted…" are of course, correct provided that one identifies the approach referred to. Everything which has gone before goes to the invalidity of the conditions set out in section 4(3) and (5): the "approach" referred to relates to those conditions not to section 4(1).

j. Paragraph 20 asserts (in subparagraphs i) to iv)) that it follows from what has gone before that:

    i. The original detention of the goods was flawed in that Asiana was not told of its right to retain or reclaim or have repaid any duty.

ii. As a result of visits to Asiana's premises and correspondence, demands for back duty were raised. It is complained that "no reference was made to [Asiana's] right to repayment of any duty paid, thus those demands were similarly flawed".

iii. That last aspect (*ie* failure to inform Asiana of its right to repayment) is repeated in relation to later correspondence in which Asiana complained of the detention of the goods and the demand for duty.

iv. Reference is made to later responses from HMRC which continued to fail to draw attention to the right to repayment and during which, it is asserted, HMRC continued to rely on section 4(3) even after the decision of the CJEC in *RCL CJEU*.

k. Paragraph 21 then concludes by submitting:

i. That HMRC can have no answer to the appeal (that is to say, to discharge the excise duty assessment).

ii. That the demand for payment should be withdrawn.

iii. That the decision to detain and demand payment of duty without reference to the right to repayment should be reversed as being unlawful and irrational.

iv. That the subsequent responses and/or decisions on review should be reversed or overturned on the same grounds.

18. There are a number of observations to make about these Further Grounds.

a. The first is that they are focused on the invalidity of the conditions contained in sections 4(3) and (5). No mention is made of section 4(1) or any invalidity of the requirement of that subsection that duty should have been paid. As I have said, HMRC do not seek to argue in this appeal that the conditions in sections 4(3) and (5) are valid. What they do say is that the invalidity of those conditions does not assist Asiana in its appeal against the excise duty assessments.

b. The second point is that it is important for me to note that there is nothing whatsoever in the judgment in *RCL CJEU* which casts doubt on the validity of the requirement in section 4(1) that duty should have been paid; indeed, the Court expressly recognises that a refund system is permitted by the Directive. If Asiana is to find some breach of EU law on the facts of the present case in continuing to assert the claim to excise duty, it has to be found elsewhere and cannot be found in, or even derive support from, the decision of the Court.

c. As to the assertion in paragraph 19 of the Further Grounds that, had any duty been paid in respect of importation, there would have been an entitlement to repayment, that may or may not be so. The right to repayment would be dependent on demonstrating the relevant end-use. For the purposes of the present appeal, it can be assumed that Asiana may be able to demonstrate such end-use. But it simply does not follow from that that the demand must be withdrawn.

d. The third point relates to the statement in paragraph 20 i) of the Further Grounds that the original detention of the goods was flawed. That may be so, but it seems to me to be wholly irrelevant to the application to amend

by adding the Further Grounds. This is because the Further Grounds are sought to be added to the ground of appeal against the excise duty assessments. But, as I have explained, none of the excise duty assessed relates to goods which were detained. It is therefore quite beside the point whether the detention of the goods which were detained was proper or not.

The Judge's decision

19. The Judge allowed the application for the grounds of appeal to be amended by adding the Further Grounds, that is to say the grounds as set out in the application dated 12 June 2013. Whatever arguments he heard and views he expressed, that is the only amendment for which he gave permission.

20. At [3] of the Decision, the Judge set out the second question referred in *RCL CJEU* as formulated CJEU, that is to say the validity of certain of the conditions in sections 4(3) and (5) FA 1995. He referred to Article 27(1)(f) of the Directive and set out relevant parts of section 4 FA 1995. At [6] he noted that the Court had held, in [53] of its judgment, that a Member State could give effect to the exemption by means of a refund of duty paid. But he noted ("However,….") [56] of the judgment where the Court said that the exemption could not be made conditional on the satisfaction of conditions laid down in national legislation, namely the restriction on persons able to make the claim, the time limit on making the claim and the minimum amount of the claim unless, as the Court said, "it is apparent from concrete, objective and verifiable evidence that those conditions are necessary **to ensure the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse**". The words which I have emphasised in bold reflect the opening words of Article 27(1) of the Directive. Quite clearly, the Court was addressing itself to the conditions which a

Member State is authorised to lay down by Article 27(1): it was not addressing itself to the possibility of a Member State adopting a refund system as envisaged by recital 23 and expressly authorised by Article 27(6) of the Directive. It cannot, in my judgment, sensibly be suggested that a Member State is able to adopt a refund system only if, and to the extent that, such a system is **necessary** to ensure the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse. Thus a taxpayer who has at all times had sufficient assets to pay any excise duty due but has simply failed to pay clearly cannot maintain that he does not need to pay it because, if he did so, he would be entitled to a refund; such a taxpayer could not sensibly argue that the refund system was invalid because it was not **necessary**.

21. The Judge then addressed *RCL F-tT* noting that the tribunal had decided that excise duty:

> "was properly payable on the goods as the [CJEU] had recognised in paragraph 53 of its judgment in [*RCL CJEU*] that a Member State can give effect to the exemption by means of a refund of excise duty paid, depending on how the products in question are used".

22. I entirely agree with that. I will say something more about [53] of the CJEU's judgment later. It is clear, and I think that the Judge recognised this, that excise duty was properly payable on the consignments of Shaoxing cooking wine with which the current appeal is concerned. Whether or not an exemption is then available so as to cancel, in some way, Asiana's liability to duty does not detract from the fact that duty was, initially, properly due. The duty became due on import and, under the refund scheme authorised by the Directive, the benefit (to be effected by way of refund) of the exemption became available only once the cooking wine had been used in the manufacture of the relevant foodstuffs.

23. The Judge then noted (see [9] of the Decision) that the tribunal had held that HMRC's decision not to restore must be regarded as irrational, explaining why the tribunal had reached this conclusion. He did not, in this paragraph or anywhere else, record that the demand for excise duty in the present case does not relate to any of the goods detained and did not explain the relevance of this part of the tribunal's decision to the Further Grounds. Next, in [10] of the Decision, he accepted that the restrictions contained in sections 4(3) and (5) FA 1995 are incompatible with the Directive. For my part, I do not read that as an acceptance which he intended to be a matter or decision: he was, in the context of the Decision, saying no more than that conclusion should be accepted for the purposes of the application to amend (and, to repeat again, HMRC accepts that to be a correct assumption for the purposes of the appeal before me).

24. In [11] of the Decision, the Judge summarised the Further Grounds, in a brief but also fair way as follows:

    a. The original detention of the goods against a demand for duty was flawed because Asiana was not told of its right to reclaim or have repaid any duty paid in respect of goods imported.

    b. The demand for duty raised and further duty in respect of other importations were similarly flawed as no reference was made to Asiana's right to repayment.

    c. For the same reason, when a complaint was made about both the retention and the demand for duty, the response wrongly justified the detention and the demand for payment without informing Asiana of its right to repayment.

d. The subsequent responses also failed to draw to Asiana's attention its right to repayment. This was so even after *RCJ CJEU* had been drawn to HMRC's attention (before the judgment had been given): HMRC continued to apply the conditions in section 4(3) and (5) FA 1995 adding that it would defer further consideration of that reference until after the judgment of the Court had been given.

25. The Judge then addressed HMRC's arguments. Mr Yates (who appeared for HMRC before the Judge and appears before me) is recorded as submitting that, in relation to the appeals in question, no claim had been made for repayment of any of the excise duty as none had been paid. Consequently, there had been no decision to refuse to repay duty which could be the subject of an appeal and, importantly to my mind, no evidence had been produced that the product had been used as required by section 4 FA 1995. The submission was that the appeals simply relate to the question whether excise duty is payable or not and the new question raised, that is whether there is now a claim for a refund is not relevant to the appeal.

26. The Judge accepted those submissions in the first two sentences of [15] of the Decision, (describing the situation as one where there had been no formal claim for relief so that there is no decision which could presently be the subject of an appeal).

27. He went on, however, to say this:

> "There is however no doubt that in the light of the decision in [*RCL F-tT*] that, had the duty been paid it would be arguable that Asiana would have a claim for repayment under section 4 FA 1995. It seems to me that it would therefore be open to Asiana to pay the duty concerned now, make a claim for repayment and then if that claim were rejected challenge that decision in the Tribunal by submitting a new appeal. HMRC have accepted that Asiana does not have the

resources to do that and has issued a certificate of hardship that has enabled the current appeals to go forward without payment of the duty assessed."

28. The assertion that there is no doubt is not one I agree with. First, there has been no decision which establishes that the conditions of section 4(3) and (5) are in fact invalid. I do not read *RCL F-tT* as a decision to that effect and, even if it is, it is not one which was binding on the Judge and is certainly not binding on me. HMRC may seek to argue in due course that the conditions are justifiable and valid. But this does not matter: to repeat yet again, HMRC accept for the purposes of the appeal before me that it is arguable that those conditions are invalid and that the question of allowing the amendment should be answered on the footing that they are invalid.

29. Secondly, there is another reason for my disagreement, the explanation of which requires a little deconstruction of the Judge's proposed course of action for Asiana. The Judge proposed the following:

    a. It would be open to Asiana to pay the duty. I agree.

    b. Asiana could make a claim for repayment. I agree, but it would have to demonstrate to HMRC's satisfaction that the Shaoxing cooking wine concerned had been used in the manufacture of foodstuffs. It may be able to do so, but as yet it has not attempted to do so, simply asserting that, in effect, it is obvious that that is the case adding that expert evidence will be adduced (assuming it could obtain permission to adduce expert evidence, the need for which is not, to me at least, self-evident). In the absence of any evidence at all from Asiana (the current position), HMRC could not, in my view, be expected to make a refund of any duty actually paid. Since section 4(1) FA 1995 entitles a taxpayer to repayment only if the HMRC is

satisfied about the end-use, there would be no prospect of success in an appeal against a refusal by HMRC to refund in the absence of such evidence: see further the discussion at paragraphs 47*ff* below.

c. If Asiana were to make a claim after adducing the relevant evidence to HMRC, then I agree that Asiana could, subject to any relevant time-limits, challenge any refusal of a refund in the tribunal.

30. What the Judge concluded from all of this, in [16] of the Decision, is that it would be a grave injustice if Asiana were not able to pursue its arguments because it had not paid the duty and therefore could not claim repayment under section 4 FA 1995 whereas if HMRC had detained the goods and refused to restore them it would have been entitled to have that decision reviewed. And so, he said, this

> "therefore brings into question whether Asiana would be denied an effective remedy and deprived of the exemption that it may be entitled to under Article 27(1)(f). It is therefore arguable that in a situation where a post clearance demand is made and the goods have been processed in circumstances where the importer can show that the conditions in Sections 4(1) and (2) FA 1995 have been satisfied the requirements held to be lawful in [*RCL F-tT*] namely that the duty be paid first and then reclaimed, may be incompatible with the Directive."

31. He then concluded, in [17] as follows:

> "…in the light of the fact that it may be entitled to claim the benefit of the exemption, Asiana should be able to challenge the demand for payment on the basis of the arguments set out in its further grounds of appeal."

32. As to the suggestion of grave injustice, different minds might take different views about that. The grave injustice expressly identified is that Asiana would be denied an effective remedy because it has not paid the duty; the Judge said nothing about the inability of Asiana to pay or the reasons for such impecuniosity. His language suggests that he considered the point to be arguable even where the taxpayer is not impecunious; that is consistent with what he said in the passage quoted where, in

speaking of "an importer" who has satisfied what he described as the conditions in section 4(1) and (2), he appears to be suggesting that the conditions in section 4(1) and (2) may be incompatible, in all cases, with the Directive. He does not begin to explain why that should be so, and makes no mention of Article 27(6) or of what the principle of effectiveness entails.

33. Quite apart from that, the Judge does not begin to explain how the argument which he identified in [16] of the Decision (based on the analogy with the case described in [15] where it is supposed that Asiana had paid the duty and made a claim for repayment) justifies the granting of permission to appeal on the grounds set out in Further Grounds of appeal.

Principles to apply on the appeal from the Decision

34. Although there was some debate between the parties before the hearing about the correct principles for me to apply in considering the appeal from the Judge, I think the common ground between the parties by the time of the hearing, and which I accept, is sufficient to guide me. An appeal only lies on a point of law. I can interfere with the Judge's decision only if he has made an error of law. This could be the case for one of, at least, the following reasons:

    a. He has applied the wrong approach as a matter of law.

    b. He has taken into account irrelevant considerations and/or failed to take into account relevant considerations.

    c. Although he had a discretion whether to allow the amendments, he has acted outside the range of reasonable decisions which a person exercising such a discretion could make.

35. The Judge's decision could be viewed in different ways. It could be seen as a case-management decision, in which case an appellate court, it is said, should be reluctant to interfere. That, of course, is correct in relation to court proceedings but the law is more prescriptive in the present case where, as just indicated, an error of law must be identified. The decision could be seen as dealing with an application for permission to appeal, where permission should be given only if there is an arguable case on a point of law, that is to say that the appeal is not fanciful. Or the decision could be approached in the same way as an application to strike out existing grounds of appeal as disclosing no reasonable grounds (assuming, contrary to the actual position that an appeal could be lodged without permission). Whichever approach is adopted, I think that the principles are as described in the immediately preceding paragraph.

Discussion

36. As already explained, the assessments to excise duty do not concern any goods which were detained. Clearly, therefore, the decision in *RCL F-tT* concerning detention has no direct application in the present case. Mr Trollope seeks to draw an analogy however. As can be seen from my discussion of the Further Grounds, it is said that, just as the failure in *RCL F-tT* to explain the procedures resulted in the refusal to release the detained goods being unlawful, so too it is said that the failure in the present case to explain the right to claim a refund renders the demand unlawful. I reject that submission as simply unarguable. The two situations have nothing relevant in common. A decision to refuse to release detained goods involves the exercise of a discretion. On the facts of that particular case, the failure to explain was an important factor in leading the tribunal to the conclusion that the decision was "irrational"; it is to be borne in

mind that the refusal was also based on an incorrect application of the law since the officer, without the benefit of the decision in *RCL CJEU*, considered that there was no right to claim exemption in the first place because the conditions in sections 4(3) and (5) had not been fulfilled. In the present case, there is no exercise of discretion involved: either the excise duty is due for payment or it is not. It is not for HMRC to give advice to a taxpayer in the position of Asiana about whether it can or should make any sort of claim. I know of no principle which would cast such an obligation to advise on HMRC. Such a principle would be likely to cast an enormous burden on HMRC across a range of taxes: there can be no principle which would restrict the obligation to advise only in respect of excise or customs duties. The tribunal in *RCL F-tT* did not identify any such obligation: its decision arose from the particular facts of that case in the particular context of a decision-making process.

37. It is not entirely clear whether the Judge took this view. He referred in the Decision to the invalidity (or at least the arguable invalidity) of the conditions in section 4(3) and (5) FA 1995 expressly accepting some of Mr Trollope's submissions in relation to those conditions: see [10] of the Decision. Apart from the analogy which it was submitted could be drawn, and which I have rejected as unarguable, sections 4(3) and (5) are, in my view, wholly irrelevant to Asiana's appeal. If he did take these conditions into account in reaching his decision, he was wrong to do so.

38. I do not need to form a view about that since, in my view, the Judge's reasoning does not support his conclusion that the Further Grounds (in contrast with any other ground which he might have identified) has any reasonable prospect of success. I have provided above a summary of the Further Grounds and I have also

set out the Judge's own summary. Those grounds are based on sections 4(3) and (5) being non-compliant with the Directive and on the failure of the HMRC to explain that Asiana could pay the duty and then claim a refund. The Decision does not explain why those grounds are arguable. Those grounds are, in my view, unarguable as a defence to the demand for payment of the excise duty.

39. The Judge did not give permission to amend the notice of appeal to raise any ground of appeal other than the Further Grounds. His only order or direction was that the notice of appeal could be amended to raise the Further Grounds. He appears to have thought that, because he had identified what he perceived as an arguable ground, namely that Asiana was deprived of the exemption and had no effective remedy, he should allow the amendments. In doing so, I consider that he was in error. But if, contrary to that view, he did consider the actual Further Grounds to be arguable, I have to disagree. I do not consider that the Further Grounds are arguable. In my view, therefore, the Judge was wrong, as a matter of law, to have allowed the amendments which he in fact allowed.

40. I would not, however, want Asiana to leave this appeal thinking that, if only it had sought to appeal on yet further grounds, it would have been right to grant permission to appeal on those grounds. It seems to me that I can, and should, deal with the further ground of appeal which Mr Trollope has argued by reference to the principle of effectiveness.

41. The difference between the parties comes down to this. HMRC say that the refund regime is compliant with the Directive. On that basis, Asiana's appeal cannot succeed. Even if it is to be accepted that the conditions in sections 4(3) and (5) FA are invalid, it is inherent in a refund regime that duty must be paid before a repayment can be claimed. Article 27(1) falls to be interpreted with

Article 27(6) (read with recital 23 of the Directive); a regime which provides for exemption to be given only if repayment of excise duty already paid is compliant with the Directive. If payment of excise duty is not made, there is (self-evidently) no right to repayment. There is thus no right under EU law which requires to be vindicated when excise duty has not been paid; and the principle of effectiveness has no scope for application.

42. In contrast, Asiana submits that the overarching consideration is that exemption is available when the relevant use can be demonstrated. If the requirement that there be prior payment of duty results in the right to exemption being lost (because a claim for refund of payment cannot be made), then that requirement cannot be insisted upon by HMRC. The principle of effectiveness would be breached.

43. In my judgment, HMRC are correct on this issue. They are obviously correct as a matter of domestic law. They are also correct as a matter of EU law; and I regard the matter as *acte clair*.

44. It is clear beyond doubt that Member States may give effect to the exemption through a refund regime as is stated in Article 27(6) of the Directive. It is inherent in that, in my judgment, that such a regime is compliant with the Directive in all cases and that there is no scope for a person to argue that, on the facts of their particular case, the right to the exemption cannot be obtained. The right under EU law is, as HMRC submit, a right under the Directive as properly implemented. A refund regime is a proper implementation of the Directive; a failure by a Member State to provide a person with a right which goes beyond that which a proper implementation of the Directive requires is not a breach of EU law. To put the matter a different way, the exemption to which Asiana may be entitled is the right to repayment of any duty which it has paid and there is no breach of the Directive

resulting from the absence of any UK provision allowing for the discharge of unpaid duty.

45. If, as may well be the case, some of the conditions laid down in section 4(3) and (5) FA 1995 are invalid, then the UK legislation is to that extent not compliant with the Directive. The wording of the UK legislation is clear and cannot be given a conforming interpretation. In those circumstances, the offending provisions are to be disapplied leaving the valid parts on the legislation in place. It would not be correct to strike down the entirety of section 4 leaving a taxpayer able to rely on the Directive as though section 4 FA 1995 had never been enacted. This means that the requirement to demonstrate the relevant end use to the satisfaction of HMRC remains a perfectly valid requirement. Asiana has not even attempted to demonstrate the relevant end use to HMRC who are clearly, and justifiably on the information currently before them, not satisfied about the relevant use. The time at which to demonstrate that end use is not at some time during the course of an appeal: it is before the appeal is made.

46. This result is entirely consistent with the decision of the Court in *RCL ECJ*. [53] of the judgment of the Court draws a clear distinction between the ability to adopt a refund system ("although the member states may give effect to the exemption …. by means of a refund…") and the making of an exemption conditional ("they cannot, on the other hand, make the application of that exemption conditional on compliance with condition which are not proven *etc*"). There is, as I have already said, no requirement that a refund system should be adopted only where it necessary to ensure the correct and straightforward application of the exemption and to prevent any evasion, avoidance or abuse.

47. Since the Judge did not, in his order, give permission to raise this argument, it is open to me to decide the issue untrammelled by his view. I do not regard the point as remotely arguable.

48. That is enough to dispose of the appeal in HMRC's favour. I would only add this. Even if it were, contrary to my view, arguable that the refund regime adopted by the UK legislation was not compliant with the Directive in the case of an impecunious taxpayer, Asiana clearly had no directly enforceable rights at this stage of the proceedings since it has not demonstrated the required end use to HMRC's satisfaction. It can, in my judgment, have no such directly enforceable right unless and until it has produced evidence to HMRC on the basis of which they could not properly refuse a refund had payment actually been made.

Disposition

49. HMRC's appeal is allowed. The permission granted by the Judge to amend the grounds of appeal is discharged.

Mr Justice Warren
Chamber President

RELEASE DATE: 29 OCTOBER 2014