**[2022] UKFTT 00105 (TC)**

# TC 08436/V

***CUSTOMS DUTY AND VAT-importation of aircraft-whether within EU customs special procedure when entered UK-impact of expired end use authorisation-whether the aircraft had left the customs territory of the EU before landing in UK-whether HMRC must remit the customs duty and VAT-whether simplified end use procedure should have applied-whether demand in breach of appellant's legitimate expectation-whether appellant entrapped by HMRC***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2018/05914**

**BETWEEN**

**CAERDAV LIMITED**
**(FORMERLY CARDIFF AVIATION LIMITED)** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE MARILYN MCKEEVER**

**The hearing took place on 5, 6 and 19 October 2021. The form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS video platform. A face to face hearing was not held because of the ongoing restrictions as a result of the Covid-19 pandemic and it was considered appropriate to hold the hearing by video. The documents to which I was referred are a Hearing Bundle of 1334 pages, a Supplementary Hearing Bundle of 190 pages, an Authorities Bundle of 783 pages, a Supplementary Authorities Bundle of 270 pages, a further authority, a chronology of the case, revised and additional witness statements and the Skeleton Arguments of the Appellant and the Respondents.**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.**

**Ms Sadiya Choudhury, instructed by Mazars LLP, for the Appellant**

**Mr Jim Duffy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This is an appeal against a C18 demand note issued on 23 April 2018 for customs duty of £275,547.12 and import VAT of £55,086.33 giving a total of £330,633.45. The note relates to the import of an aircraft, an Airbus 319-111, registration number 5H-FJA ("the aircraft") from Sophia in Bulgaria to St Athan, near Cardiff in Wales. The Appellant's principal ground of appeal is that the aircraft was entered into a customs special procedure (inward processing) in Sophia and remained subject to that special procedure upon entering the UK so that it was not subject to customs duty and VAT on entry. HMRC contend that the special procedure was discharged when the aircraft left EU airspace on its journey from Sophia to St Athan so that a further import occurred when the aircraft landed in the UK.

2. The Appellant further argues that HMRC should remit the customs debt on the basis of Article 174(1)(b) of the Union Customs Code as the original customs declaration has turned out not to be justified as a result of special circumstances.

3. In the alternative, if the customs debt is found to exist, the Appellant argues that:

   (1) HMRC have applied an *ultra vires* restriction on the simplified End Use customs procedure and had they not done so, the Appellant could have used that procedure and the customs debt would not have arisen.

   (2) The actions of HRMC's Officer Jones in issuing the demand note were in breach of the Appellant's legitimate expectations; and

   (3) The matter was conducted by HMRC in such a way as to amount to "entrapment".

4. In addition to the documents mentioned above, I heard oral evidence from four witnesses, Mr Coleman, the Appellant's Finance Manager, Mr Hina, a customs consultant engaged by the Appellant, Mr Jones, the Officer of HMRC who issued the demand note and Mr Snow, a Senior Business Manager of HMRC and a specialist in customs matters.

### PRELIMINARY MATTERS

5. The hearing was originally listed for two days. The anticipated witnesses were Mr Coleman and Mr Jones. On 30 July 2021 HMRC received documents from the Bulgarian customs authority ("the Bulgarian Documents") following a request for assistance which was requested by the Appellant. HMRC provided the documents to the Appellant on 10 August 2021. As a result of the receipt of the Bulgarian documents, Mr Jones submitted a revised witness statement. Shortly before the hearing I received applications in response to the Bulgarian Documents (which were granted) to admit further witness evidence from Mr Hina and Mr Snow respectively. As a result of having additional witnesses, the original hearing went part heard and was completed at the resumed hearing on 19 October 2021.

6. On 20 October 2019 HMRC made a Strike Out application in relation to the grounds of appeal outlined at [2] and [3] above. This was never pursued. It was agreed to treat the application as withdrawn and the relevant issues were dealt with as part of the substantive hearing.

### THE FACTS

7. Caerdav Limited (formerly Cardiff Aviation Limited) ("Caerdav") provides maintenance, repair and overhaul services and training services for major airlines involved in the travel sector. It operates from a business park which is part of a former RAF station at St Athan, near Cardiff. The company is a substantial business and before the pandemic employed around 100 people. Between 2014 and 2018 the company had suffered financial difficulties

and there had been a high turnover of senior staff, having had four or five CEOs and three Finance Directors in the period.

8. When an aircraft lands at St Athan from outside the EU in order for Caerdav to carry out services, Caerdav is regarded as importing the aircraft and the default position is that customs duty and import VAT are due.

9. The Union Customs Code of the EU provide for a number of "special procedures". Where goods are entered into a special procedure no duty is due, or it is due at a reduced rate. Under the "End Use" procedure, goods may be released for free circulation in the EU at a reduced or zero rate of duty, provided that the importer holds an End Use Authorisation ("EUA"). Caerdav had held an EUA for a number of years, but the authorisation in question expired on 31 October 2016. The person who had dealt with the maintenance and renewal of the EUA was still employed by the company at the time, although she left in February 2017, but for some reason, the expiry of the EUA was overlooked. Mr Coleman believed that the company understood that a renewal application could be made retrospectively and backdated for up to a year after expiry, so it may have been considered that the renewal of the EUA was not a priority. I should mention here that although I found Mr Coleman an honest and straightforward witness, the help he could give the Tribunal was limited. Mr Coleman is now the Finance Manager of Caerdav, but at the time of these events he was an assistant in the finance department and was not directly involved with them. He only became involved on the issue of the C18 demand note. At that point, he became responsible for the subsequent dealings with HMRC. His evidence about the earlier history is based on a review of the correspondence and conversations with colleagues. He was unable to answer questions about the reasons why certain things did or did not happen or what the company knew or believed, or at least he could only speculate about such matters, as he was not, at that stage, personally involved. As noted, the company had suffered a substantial turnover of senior staff and Mr Coleman was giving evidence mainly because he was the only senior person left who had been at the company at the time.

10. On 15 November 2016, Caerdav imported the aircraft. At the time, Caerdav used a freight forwarder to deal with imports and make the relevant declarations to HMRC. The aircraft was declared to HMRC in the mistaken belief that there was a valid EUA in place. A customs code was entered on the documentation which could only be used where there was an EUA and the duty applicable to this code was 0%. It is common ground that in the absence of a special procedure, a different code should have been used and the applicable rate would be 2.7% which is the rate used in the calculation of the customs debt.

11. The aircraft was owned by a company called BBAM and was leased to Fastjet plc and operated by Lufthansa. The aircraft was registered out of Tanzania. Fastjet was in financial difficulties and BBAM intended to sell the aircraft to another carrier in the US. Lufthansa flew the aircraft from Tanzania to Sophia in Bulgaria for maintenance work and it arrived in Bulgaria on 2 October 2016.

12. The aircraft came to the UK on 15 November 2016 and, after some minor work was carried out on it by the Appellant, the aircraft was flown to the Republic of Ireland and thence to the United States.

13. The invoice for the work included four elements: labour and materials of £1,024.65 and £51.14 respectively, £600 for six days parking and £6,785 for aviation fuel. Clearly, a minimal amount of work/servicing was carried out. It seems that a major overhaul was performed in Sophia, before the aircraft came to the UK.

14. When the aircraft was imported, the documentation was completed in the mistaken belief that the end use certificate was still in place. HMRC'S Customs Handling of Import and Export

Freight (CHIEF) computer system did not generate any error notice and the company remained unaware that the EUA had expired.

15. On 1 March 2017, a lady called Nicola Green, who had recently joined the company emailed HMRC to enquire about "reinstating" the EUA. We do not know what triggered this. She sent further chasing emails on 2 and 19 March. Mr Wignall of HMRC responded on 20 March and there was further correspondence confirming that the End Use Certificate had expired on 31 October 2016. In further emails dated 21 March, Mr Wignall informed Ms Green that it was not possible to "reinstate" an EUA, the company would have to make a new application. He provided Notice 3001 which contained guidance about the application and subsequently confirmed which form needed to be completed. He also stated that before the form could be completed the company would need a Customs Comprehensive Guarantee (CCG) and that a form CCG1 should be used for this. He provided the Customs Helpline number in case Ms Green needed further advice. Ms Green started to look into this and it appeared that in order to obtain the CCG, the company would need to obtain a guarantee from its bank. Mr Coleman said in his witness statement "As the company still had plenty of time in which to renew the certificate and there did not seem to be much hinging on it, the question of getting a CCG and renewing the end use certificate fell into limbo".

16. It is unclear why there was a delay in applying for the CCG. Mr Coleman indicated that it might have been something to do with the company considering how much the guarantee should be for. As noted, Mr Coleman was not personally involved at the time, but he understood from colleagues that the process for applying for CCG was complex and difficult and that is why it took a long time. Mr Coleman did not know when the company actually applied for the CCG.

17. Mr Jones stated that is his, admittedly limited, experience of other companies, it took about two to three weeks to obtain a CCG.

18. HMRC's Authorisation and Returns Team (ART) set up an audit into the company on 28 March 2017. The ART had become aware that Caerdav had claimed zero rates of duty on six imports after the EUA had expired. The goods imported under the expired authorisation had a customs value of over £10m, with most of that attributable to the aircraft. The purpose of the audit was to investigate the company's use of the EUA, not only after its expiry, but also to see how well the company had complied with the conditions attaching to the EUA. For example, had the company made and kept full records and had they made accurate customs declarations and used the right commodity codes?

19. On 31 May 2017, Officer Rhys Jones and another HMRC officer visited the company's premises. They were mainly dealing with a Mr Cook who left Caerdav in September 2017. Before the visit, Mr Jones had asked the company to provide a series of documents in relation to 11 import entries made between 31 July 2015 and 15 November 2016. Some of the documents requested were provided at the meeting but many were missing. Some were produced later, but others have never been produced. Mr Jones concluded that the company had not been adhering to the conditions of the authorisation, as they had not been keeping adequate records. Mr Jones' notes show that he requested the commercial invoice and related documents in relation to the import of the aircraft.

20. Although not mentioned in his notes, Mr Jones stated that he advised that the company should make a new application for an EUA and that it was possible to apply for a retrospective authorisation which could be backdated by up to a year. If granted, this would solve the problem of the company having made imports under an expired authorisation. Mr Jones explained that a retrospective application had to satisfy a number of conditions and that it could only be

applied for in exceptional circumstances. It should have been clear to the company that the grant of a retrospective authorisation was not a matter of routine.

21. Mr Jones notes of the meeting indicate that the need for a CCG was mentioned, although this was not dealt with in the subsequent correspondence. The company, in the person of Ms Green, was aware, from the previous correspondence that it needed a CCG and some effort had been made to take this forward although for some reason the company did not proceed.

22. The audit was hosted by Mr Cook and although Mr Coleman was not involved, he does recall asking Mr Cook how it was going. Mr Cook was concerned because he had been told that there was a potential liability of £10m or £11m. It seems that this related to a requirement for documents relating to an aeroplane other than the aircraft and it was subsequently resolved. It should, however, have been clear to the company that the potential liabilities were large. Mr Coleman agreed that the company was aware that the customs duty was based on value and the potential duty on the import of an aeroplane would have been a large sum of money.

23. Following the meeting, Officer Jones sent Mr Cook a letter on 7 June 2017. Mr Jones asked for additional information/documents in relation to a number of entries where End Use had been claimed, both before and after the expiry of the EUA. This included the aircraft where the company was asked for the commercial invoice and any other relevant documents. The letter also set out what needed to be done to obtain an EUA. It said that a new application had to be made on form SP1 and that the period of authorisation would not normally be backdated beyond the date of submission of the application. It set out the need to explain the reasons for requesting backdating and that they would have to produce records showing compliance with end-use requirements. It emphasised that the maximum period of retrospection was one year from the date of the application. Mr Jones offered to provide a letter which would negate the company having to provide records "so that you can make a request for retrospection back to the entries made in November 2016, which were made on an expired authorisation". There were also recommendations to improve future record keeping.

24. The letter, importantly, stated

> "…I will grant the company until 30th June 2017 without taking any action in regards to the entries made under an expired Authorisation. If the company have not completed all parts of the application in full, including the details regarding the guarantee, and submitted it to the Authorisation and Returns Team… by this date, then I will issue the company a Post-Clearance Demand Notice for the entries that were made on the expired Authorisation, i.e. all entries made on or after 01/11/2016."

25. I find that the company was aware, in March 2017 that its EUA had expired and even if this had been forgotten about, the need for a new EUA was pointed out during the audit visit in May. It was also made clear that it would need to be backdated to cure the import of the aircraft on the expired EUA. I infer that the directors of the company must have known that there was a substantial amount of duty at stake. The company was also aware of the need for a CCG in March 2017 and this was again mentioned at the audit meeting. The letter of 7 June put these matters beyond doubt. The company must have realised that it needed to apply for a new EUA and the CCG, that they had to request retrospection which would not be automatic, that there was a limit to the period of backdating and if they did not obtain the CCG and a backdated EUA, the company would potentially have a very substantial liability for duty on the aircraft imported after 31 October 2016.

26. On 5 July, Mr Cook sent some of the documents requested to Mr Jones. No mention was made of the EUA application. On 10 July Mr Jones replied confirming some entries were now satisfactory, the commercial invoice sent by Caerdav to the customer was still needed for three

entries including the aircraft and documentation was still needed for three further entries. He set a new deadline for provision of the documents of 17 July 2017. He also required evidence that Caerdav had applied for the EUA by 17 July. On 9 July, Mr Cook said he had been unable to find the further documents. Mr Jones suggested asking the freight agents.

27. On 21 June 2017 the Customs Comprehensive Guarantee Team (CCGT) acknowledged that Ms Green had submitted an application for a CCG and requested completion of a questionnaire within 14 days. On 4 July, Ms Green asked for an extension of one week owing to staffing difficulties. The CCGT replied on 12 July giving a one week extension to return the questionnaire and stating that if they did not receive a response by 19 July, the application would lapse and the company would need to reapply. I was not taken to any subsequent correspondence about the application and in the light of Mr Coleman's statement that the process of obtaining the CCG was "exceptionally arduous, complicated and time-consuming, involving numerous steps" I infer that that application lapsed.

28. On 14 July 2017, Mr Cook had emailed Mr Jones attaching a copy of the CCGT email of 12 July to show the current status of the CCG/EUA application. He also said that they had exhausted all avenues and could not investigate the missing audit items any further.

29. On 24 August 2017, Mr Jones asked the ART for an update on Caerdav's application for an EUA and was informed no application had been received.

30. Mr Cook left the company on 15 September 2017. Following that, the company decided that several members of staff should be trained in the correct customs procedures and a group of eight people including Ms Green and Mr Coleman attended a training course at which it was stated that End Use would no longer be required in relation to aircraft from January 2018, assuming the appropriate legislation was duly passed, which it was on 10 January 2018.

31. Mr Coleman's understanding was that when the company became aware, as a result of the training course, that End Use would no longer apply to the import of aircraft from the near future, and believing that "next to no liability hinged on the renewal" of the EUA the company effectively ceased to pursue the renewal of the EUA. I note that had an application been made at this time, it could still have been backdated to cover the import of the aircraft. Mr Coleman accepted that there was nothing in the documents to indicate that HMRC would not pursue any liability.

32. There were three reasons why the EUA application was not renewed. First Mr Cook, who was dealing with the matter left, although if it had been considered important, someone else would have taken it on. Secondly, the company understood that within a few months, it would no longer need the EUA to import aircraft and importantly, the company did not think that it might have a very large liability to customs duty and VAT if it did not renew the EUA.

33. On 10 October 2017 HMRC issued a "right to be heard letter" stating that as a result of errors in the company's records, import VAT of £4,708.18 was due. The schedule to the letter set out the errors and their consequences. The VAT assessed related to a lack of documentation showing that End Use applied, at a time when the EUA subsisted.

34. Under the heading "non-monetary errors" there was a statement that "The following entries had errors but these have not caused any underpayments of Customs Duty or Import VAT". One of those entries related to the aircraft. The Schedule went on to say "Each of these entries were aircraft entered to End Use. However, a full audit trail of the goods was not presented during the audit. As the goods are qualifying aircraft for VAT relief, there is no underpayment on these goods".

35. A similar letter was sent to Mr Anderson, who had taken over from Mr Cook, on 10 November 2017 stating the intention to issue a demand note for £12,222.34 import VAT. The

schedule to the letter explained the proposed demand note. Under the heading "monetary errors" there were five entries dated November and December 2016. The schedule stated "All of the above entries were entered to End Use Authorisation…and had import VAT suspended at the time of import. However the End Use Authorisation expired on 31st October 2016. Therefore the import VAT that was suspended under the use of an expired authorisation is also now due". The entries and comments under the heading "non-monetary errors" were the same as in the 10 October letter. That is, it stated that there was no underpayment for four entries including the aircraft.

36. The C-18 demand note was issued on 1 December 2017 (the document incorrectly states 2015).

37. Penalties of £4,000 were charged for failure to produce documents.

38. Caerdav did not challenge these charges as they were considered to be relatively minor. Mr Coleman acknowledged that there was nothing in the correspondence to indicate that the company did not need a backdated EUA.

39. In February 2018 the ART carried out a review of the case and discovered that additional duty and import VAT was due. The aircraft had been declared to End Use after the expiry of the EUA. The commodity codes which had been used gave a 0% rate of duty, but these codes could only be used with a valid EUA. They should not therefore have been used in relation to the aircraft. Different commodity codes should have been used, in the absence of a valid EUA, which gave a rate of duty of 2.7%. Mr Jones had overlooked the fact that the wrong commodity codes had been used. Once he had been alerted to this, he wrote a further right to be heard letter on 13 March 2018 stating that £275,547.12 customs duty and £55,086.33 import VAT was due, a total of £330,633.45. The schedule to the letter explained that six entries, including the aircraft had used commodity codes which were only applicable with a valid EUA and as the company did not have one, different codes should have been used which carry a 2.7% rate of duty, giving rise to the customs debt. The formal C-18 Post Clearance Demand Note was issued on 23 April 2018.

40. Mr Coleman states that, in the light of the previous correspondence, this letter caused consternation at the company. Ms Green telephoned Mr Jones and he explained the mistake over the commodity codes on the telephone and in a subsequent email. The 13 March letter was the first indication that the company had that the expiry of the EUA would have such a substantial financial impact.

41. Mr Anderson, the managing director of Caerdav responded to the right to be heard letter by an undated letter (in fact dated 6 April 2018). He noted that the point had not been picked up in the letter of October 2017 and that the company believed it had a legitimate expectation that the liability would have been picked up when the entry was previously reviewed. Mr Anderson further argued that a retrospective application for an EUA could be made without a time limit under the Union Customs Code and that the company had submitted a retrospective application. Mr Anderson sent a further letter, dated 17 April 2018, referring to a legitimate expectation having been raised by the factS that the CHIEF computer system did not reject the initial entries with out of date EUA codes, the October 2017 letter indicated only minor errors and the five month delay in raising the issue which made it impossible to apply for a retrospective End Use approval. He submitted that HMRC could put matters right by an application of "Terex/Caterpillar" (to which I shall return).

42. Mr Jones issued his decision letter on 18 April 2018 confirming that the amount of £330,633.45 was due. Mr Jones pointed out that at the 31 May 3017 meeting, which Mr Anderson had attended, and afterwards, he had advised the company to apply for a new EUA with retrospective effect as soon as possible. The actual decision, following the October and

November 2017 letters, that £12,222.34 was the amount due, was made on 15 December 2017. That letter began with the statement, in bold, "We've issued this decision without prejudice to any further action that we may take in relation to this matter". Mr Jones disagreed with the suggestion that the company had been denied the opportunity to apply for a retrospective EUA. He also pointed out that retrospection was only granted in exceptional circumstances and that in any event, the company had not been able to produce the relevant documents for the aircraft. He also stated that the computer system is not responsible for detecting expired authorisations; it is the importer's responsibility to ensure accurate declaration are made to Customs.

43. Mr Anderson wrote again, reiterating his points and requesting a review. A review conclusion letter, upholding Mr Jones' decision was issued on 9 August 2018 and on 7 September 2018, the company appealed to the Tribunal.

44. Caerdav had in fact made an application for a new EUA on 4 April 2018. The application requested authorisation to commence on 1 November 2016. In an email acknowledging the application dated 10 April 2018, Officer Errington pointed out that the authorisation could be backdated by a maximum of one year and only in exceptional circumstances. Officer Errington stated that the earliest date that the authorisation could commence would be 9 April 2017 and he invited the company to explain the nature of the exceptional circumstance. I did not have a copy of Ms Green's reply, but Officer Errington wrote on 30 April 2018 that he would backdate the application to 9 April 2017 if she could demonstrate exceptional circumstances and otherwise, he would be minded to issue the authorisation to commence from 9 April 2018. Ms Green replied asking for the EUA to commence on 9 April 2018. There seemed to be no attempt to put forward any exceptional circumstances. Of course, even if the authorisation had been backdated for the maximum period, it would not have covered the import of the aircraft and the need for an EUA for aircraft no longer applied, so this is not perhaps surprising.

45. The new EUA was issued on 15 May 2018, commencing on 9 April 2018.

46. In the course of preparing for the appeal, the company tried to check the history of the aircraft before and after it came to St Athan to determine whether it had previously entered into free circulation in the EU. If this was the case, the duty and VAT would not be due.

47. The company established, from a plane-spotters website that the aircraft had been at Sophia Bulgaria from 2 October to 3 November 2016 before it arrived in Cardiff. After the aircraft left St Athan, it flew to Shannon in the Republic of Ireland and from there to its new home in the US. The Appellant was unable to establish whether the aircraft had been formally imported into Bulgaria, and therefore into the EU. In August 2019, the Appellant's representatives, Mazars LLP emailed Lufthansa about whether it had imported the aircraft into Bulgaria but received no response.

48. Also in August 2019, HMRC made a mutual assistance request to the Bulgarian customs authorities enquiring about the entry of the aircraft into Bulgaria. In November, the Bulgarian customs authority responded saying that the aircraft did not land in Bulgaria as the flight was cancelled, contrary to the Appellant's information.

49. On 9 February 2021 HMRC provided a copy of the mutual assistance request to the Appellant, from which it was clear that they had asked about the wrong date. The request related to the period 30 September 2016 to 1 October 2016 whereas the Appellant's information was that the aircraft had been in Bulgaria on 2 October 2016. On 17 May 2021, Mazars wrote to HMRC, pointing out the error and asking them to make a further mutual assistance request. A further request was made in June 2021 referring to the correct dates.

50. The Bulgarian authorities responded on 21 July 2021 confirming that the aircraft had landed in Bulgaria on 2 October 2016 and providing copies of the customs declarations and

various documents submitted with them ("the Bulgarian documents"). The Bulgarian documents showed that Lufthansa Technik Sofia had entered the aircraft into the EU customs special procedure of "inward processing". The Bulgarian documents also included an "export accompanying document" ("EAD") which indicated that the aircraft's ultimate destination was the USA.

51. The Bulgarian documents were sent to Mazars on 10 August 2021, following which both parties sought to adduce further witness evidence (which I allowed) to elucidate the significance of the documents.

52. I will return to this in detail below, but at this stage, I note that inward processing allows goods to be imported into the EU at zero or reduced rates of duty for "processing", such as repairs. The goods remain subject to the special procedure until they leave the territory of the EU.

53. The importance of this for the Appellants, is that if the aircraft remained subject to inward processing when it arrived at St Athan, there was no liability to customs duty in the UK so that it was irrelevant that the EUA had expired.

**THE EU LAW RELATING TO SPECIAL PROCEDURES**

54. The Union Customs Code Regulation (EU) No. 952-2013 (UCC) governs customs matter within the EU, including Customs Special Procedures which includes End Use and Inward Processing. Procedural Rules are contained in Regulation (EU) 2015/2446 ("the Delegated Regulations") and Regulation (EU) 2015/2447 ("the Implementing Regulations).

55. The normal rule is that when goods enter the EU from a non-member state, customs duty and import VAT may be payable. Where a Special Procedure applies, there is an exemption or reduction in the duty. Mr Snow explained that the purpose of the Special Procedures is to support businesses in the EU where the imported goods will not compete with EU goods. The procedures create a risk that the goods on which no duty or VAT has been paid might be diverted to the EU market without paying the duty or satisfying the qualifying conditions. For this reason, Special Procedures are subject to authorisation and ongoing supervision and monitoring by the customs authorities of the member states. Article 79 of the UCC provides that a customs debt arises on non-compliance with any of the requirements of the Special Procedures. Article 211 of the UCC requires an authorisation for inward processing and end use, among other things.

56. Article 256 of the UCC sets out the scope of Inward Processing:

> "1. …, under the inward processing procedure non-Union goods may be used in the customs territory of the Union in one or more processing operations without such goods being subject to any of the following: (a) import duty; (b) other charges as provided for under other relevant provisions in force; (c) commercial policy measures, insofar as they do not prohibit the entry or exit of goods into or from the customs territory of the Union."

57. It is common ground that the aircraft constituted, and always had constituted, "non-Union goods". "Processing operations" would include repairs and maintenance. Goods which are entered into the Inward Processing procedure are intended ultimately to be removed from the EU, although they may be moved around the territory of the EU in certain circumstances whilst remaining subject to the procedure.

58. Article 214 of the UCC provides for records to be kept where goods are in a Special Procedure and the records "shall contain the information and the particulars which enable the customs authorities to supervise the procedure concerned, in particular with regard to identification of the goods placed under that procedure, their customs status and their movements."

59. Article 178.1 of the Delegated Regulations provides that the records referred to in Article 214 UCC are to include the location of the goods and information about any movement of them. In other words, where goods are under a Special Procedure, there should be a paper trail covering all the movements of those goods until discharge from the Special Procedure.

60. Article 215 UCC provides for the discharge of a Special Procedure on the goods leaving the EU:

> 1. In cases other than the transit procedure and without prejudice to Article 254 [End Use], a special procedure shall be discharged when the goods placed under the procedure, or the processed products, …, have been taken out of the customs territory of the Union, or ….”

61. Article 219 UCC provides

> “In specific cases, goods placed under a special procedure other than transit or in a free zone may be moved between different places in the customs territory of the Union.”

62. Article 179 of the Delegated Regulations provides:

> “1. Movement of goods placed under inward processing, temporary admission or end-use may take place between different places in the customs territory of the Union without customs formalities other than those set out in Article 178(1)(e) [which relate to records and information].”

63. Article 267 of the Implementing Regulations provides, so far as material:

> “1. Movement of goods to the customs office of exit with a view to discharging a special procedure other than end-use and outward processing by taking goods out of the customs territory of the Union shall be carried out under cover of the re-export declaration. …
>
> 5. Where movement of goods takes place in accordance with paragraphs 1 or 3, the goods shall remain under the special procedure until they have been taken out of the customs territory of the Union.”

64. The “customs territory of the Union” is defined in Article 4 of the UCC as being the territories of each of the member states “including… their airspace”.

65. The “customs office of exit” is defined by Article 329(1) of the Implementing Regulations:

> “…the customs office of exit shall be the customs office competent for the place from where the goods leave the customs territory of the Union for a destination outside that territory.”

66. Article 136 of the UCC provides:

> “Articles 127 to 130 and 133, Article 135(1) and Articles 137, 139 to 141, and 144 to 149 [which relate to the import of goods into the customs territory of the Union] shall not apply to non-Union goods and goods referred to in Article 155, which have temporarily left the customs territory of the Union while moving between two points in that territory by sea or air, provided they have been carried by direct route without a stop outside the customs territory of the Union.”

67. In other words, if goods are moving by air between two places within the EU and “temporarily leave” the EU, no new customs entry takes place on arrival.

68. The position may be summarised as follows:

(1) When goods enter the EU they are subject to customs duty and import VAT.

(2) If the goods are entered into Inward Processing on entry to the EU, the duty and VAT is suspended.

(3) No duty or VAT is due whilst the goods remain within the Inward Processing procedure.

(4) If the goods are discharged from the Inward Processing procedure and subsequently arrive elsewhere in the EU, customs duty and VAT are due.

Goods are discharged from the Special Procedure i.e. it ceases to apply when the goods are taken out of the customs territory of the Union (but it continues to apply until that happens).

(5) The customs office of exit is the office/place from which the goods leave for a destination outside the EU.

(6) There are circumstances where goods may temporarily leave the EU territory whilst remaining within the Inward Processing procedure.

**APPEAL RIGHTS AND THE RELEVANT DOMESTIC LAW**

69. Article 44 of the UCC gives a person a right of appeal against the decision of a customs authority relating to the application of customs legislation which affects that person. This is given effect in domestic law by Finance Act 1994 (FA 1994). Section 13A provides:

> "[**13A Meaning of "relevant decision"]**
>
> [(1) This section applies for the purposes of the following provisions of this Chapter.
>
> (2) A reference to a relevant decision is a reference to any of the following decisions—
>
> (a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union], as to—
>
> (i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
>
> (ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
>
> (iii) the person liable in any case to pay any amount charged, or the amount of his liability; or
>
> (iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;.."

70. The decision in dispute is a "relevant decision" and the right of appeal to the Tribunal is conferred by section 16 FA 1994. Section 16(5) sets out the Tribunal's powers on an appeal against a relevant decision:

> "(5) In relation to other decisions [essentially relevant decisions], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

71. The Tribunal accordingly has a full appellate jurisdiction in this matter.

72. At the time, Section 1(4) of the Value Added Tax Act 1994 (VATA) provided:

> "VAT on the importation of goods from places outside the member states shall be charged and paid as if it were a duty of customs".

73. Sections 15 and 16 VATA contain further provisions about imported goods and how customs enactments apply to VAT. Those sections state, so far as material:

> "**15 General provisions relating to imported goods**
>
> (1) For the purposes of this Act goods are imported from a place outside the member States where—
>
> (a) having been removed from a place outside the member States, they enter the territory of the [European Union];
>
> (b) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory; and
>
> (c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the [European Union] would be incurred.
>
> (2) Accordingly—
>
> (a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the [European Union] would be incurred, and
>
> (b) the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt. …
>
> **16 Application of customs enactments**
>
> (1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—
>
> (a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and
>
> (b) the [EU] legislation for the time being having effect in relation to [EU] customs duties charged on goods entering the territory of the [European Union], shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, [EU] customs duties.
>
> (2) Regulations under [section 105 of the Postal Services Act 2000] (which provides for the application of customs enactments to postal packets) may make special provision in relation to VAT."

74. This means that the liability for import VAT follows the liability for customs duty and the equivalent appeal rights apply.

75. I now turn to the Appellant's grounds of appeal.

**THE INWARD PROCESSING GROUND**

76. Following receipt of the Bulgarian Documents, the Appellant's main ground of appeal is that when the aircraft arrived at St Athan it was subject to Inward Processing so that no duty or VAT was due and it was irrelevant that the EUA had expired. In the Appellant's view,

Shannon (in the Republic of Ireland) was the customs office of exit and the aircraft remained within the Special Procedure until it left Irish airspace on its way to the USA.

77. The Respondent's submit that the customs office of exit was Sophia in Bulgaria and the aircraft was discharged from Inward Processing when it flew over Serbian airspace on its way to St Athan. On arrival it was no longer subject to EU customs control and its arrival constituted a new import on which duty and VAT were due (but would not have been had a valid EUA been in existence).

78. HMRC and Caerdav both produced witness evidence in support of their respective cases. Mr Hina and Mr Snow were not "expert witnesses" in the technical sense but both had extensive practical experience of customs procedures and might be described as experts in the field.

79. There were two critical documents among the Bulgarian documents, the import entry document, for which there was an English translation and an "accompanying customs document" which was the equivalent of the UK document known as an "Export Accompanying Document" and which I will call the EAD.

80. Mr Snow and Mr Hina agreed that the import entry shows that the aircraft was entered to Inward Processing by Lufthansa Technik Sophia on its arrival at Sophia in Bulgaria on 3 October 2016.

81. The EAD was only provided in its Bulgarian version, but the information was largely contained in EU wide codes, so that Mr Hina and Mr Snow were able to comment on the effect of the document.

82. They agreed that it was an export declaration showing Bulgaria as the country of export and the US as the destination country. The EAD referred to the aircraft which was identified as an Airbus A319-111 and stated its gross mass and registration number.

83. Mr Hina noted that the Export Customs Procedure Code was in respect of a re-export of Inward Processing goods, but that code covered VAT only. He suggested that a different code should have been used which covered both customs duty and VAT. Mr Snow agreed that it appeared there had been an error in the code. There was a further copy of the import entry with a manuscript annotation dated 2 March 2017. It was suggested that this indicated that the Inward Processing procedure arising from the import entry had concluded, the IP having been discharged by the export referred to in the EAD.

84. The code for the intended office of exit from the EU is that of Sophia, Bulgaria. Mr Snow suggests that this is consistent with a direct export from Bulgaria out of the EU. If there was to be an indirect export from the EU, i.e. via another member state, Mr Snow would have expected there to be additional codes. There is nothing to show that there was any subsequent amendment to this. Mr Hina considers that this was a further error by the Bulgarian authorities and that for an export via another member state it should also have included the codes for St Athan and Shannon. He suggests that the Bulgarian authorities were content that the IP liability was discharged by as a result of the export to the US, there being evidence that the aircraft had ultimately arrived in the US.

85. Mr Hina stated that a copy of the EAD should have been given to Caerdav when the aircraft arrived in Wales which would have indicated that it was under customs control and there was no need to enter it to End Use or submit a customs entry. No such document was provided to Caerdav.

86. In summary, Mr Hina's view is that the aircraft entered IP in Bulgaria and was indirectly exported to the US via St Athan and Shannon so that it remained within customs control until

it left the EU on its way from the Republic of Ireland to the USA but the EAD erroneously failed to refer to St Athan and Shannon.

87. Mr Snow does not agree that the codes for St Athan and Shannon were omitted in error. He considers that the EAD is consistent with a direct export from Sophia to the US so that the IP procedure would be discharged, in accordance with Article 215 UCC, when the aircraft left the territory of the EU and it did not matter where it went on the way to the US. He did not consider that Article 267 of the Implementing Regulations applied which allows goods to remain under a Special Procedure where the goods are declared for indirect export via a customs office of export in another member state.

88. No evidence was provided of the actual flight plan of the aircraft on leaving Sophia, but I was taken to a map of Europe showing a line between Sophia and St Athan. It was not suggested that this was an entirely accurate representation of the route, but it clearly showed that if the aircraft took a reasonably direct route it must have flown over Serbian airspace. Serbia is not in the EU. It may also have flown over Switzerland, also outside the EU. The burden would be on the Appellant to prove that the aircraft did not leave the customs territory of the EU on its flight from Sophia to St Athan. It seems clear that the aircraft would have had to have made a substantial detour to avoid flying over Serbia. Mr Snow had also obtained flight radar records of flights from Sophia to EU destinations including London, Paris and Berlin and the routes had crossed Serbian air space. I find, on the balance of probabilities, that the aircraft did fly over Serbia on its route to St Athan which on the face of it constituted leaving the customs territory of the EU. If the export of the aircraft was a direct, rather than indirect export, the Appellant would be treated as importing the aircraft from outside the EU when it arrived at St Athan so that, in the absence of a valid EUA, they were liable for the customs duty and VAT.

89. Mr Snow was cross-examined on the procedures for direct and indirect export in oral evidence. He stated that if the aircraft remained under customs control, entries would be made in the Export Control System (ECS), an EU wide computer system showing that it was an indirect export. The actual office of exit would need to tell the office of export (Sophia) when the goods actually left the EU from the other state. The EAD provides the link and should show the other member states to which the goods will be taken before exiting the EU. This enables the office of export to discharge the IP. It is not necessary in the case of a direct export as the office of export would know when the goods left the EU and could discharge the IP itself. If the export was a direct export there was no need to make any entries on the ECS. Mr Snow stated that as the EAD showed Sophia as the office of exit it would not be possible to start an ECS movement on the basis of that document. The EAD would need to mention the other EU states to which the goods were going in order to start an entry in the ECS. In his view, there was a zero possibility that there had been an entry on the ECS based on the EAD.

90. The Bulgarian Documents did not include any entries from the ECS which is consistent with a direct export. Although there were some handwritten indications on the invoice that the aircraft was going to the US via Wales and Ireland, Mr Snow indicated that the documents would be processed electronically and would not pick up manuscript notes.

91. Mr Snow also stated that where the aircraft had left the EU by flying over non-EU airspace, it would only re-enter the EU for customs purposes when it next landed. If it landed in a non-EU country there would be no duty/VAT, but if it landed in a member state this was regarded as an import from outside the EU and duty and VAT were, in principle, due.

92. Ms Choudhury put it to Mr Snow that Article 136 UCC meant that the aircraft should not be regarded as imported on its arrival in Wales because it had only "temporarily left the customs territory of the Union while moving between two points in that territory by …air" as it had

gone directly from Sophia to St Athan "without a stop outside the customs territory of the Union".

93. Mr Snow's response, and Mr Duffy's submission was that the aircraft had not temporarily left the customs territory of the Union while moving between two points in the territory as this only applied where the movement was under a Special Procedure. One has to read Article 136 UCC with Article 267 of the Implementing Regulations. Article 267 is headed "movement of goods under a special procedure". Article 267.1 provides: "Movement of goods to the customs office of exit with a view to discharging a special procedure other than end-use and outward processing by taking goods out of the customs territory of the Union shall be carried out under cover of the re-export declaration." That is, where goods are going from one member state to another member state from which they will leave the EU, thus discharging the special procedure, this must be done under cover of a document such as the EAD showing that the export from the first member state is indirect, via another member state. Where this is the case, Article 267.5 provides that the Special Procedure continues until the goods have left the customs territory of the Union.

94. In such circumstances, Article 136 would preserve the status of being subject to a Special Procedure even if the goods flew over non-EU airspace on the way from one member state to the customs office of exit in another member state. The EAD and ECS would need to show that it was intended to be an indirect export for Article 136 to apply.

95. In the present case, Mr Duffy submits, the aircraft was not moving between two points in the customs territory of the Union, the EAD indicated that this was a direct export and the aircraft was moving from Sophia to the USA. It did not matter that it was stopping elsewhere on the way or that it was stopping in another EU state. Article 136 did not apply. Therefore the effect of Article 267.5 was to discharge the IP procedure as soon as the aircraft leaves the customs territory which was when it flew into Serbian airspace.

96. Ms Choudhury submits that there was an error in the EAD and it should have shown that the aircraft was being exported via St Athan and Shannon. She relies on Article 136, which she submits, means what it says and that flying over non-EU airspace and then back into EU airspace does not deprive the IP procedure of its effect. There is nothing in Article 267 to override this. Accordingly, she submits, the aircraft remained subject to IP when it arrived in Wales and there was no need for any further customs declaration in the UK.

97. She argues that a Special Procedure cannot be discharged while an aeroplane is in the air. It can only apply where the aeroplane is on the ground, ready to leave the customs territory for good. If this is wrong it would lead to the illogical situation that an aeroplane can leave the EU customs territory if flies into non-EU airspace, but the import applies only when it lands and not when it flies back into EU airspace.

98. In summary, Ms Choudhury submits that the aircraft was under customs control as it was still covered by the IP procedure when it landed at St Athan, so there was no new import and no liability to customs duty or import VAT.

99. Ms Choudhury drew my attention to HMRC's guidance on the National Export System for export declarations (NES). UK exporters must use the NES system to declare exports to countries outside the EU. The UK system works alongside the ECS. The guidance states:

> "The Export Control System (ECS) is an electronic messaging system operating throughout the EU to harmonise procedures and tighten security on goods being transported through the EU to third (non-EU) countries. This is also known as indirect exports. ECS works alongside CHIEF [the UK system] as part of the NES.

> If you're sending goods through another EU country before their export to a third (non-EU) country, you must complete an export declaration on CHIEF. This needs to include ECS safety and security data. An Export Accompanying Document (EAD) will need to be printed to accompany the goods to the Office of Exit in the other member state….
>
> Under EU legislation in force before 1 May 2016, indirect exports must be accompanied by an Export Accompanying Document (EAD) to the customs Office of Exit. The EAD contains the Master Reference Number (MRN) and bar code of the consignment of goods and must be presented at the customs Office of Exit with the goods before leaving the EU. Under new Union Customs Code (UCC) legislation in force on the 1 May 2016, when an indirect export is presented at the customs Office of Exit the person presenting the consignment must provide the MRN of the export declaration. There is no obligation to provide a paper EAD."

100. The guidance also refers to Special Procedures:

> "An important function of the NES is to track consignments which are exported under special procedures (SP). SP are designed to help businesses based in the EU compete in the global market. Importers can suspend paying duty and VAT on goods covered by SP arrangements."

101. Ms Choudhury points out that from May 2016 there is no obligation for a paper EAD to be provided to the customs office of export. There was an EAD produced in Bulgaria, but Caerdav did not receive one.

102. Ms Choudhury submits that there was no evidence about what was on the Bulgarian national system; its equivalent to the NES and this casts doubt on Mr Snow's evidence. She submits that Special Procedures should be recorded on the NES not the ECS and there is no evidence as to whether there was any entry on the ECS.

**Discussion on the Inward Processing ground**

103. The critical question is whether the aircraft remained within the IP procedure when it landed at St Athan, as contended by Ms Choudhury or whether it left the customs territory of the Union when it flew into Serbian airspace, discharging the IP procedure, so that it was a new import on arrival at St Athan, as submitted by Mr Duffy.

104. I prefer Mr Snow's evidence and Mr Duffy's arguments on this point. I also bear in mind that the burden of proof lies on the Appellant to show, on the balance of probabilities, that no duty or VAT was due.

105. It is clear that the aircraft was declared under the IP procedure on entering Bulgaria from Tanzania, as shown by the import entry. The EAD shows that Bulgaria is the country of export and the destination country is the US. The EAD further shows that the intended customs office of exit is Sophia, Bulgaria. This is consistent with a direct export from Bulgaria, rather than an indirect export via another member state or states.

106. Ms Choudhury suggests that the failure of the EAD to refer to St Athan and Shannon, which would have indicated an indirect export, was a further mistake and they should have been mentioned. There is nothing to support this and it is inconsistent with the other entries on the EAD.

107. Although we cannot know for certain whether there was any entry in the ECS, no entries were provided by the Bulgarian authorities. The information ultimately provided was comprehensive and I consider it more likely than not that if there had been any entries, copies would have been provided. I accept Mr Snow's evidence that there would only be entries on the ESC if it were intended to make an indirect export via another EU country. This is supported

by the guidance on NES which indicates that the ECS is an EU-wide electronic messaging system to harmonise procedures and tighten security on indirect exports. The fact that there is no evidence of entries on the ECS is consistent with a direct export from Bulgaria.

108. Ms Choudhury pointed out that at the time in question, there was no need for a paper EAD so one would not expect Caerdav to have received one.

109. However, the guidance indicates that if the office of exit was Shannon, even though a paper EAD was not needed, the person presenting the goods for exit in Shannon must provide the Master Reference Number contained in the EAD. Mr Hina stated that Caerdav should have been given a copy of the EAD on arrival (assuming it was an indirect export). I infer that if a paper copy was not necessary, Caerdav should have been given the information in another form to show that the aircraft remained under customs control. Caerdav did not receive the EAD and there was no suggestion it received the relevant information, so it could not have passed it to the exporter in Shannon. This also suggests that the export was a direct export from Bulgaria.

110. The documentary evidence, and in particular the EAD, is consistent with a direct export from Bulgaria to the US, rather than an indirect export via another EU member state. This is supported by the facts there were no ECS entries included in the Bulgarian Documents and that Caerdav did not receive an EAD or the information in it which would have indicated that the export from Sophia was an indirect export. I conclude that the aircraft was the subject of a direct export from Bulgaria and accordingly, under Article 267 of the Implementing Regulation it would have been discharged from the IP procedure when it left the customs territory of the EU. I have found, on the balance of probabilities that the aircraft flew over Serbia, so it left the customs territory of the Union when it flew into Serbian airspace.

111. I also agree with Mr Snow's and Mr Duffy's interpretation of the relationship between Article 267 and Article 136 UCC. Article 136 refers to movements between two points in the customs territory. So if the aircraft was moving from Sophia to St Athan under a Special Procedure, the aircraft would have "temporarily left" the territory while flying over Serbian airspace. In this case, it would have remained within the Special Procedure and there would have been no new import on arriving in Wales.

112. However, the aircraft was not moving between two points in the customs territory. The movement was from Bulgaria to the US, albeit it stopped at other places on the way. This was a direct export, so Article 136 did not apply and by virtue of Article 267, the aircraft ceased to be subject to the IP procedure when it first left the EU as it entered Serbian airspace. This is consistent with the objective of the Special Procedures which is to prevent goods being diverted to the home market without payment of duty or VAT. If the movement is within the EU, i.e. if a Special Procedure applies, the systems would track that movement and ensure that the authorities knew when the goods finally left the EU. If the movement is a direct export to a country outside the EU, the systems no longer track it, so the Special Procedure is discharged when the goods first leave the customs territory.

**Conclusion on the Inward Processing ground**

113. For the reasons set out above, I conclude that the aircraft was not under customs control when it landed at St Athan, the Inward Processing procedure having been discharged when the aircraft entered Serbian airspace.

114. Accordingly, the aircraft arrived in St Athan from outside the customs territory of the EU and was subject to customs duty and import VAT. Although the entry was declared to End Use, the EUA had expired at the time of import and so the liability arose and is due.

**THE REMISSION ON THE BASIS OF *TEREX* PRINCIPLES GROUND**

115. Ms Choudhury submits that the customs debt should be remitted under the UCC in accordance with the CJEU's decision in joined cases C-430/08 and C-431/08 *Terex Equipment Ltd v HMRC, F G Wilson (Engineering Ltd) v HMRC, Caterpillar EPG Ltd v HMRC* [2010] STC 575 ("*Terex*").

116. Mr Duffy submits that the Tribunal has no jurisdiction to consider this ground as it is the sort of matter amenable only to judicial review.

117. Ms Choudhury submits that the remedy provided under Article 120 UCC is an aspect of EU law which this Tribunal can consider and she cited a number of authorities to the effect that judicial review is not available where there is some other remedy, for example *R (on the application of Glencore Energy UK Ltd) v HMRC [2017] EWCA* Civ 1716.

118. In *Finucane* [2021] CSOH 38 at [22] and [24] the Court of Session said:

> "Although the nature of the petitioner's challenge could be described as constitutional, in so far as it seeks a declaration that certain provisions of UK tax legislation are unlawful because they breach principles of EU law, the critical fact that gives him standing is that he is resisting a charge to income tax that he expects to be made upon him. That, in my view, is a matter whose resolution has been allocated by Parliament to the specialist tax tribunals….
>
> There was a suggestion in the petitioner's written note of argument, not pursued in oral argument, that consideration of the EU law issues raised in the petition would be beyond the jurisdiction of the First-tier Tribunal. It was also contended that these were matters beyond the experience and expertise of such a tribunal. I reject both of these contentions. As regards jurisdiction, it is beyond any doubt that the tax tribunals can, and indeed must, make findings in relation to EU law issues raised by parties (and could until the UK's departure from the European Union have made references to the Court of Justice for preliminary rulings)."

119. It is clear that the FTT has jurisdiction to consider matters of EU law where they affect HMRC's claim for tax or duty. To the extent that this ground relates to whether the duty is due and the amount of it, I agree with Ms Choudhury that I can consider her submissions and I note that Terex itself was a referral to the CJEU from a VAT tribunal.

120. In *Terex*, customs agents acting on Terex's behalf used the wrong procedure codes in export declarations of goods that had been imported under the inward processing procedure which resulted in the company paying customs duty which should not have been due. The company applied for the declarations to be revised to reflect the correct position and for remission of the customs debt due. The CJEU held at [62] to [64]:

> "62 If the revision indicates that the provisions governing the customs procedure in question were applied on the basis of incorrect or incomplete information and that the objectives of the inward processing procedure are not threatened, **in particular in that the goods covered by that customs procedure had actually been re-exported, the customs authorities must, in accordance with Article 78(3) of the Customs Code, take the measures necessary to regularise the situation**, taking account of the new information available to them (see, to that effect, *Overland Footwear*, paragraph 52).
>
> 63 **Where it is apparent, in the final analysis, that the import duties were not legally owed when they were entered in the accounts, the measure necessary to regularise the situation can consist only in remission of those duties** (see, to that effect, *Overland Footwear*, paragraph 53).

> 64 That remission is to be made in accordance with Article 236 of the Customs Code if the conditions laid down by that provision are fulfilled, in particular that there has been no manipulation by the declarant and that the application for remission has been submitted within the time-limit, which is in principle three years (see, to that effect, *Overland Footwear*, paragraph 54). [Appellant's emphasis added]"

121. *Terex* was decided under the previous customs code, Regulation 2913/92. Article 78.3 of that code provided:

> "3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularize the situation, taking account of the new information available to them."

122. While there is no exact equivalent to article 78.3 of the 1992 Customs Code, Ms Choudhury argues that Articles 173 and 174 of the UCC have the same effect under law in respect of Special Procedures and HMRC are therefore able to correct the position, applying *Terex*.

123. The Appellant contends that Article 174(1)(b) applies which provides that the customs authorities shall, on an application by the declarant i.e. Caerdav, invalidate a customs declaration already accepted where they are satisfied that, as a result of special circumstances, the placing of the goods under the customs procedure for which they were declared i.e. End Use, is no longer justified. That is, if HMRC are now satisfied that End Use was not the correct procedure, they can invalidate that declaration. The Appellant further submits that the prior entry of the aircraft into the IP procedure, LTS's failure to inform it of this or to respond for requests for information and the production of the Bulgarian Documents following the second request for assistance constitute special circumstances.

124. *Terex* also held that where the import duties were not legally owed, the situation can only be regularised by remitting the duties. Article 116 UCC provides for duties to be repaid or remitted as follows:

> "1. Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:
>
> (a) overcharged amounts of import or export duty;
>
> (b) defective goods or goods not complying with the terms of the contract;
>
> (c) error by the competent authorities;
>
> (d) equity.
>
> Where an amount of import or export duty has been paid and the corresponding customs declaration is invalidated in accordance with Article 174, that amount shall be repaid."

125. The Appellant contends that remission should take place under Article 120 UCC on grounds of equity. Article 120 sets out when Article 116(1)(d) applies:

> "1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

> 2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty."

126. Article 121 provides that an application for repayment or remission of duties must be made to the customs authorities within three years of notification of the customs debt, but this time limit is suspended from the date an appeal is made, for the duration of the appeal proceedings. Ms Choudhury contends that if HMRC seek to argue that the Appellant has made no application under Article 120, the grounds of appeal in the Notice of Appeal submitted by Mr Anderson (which asserted that HMRC could "correct the position as per *Terex*") and the Appellant's Skeleton Argument which also raised this point should be regarded as constituting an application under Article 120.

127. Ms Choudhury submits that if the customs debt were enforced, the Appellant would be at a clear disadvantage compared to other operators in the same business who are not charged import duties and VAT where goods are already subject to a special procedure when they arrive in the UK. She also denies that there was any "obvious negligence" on the part of the Appellant.

128. Mr Duffy submits that the Appellant's submission that HMRC should correct the position in accordance with Terex is tantamount to an application for judicial review. It does not challenge the demand note itself which is the subject matter of this appeal.

129. Further, Mr Duffy argues that the Appellant cannot credibly argue that there was no "obvious negligence" when the Appellant failed to notice its EUA had expired and failed to renew it when the matter was raised by HMRC. Mr Coleman had conceded that there was "room for improvement" in the company's procedures, though would not be drawn further.

130. Ms Choudhury referred to *E Buyer UK Ltd v HMRC* [2017] EWCA Civ 1416 in arguing that HMRC could not raise the issues of "obvious negligence" in its Skeleton Argument as it had not been specifically pleaded in its Statement of Case. *E Buyer* was dealing with allegations of fraud or dishonesty which must, of course, be specifically pleaded. Even if *E Buyer* applies here, the first time the issue of Article 120 was raised was in the Appellant's Skeleton Argument which was filed before HMRC's Skeleton Argument. In raising the principles of *Terex*, the Appellant appreciated that it needed to demonstrate the absence of obvious negligence. I consider that HMRC are accordingly entitle to address the point.

131. Mr Duffy also submits that there has been no application under Article 174, and no application for remission of the duty and VAT. A reference to Terex in Mr Anderson's letter to Mr Jones of 17 April 2018 (the first time it was raised), in his grounds of appeal and in Ms Choudhury's Skeleton Argument, cannot amount to an application.

132. Mr Duffy contends that *Terex* does not apply for two reasons. First, in *Terex*, the taxpayer had paid customs duty which was not due. It had used incorrect customs codes which created a customs debt when the goods in question were the subject of the IP procedure and no duty should have been charged. When the declaration was revised to reflect the correct position, no duty was due and so the CJEU held it must be remitted. In other words, where the taxpayer had used codes which created a customs debt which was not due, the customs authority must put it right. The declarations must be amended to reflect the correct position and if this is that duty is not owed it must be remitted. In the present case, Caerdav had used codes which would have been correct if there had been a valid EUA in force. As there was no EUA, the duty was due.

133. Secondly, Ms Choudhury argued that the declaration ought to be revised on *Terex* grounds because the aircraft was already subject to a Special Procedure and so the declaration

to End Use was incorrect, but no duty was due. Mr Duffy submits that the aircraft was not subject to IP on entry to the UK so there is nothing to correct.

134. Ms Choudhury also argued that even if the aircraft was not subject to customs control and so was imported under an expired EUA, the circumstances still constitute special circumstances within Article 120 and *Terex* should apply.

135. To the extent that she is suggesting HMRC should not pursue the Appellant for the customs debt, Mr Duffy responds that under EU law HMRC has no discretion in the matter. If a customs debt has been incurred, HMRC is obliged to collect it under Articles 1, 3 and 79(1) UCC.

**Discussion of the remission on the basis of *Terex* principles ground**

136. I cannot accept the Appellant's contentions for a number of reasons.

137. First, the Appellant has not followed the correct procedure and has not made an application to invalidate the customs declaration. Even if that had been done and if the End Use declaration were invalidated, that would result in a situation where the aircraft had been imported and was not under any special procedure, so the duty would be due, subject to the application of Articles 116 and 120.

138. Nor has the Appellant made an application for remission of the customs debt as required by Article 121, although the time limit has been suspended by the appeal.

139. The more fundamental reason why I cannot accept the Appellant's submissions is that Articles 116 and 120 do not apply in the present situation. The provisions of the UCC regarding repayment and remission, beginning with Article 116 are about repaying duty which has been charged when a lower amount or no duty was actually due. All of the grounds in Article 116 have conditions attached to them.

140. Article 120 does envisage a situation where a customs debt which is actually due may be remitted. It sets out the conditions applicable to remission on the ground of "equity". First there must be "special circumstances" but that is defined in paragraph 2 of Article 120. There must be something in the circumstances of the taxpayer which puts in it an "exceptional situation" as compared with other operators engaged in the same business and this has caused the taxpayer to be disadvantaged compared with such other operators because duty is being collected from it and not them. Secondly there must be no deception or obvious negligence which can be attributed to the debtor in connection with the special circumstances.

141. If a customs authority grants remission in accordance with Article 120, Article 121(4) requires the Member State to inform the Commission of the fact. This suggests that the Article 120 has effect in truly exceptional circumstances.

142. The circumstances set out at [123] do not amount to special circumstances in this context. If the aircraft had been subject to IP on entry, no duty would have been due and it would not be necessary to rely on equity. The equity ground applies where a customs debt has in fact been incurred and special circumstances apply. On the basis that no special procedure applied, a customs debt is due, but Ms Choudhury has not put forward any circumstances of the exceptional kind which would constitute special circumstances within Article 120(2). The Appellant has not been treated any differently from other operators in the same business.

143. Further, the customs debt was incurred because the Appellant failed to notice that their EUA had expired and failed to remedy the situation when it was raised by HMRC. I consider that this amounts to "obvious negligence".

144. I therefore find that Article 120 does not apply in the present case and there is no obligation on HMRC to remit the duty which is due.

145. The circumstances of *Terex* can clearly be distinguished from the present case. *Terex* was a case where an error in a customs declaration resulted in duties being paid which were not actually due. In these circumstances, the declaration can be corrected to reflect the correct position that no duty should have been paid and the overpaid amount must be remitted to the taxpayer. In the present case, the opposite applies. The declaration was incorrect because the codes used only applied where there was a valid EUA and the Appellant's EUA had expired. The duty was therefore properly due and there is nothing to correct or remit.

146. Ms Choudhury also sought to rely on two further EU cases which deal with different provisions relating to the remission of duty contained in Regulations relating to the previous Community Customs Code. In *Firma Sohl & Sohlke Hauptzollamt* Bremen C-48/98, the ECJ said at [54]

> "It follows from the judgment in Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 46, that Article 13 of Regulation No 1430/79 and Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), pursue the same aim, namely to limit the **post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations.** It follows that the conditions to which the application of those articles is made subject, that is to say that no negligence or deception may be attributed to the person concerned in the case of Article 13 of Regulation No 1430/79 and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 5(2) of Regulation No 1697/79, must be interpreted in the same manner."[Appellant's emphasis]

147. In Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, a company declared goods to the wrong tariff classification as a result of information, ultimately, provided by a member state customs authority and became liable for duty as a result. No duties would have been due had the correct tariff been used. The company sought waiver of the post-clearance recovery of duty under Article 5(2) of Regulation 1697/79. The ECJ said at [44]-[46]

> "44 The information thus supplied may cause the trader to entertain legitimate expectations on the basis of which he may believe that he declared his goods in conformity with the tariff rules in force. In those circumstances, the obligation to pay import duties ex post facto is clearly unfair.
>
> 45 As regards the absence of any negligence or deception, it is for the national court to find whether or not, in circumstances such as those in the present case, those conditions are fulfilled.
>
> 46 That determination must, however, take account of the fact that Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1679/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. Seen in that light, the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1679/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79, and therefore the conditions laid down by the latter provision must be assessed in the light of those laid down in Article 5(2) of Regulation No 1679/79."

148. Article 5(2) of Regulation No 1679/79 provides:

> "2. The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned."

149. Article 13 of Regulation No 1430/79 provides:

> "Import duties may be repaid or remitted in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned."

150. *Firma Sohl* and *Hewlett Packard France* state that the aim of the Regulations is to "limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations." The cases are concerned with a situation where information from the customs authority has resulted in the taxpayer paying duty which was not due. The cases indicate that information which caused the taxpayer to make the wrong customs declaration, may have created a "legitimate expectation" that they were making the right declaration and where this has caused them to pay too much duty, the customs authority should remit the duty. Again there are requirements that there must have been "no negligence" (Article 13), which Firma Sohl states must be interpreted in the same manner as the requirement in Article 5(2) that there was no error made by the customs authority which could reasonably be detected by the taxpayer.

151. Ms Choudhury asserted in her Skeleton Argument that "the Appellant submits that the payment of duty in this case is clearly not justified for the reasons given immediately above [which were the extracts from *Firma Sohl* and *Hewlett Packard* set out above]". She did not elaborate on this at the hearing.

152. These cases were decided on provisions which have now been superseded, but I understand her to be arguing that similar principles should apply in considering Article 120. However, in the present case, the payment of duty *is* justified; it is properly due. Further, the question whether the authority's error (in this case stating in the October and November 2017 letters that the relevant entries had not resulted in an underpayment of duty or VAT) was detectable is linked to the issue of obvious negligence. In the present case the Appellant should have known, and on the basis of Mr Coleman's evidence, was aware that that the EUA had expired and so duty was due and it should have known that HMRC's statement, that there had been no underpayment of duty or VAT, was erroneous. That is, HMRC's error was detectible and, indeed, detected.

153. Ms Choudhury also sought to rely on *Firma Sohl* as authority that the demand for duty must be compatible with the fundamental principle of legitimate expectation. In *Firma Sohl* and *Hewlett Packard*, it was the taxpayer's reliance on incorrect information provided by the customs authority which caused the taxpayer to make the wrong entry which gave rise to the customs debt.

154. In the present case, HMRC's error, in saying the entries caused no underpayment, did not cause the Appellant to make entries which gave rise to the customs debt. That debt was due as a result of the Appellant's failure to renew its EUA and incorrectly entering the aircraft to End Use.

155. Following on from these cases, Ms Choudhury also seeks to argue that the EU principle of legitimate expectation applies generally to the statements made by HMRC and that the FTT has jurisdiction to consider it. She referred to the Court of Appeal case of *R (on the application*

*of Drax Power Ltd and another) v HM Treasury* [2016] EWCA Civ 1030 which set out the principle as developed in EU law. For example at [58]

> "58. *ADJ Tuna Ltd v Direttur ta-Agrikoltura u s-Sajd* [2011] ECR I-1655 makes clear that the need is indeed for these requirements to be satisfied, at paras. 71 and 72:
>
> > "71. It should be noted that the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation in which it appears that the Community administration has led him to entertain reasonable expectations (see, to that effect, Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v EEC* [1987] ECR 1155, paragraph 44, and Joined Cases C-37/02 and C-38/02 *Di Lenardo* and *Dilexport* [2004] ECR I-6911, paragraph 70).
> >
> > 72. In whatever form it is given, **information which is precise, unconditional and consistent** and comes from authorised and reliable sources constitutes such assurances (see Case C-537/08 *P Kahla Thüringen Porzellan v Commission* [2010] ECR I-0000, paragraph 63). However, a person may not plead breach of that principle **unless he has been given precise assurances by the administration** (see Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147, and judgment of 25 October 2007 in Case C-167/06 *P Komninou and Others v Commission*, paragraph 63)" (emphasis supplied)."

156. And at [62]

> 62. That *Plantanol* did not establish any different test is also clear from Case T79/13 *Accorinti v ECB* (judgment of 7 October 2015), in which the usual conditions necessary for invoking the principle of the protection of legitimate expectations were set out and the Court referred to, among other cases, *Plantanol*, as follows:
>
> > "75. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectation extends to any person in a situation where an EU authority has caused him or her to have justified expectations. Nevertheless, the right to rely on that principle **requires that three conditions be satisfied cumulatively. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must be consistent with the applicable rules** …" (emphasis supplied)

157. It is not disputed that there is an EU principle of legitimate expectation. The question is whether this Tribunal has jurisdiction to consider it.

158. Ms Choudhury sought to argue that there are circumstances where the FTT can address public law issues such as legitimate expectation. The principles are set out in the Upper Tribunal case of *R & J Birkett v HMRC* [2017] UKUT 89 (TCC). At [30] the Tribunal stated:

> "The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the 40 Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act".

> Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at 5 [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

159. I do not see that this assists the Appellant. The issue before this Tribunal is whether the customs duty and VAT is due because the aircraft was imported from outside the EU and was not subject to a special procedure on entry. I have found that the duty and VAT are due and I do not need to consider whether HMRC should remit the tax due in order to arrive at that decision.

160. I consider the issue of legitimate expectation and jurisdiction in more detail in the part of this decision dealing with the UK concept. My comments there also apply here and my conclusion in relation to the EU principle of legitimate expectation is the same as for the UK principle . To the extent that the Appellant seeks a remission of the duty on the basis that HMRC's statements in the October and November 2017 letters gave rise to a legitimate expectation, this Tribunal does not have jurisdiction to consider the matter. Once I have established that the duty and VAT are due, I cannot go on the consider whether HMRC should forgo collecting that liability.

161. Ms Choudhury also argues that the EU principle of proportionality applies and that a customs debt of over £300,000 as a result of a minimal amount of work is disproportionate. She also argues that the FTT does have jurisdiction to consider this.

162. She referred to several "restoration" cases where the FTT did consider proportionality. However, in relation to restoration claims, the FTT's jurisdiction is specifically a quasi-judicial review jurisdiction; it must decide whether HMRC's decision was "reasonable" applying judicial review criteria. There is no such specific jurisdiction in the applicable legislation here.

163. Ms Choudhury also referred to *HMRC v Perfect* [2017] UKUT 475 (TCC) where the Upper Tribunal considered the meaning of UK regulations implementing EU law and accepted that the provisions must be interpreted in a manner which complies with the EU law principles of proportionality and fairness. However, proportionality in this context refers to the proportionality of the domestic/EU legislation as a whole in achieving the objective of the EU Treaties. *Perfect* itself draws a distinction between the proportionality of the legislation as it applies generally and its application to a specific case. At [57], the Tribunal said:

> "To impose liability on those drivers simply because they are in possession of the goods at the time that the fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate. The suggestion by Ms Simor that any unfairness or lack of proportionality in the application of the regime could be mitigated by HMRC, as the taxing authority, exercising discretion in individual cases, does not meet the point: the exercise of discretion in individual cases is not to be confused with the need for the system to be fair and proportionate in its application to all."

164. In the present case, there is no suggestion that the UCC or the special procedure provisions are not proportionate and the suggestion that the liability in this case is unfair in the circumstances cannot be considered by this Tribunal.

**Decision on the remission point**

165. For the reasons set out above, I have concluded that the Appellant cannot require HMRC to remit the duty and VAT on the ground of equity in Article 120 UCC, first because it has not complied with the procedural requirements, but in any event, it has not demonstrated that the conditions of Article 120 apply. I.e. it has not shown that there are "special circumstances" as defined and that there has been no "obvious negligence" on the part of the Appellant. *Terex* can be distinguished as the principle in that case applies to require remission of duty where duty which should not have been paid has been paid and the conditions are satisfied. It does not apply to require a customs authority not to collect a customs debt which is due and which they have an obligation to collect. In these circumstances there is nothing to remit or correct.

166. To the extent that the Appellant seeks to argue that remission should be made on the basis of considerations of legitimate expectation, this Tribunal does not have jurisdiction in such matters.

167. Accordingly I dismiss this ground.

**THE *ULTRA VIRES* GROUND**

168. The Appellant submits that the £500,000 limit which applies to Simplified End Use Authorisation (SEU) is in breach of EU law and ultra vires. If this limit had not existed, the Appellant would not have needed an EUA and could have made an entry in respect of the aircraft using the simplified procedure.

169. Ms Choudhury submits that the limit on the use of simplified authorisation does not exist under EU law and no member state imposes a similar limit. Therefore, there is a difference in treatment of economic operators throughout the customs territory of the EU, so the limit is ultra vires.

170. Ms Choudhury asserts that the FTT can consider whether the limit is incompatible with EU law principles such as equal treatment and if so whether it is justified. She referred to the

Court of Appeal case of *HMRC v Fisher* [2021] EWCA Civ 1438 as authority for the proposition that the Tribunals can consider whether UK law is compatible with EU law.

171. This argument was not developed at the hearing.

172. Mr Duffy submits that this ground raises policy objections which might have been amenable to judicial review but which cannot be the subject of an appeal to this Tribunal. It is a challenge to UK tax policy and not to the validity of the demand note.

173. Article 166 UCC provides:

> **"Simplified declaration**
>
> 1. The customs authorities may accept that a person has goods placed under a customs procedure on the basis of a simplified declaration which may omit certain of the particulars referred to in Article 162 or the supporting documents referred to in Article 163.
>
> 2. The regular use of a simplified declaration referred to in paragraph 1 shall be subject to an authorisation from the customs authorities."

174. Article 166 confers a discretion on the customs authority to accept a simplified declaration. It does not impose an obligation to do so on the customs authority and it does not confer a right on taxpayers to use a simplified procedure.

175. Under the UK's simplified procedure, a person can enter non-EU goods for End Use up to three times a year if the value of the goods is less than £500,000. SEU must be declared at the time of entry. It cannot be applied for retrospectively.

176. Although there was little argument on the point at the hearing, it does not seem to me that this is a situation where UK law is incompatible with EU law so that the monetary limit would be invalid. The imposition of conditions on the SEU procedure does not impinge on any right conferred on the Appellant by EU law. The procedure is introduced under a discretion conferred by EU law and sets out when the procedure can be used. By contrast, *Fisher* concerned the question whether certain UK tax legislation was in breach of the EU principle of freedom of establishment, which does give direct rights to nationals of member states.

177. Even if the limit was invalid and even if this Tribunal could make such a finding, it would not assist the Appellant. Ms Choudhury submits that if the limit had not existed, the Appellant would not have needed EUA (for which it first needed a CCG) and could have made an entry in respect of the aircraft using the simplified procedure.

178. However, there is no suggestion that the Appellant tried to use the SEU procedure or was told it was not available to them . The Appellant declared the goods under an expired EUA, it did not attempt to use the SEU procedure, or indicate that they would have used it were it not for the limit, and it cannot be applied for retrospectively. The existence or otherwise of the limit would not therefore have affected the Appellant's liability.

179. For the reasons set out above, I dismiss the *ultra vires* ground of appeal.

**THE LEGITIMATE EXPECTATION AND ENTRAPMENT GROUNDS**

## The jurisdiction issue

180. It was accepted that HMRC and, in particular, Officer Jones, had not tried to "entrap" the appellant in the sense of encouraging the Appellant not to apply for a retrospective EUA until it was too late, but it was submitted that HMRC's actions had given rise to a legitimate expectation in UK law that no demand note would be made in respect of the aircraft.

181. The first question is whether the FTT has jurisdiction to consider this ground, or whether, as HMRC submit, it can only be dealt with in an application for judicial review.

182. The Appellant relies on the recent Upper Tribunal case of *KSM Henryk Zeman PP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) (*Henryk*). The case concerned an appeal under section 83(1)(p) VATA which relates to a "best judgement" assessment by HMRC. On the facts, the Upper Tribunal found that the taxpayer did not have legitimate expectation that it was not liable to VAT, but the Tribunal went on to consider whether the FTT had jurisdiction to consider the issue of legitimate expectation in such an appeal. The Upper Tribunal's comments were, as Ms Choudhury accepts, *obiter*, but she points out that two experienced judges reviewed the authorities thoroughly in reaching their conclusion and the case should be regarded as very persuasive.

183. As set out above in *Birkett*, there may be situations where the FTT has jurisdiction to consider public law issues and in Henryk, the Tribunal said at [34]

> "The promotion of the rule of law and fairness means that the taxpayer should be entitled to defend himself by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, unless that entitlement is excluded by the relevant statutory regime. That is a question of construing the relevant statutory language."

184. The Tribunal considered two conflicting cases on the FTT's jurisdiction in legitimate expectation cases. The first is *Oxfam v Revenue & Customs Commissioners* [2009] EWHC 3078 which concerned an appeal against HMRC's refusal of a VAT input tax refund claim. The appeal was under section 83(1)(c) VATA which provides that "… an appeal shall lie to the tribunal with respect to … (c) the amount of any input tax which may be credited to a person.". The Tribunal stated at [39]

> "Although he recognised that he was departing form a widely held view, Sales J considered that section 83(1)(c) conferred jurisdiction on the FTT to consider issues of public law relevant to the matter in that subheading. He did so because:
>
> (i) he regarded the ordinary meaning of the phrase "with respect to" in the opening words of section 83(1) as clearly wide enough to cover any question relating to the determination of the input tax,
>
> (ii) (ii) the jurisdiction of the tribunal was determined by reference to the subject matter of the heading, not by reference to a legal regime or type of law, …"

185. At [41] the Tribunal commented that Sales J was not saying that section 83 conferred a general supervisory jurisdiction on the FTT. It summarised the judge's conclusion in *Oxfam* at [42]:

> "42. …, depending on the nature of the issues falling within the scope of a particular sub-heading or subsection, it may well be that public law principles do fall within the scope of the appeal jurisdiction that subsection confers. As we see it, that is not a proposition at odds with Lord Lane's observations in Corbitt, because it is not saying anything about what is needed to confer a general supervisory jurisdiction. It is saying no more and no less than that one must look at each of the subsections on its own terms and determine whether public law issues are likely to be relevant to the appeal jurisdiction each creates."

186. The second case was *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) which the Tribunal reviewed at [43] to [45]:

> "43. In a later case, *HMRC v Abdul Noor* [2013] UKUT 071 (TC), the Upper Tribunal took exactly the opposite view of the same issue under section 83(1)(c), i.e. whether there was jurisdiction on an appeal with respect to "the amount of any input tax which may be credited to a person", to consider a taxpayer's claims based on the public law concept of legitimate expectation.
>
> 44. The Upper Tribunal concluded not. It considered that the right given by 83(1)(c) is in respect of a person's right to credit for input tax "under the VAT legislation". The subject matter of s 83(1)(c) was the "amount of input tax"; input tax was a creature of the statute and the FTT's jurisdiction was formulated by reference to that statutory concept. The claim based on legitimate expectation was not a claim under the VAT legislation.
>
> 45. The Tribunal did not agree with Sales J's view that as a matter of ordinary language in context the words "with respect to" were wide enough to cover any legal question relevant to the issue of the amount of input tax attributable to the taxpayer. Any result of giving effect to the legitimate expectation would not affect the "amount of input tax". It went too far in the context of a section focussed on decisions relating to rights and obligations under the VAT legislation to include a right arising from a legitimate expectation in the words "input VAT" as Sales J's reasoning implicitly required.

187. Ms Choudhury pointed out the Tribunal's comments at [73] on the words "with respect to … an assessment" where they said:

> "Although made in a different context, and indeed in the context of statutory language which is narrower than that in section 83(1)(p) (see [39] above), we agree with the comments on Sales J in *Oxfam* at [63] as to the ordinary and natural meaning of the phrase "with respect to". As a matter of language, it defines the scope of the tribunal's appellate jurisdiction not by reference to any particular legal regime or type of law, but instead by reference to the subject-matter of the subsection."

188. The Tribunal concluded that, in the context of section 83(1)(p), which conferred a discretion on HMRC to determine the VAT liability on the basis of best judgement, the FTT did have jurisdiction to determine the question of legitimate expectation.

Ms Choudhury submits that the wording of section 13A(2) FA 94 confer a wide discretion on this Tribunal analogous to that in *Henryk*. There is nothing in the statutory context to say the FTT cannot consider legitimate expectation.

189. Section 13A(2) defines a relevant decision for customs duty:

> "(2) A reference to a relevant decision is a reference to any of the following decisions—
>
> (a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union], …"

together with the appeal rights in section 16(5) FA 94:

> "(5) In relation to other decisions [relevant decisions], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

190. The VAT appeal right arises under section 83(1)(b) which provides:

> "[(1)] … an appeal shall lie to [the tribunal] with respect to any of the following matters—
>
> (a)…

> (b) the VAT chargeable on the supply of any goods or services. . . or, subject to section 84(9), on the importation of goods . . .;"

191. Ms Choudhury submits that sub-paragraphs (b) and (c) should have similar scope and that the reasoning in *Oxfam* and *Henryk* apply in the present case to allow me to consider issues of legitimate expectation.

192. Mr Duffy submits that the comments in *Henryk* about jurisdiction were *obiter*, but, in any event, it does not assist the Appellant. The Upper Tribunal in Hendryk made it clear that each subsection of section 83(1) VATA had to be looked at on its terms and the question of jurisdiction was a matter of statutory construction. The Tribunal distinguished between section 83(1)(c) VATA which relates to the actual amount of input duty which can be credited and section 83(1)(p) which can relate to the assessment itself or the amount of the VAT. The Tribunal said at [49]

> "…So far as relevant in the context of the current proceedings, an appeal under Section 83(1)(p) is permitted "with respect to … an assessment … under section 73(1) … or the amount of such an assessment."
>
> 50. … It can be seen that in cases where certain requirements are fulfilled - i.e., where a person has failed to make any returns or to keep relevant documents or where it appears that returns are incomplete and incorrect - then the Commissioners "may assess the amount of VAT due from him to the best of their judgment and notify it to him" (emphasis added).
>
> 51. What, then, does the appeal jurisdiction undersection 83(1)(c) encompass?
>
> 52. We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in *Oxfam* and *Noor*), because an appeal lies not only with respect to the amount of an assessment but instead with respect to "an assessment … under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – the Commissioners may assess the amount of VAT due to the best of their judgment and notify it."

193. In other words, the Tribunal drew a distinction between an ability to appeal against an *amount* of tax where there is no jurisdiction to consider legitimate expectation and appeals where HMRC has discretion about the assessment, when the FTT may have jurisdiction to consider such issues.

194. Section 83(1)(b) VATA provides for appeals with respect to the VAT chargeable on the importation of goods from a place outside the Member States. This relates to the amount of tax due and gives HMRC no discretion. Similarly, under Article 28 of the Treaty on the Functioning of the European Union, all Member States must apply the common external tariff to imports from third counties. HMRC does not have a discretion about whether or not to apply customs duty.

195. Mr Duffy submits that, in this sense, section 83(1)(b) is analogous to section 83(1)(c) and that the distinction which the Tribunal in *Henryk* drew between sub-paragraph (c) and sub-paragraph (p) also applies to sub-paragraph (b).

196. Further, Mr Duffy argues that the matter is, in any event, covered by the Court of Appeal authority *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 ("*MIS*") which was not considered in Henryk. *MIS* concerned whether section 84(10) VATA enabled MIS to advance a legitimate expectation claim in the context of appeals to the First-tier Tribunal rather than by way of judicial review. The Court of Appeal considered Noor at [19] where Newey LJ said:

> "Secondly, the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do so, it could be suggested that the assessment depended on a prior decision that could be impugned on public law grounds.
>
> 20. That would be a very surprising result. In *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998, the UT (Warren J and Judge Bishopp) held, departing from views expressed by Sales J in *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), [2010] STC 686, that "the right of appeal given by s 83(1) [of the VATA] is an appeal in respect of a person's right to credit for input tax under the VAT legislation" and that the FTT did "not have jurisdiction to give effect to any legitimate expectation which [the taxpayer] may be able to establish in relation to any credit for input tax" (paragraph 87). The UT observed:
>
> > "a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83" (paragraph 87)."

In the UT's view, a number of features "point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the FTT in relation to appeals under s 83 of the VATA 1994" (paragraph 78). The UT noted that the Tribunals, Courts and Enforcement Act 2007 conferred a judicial review function on the UT but not the FTT (paragraph 29) and that the approach Sales J had favoured would have conferred a very extensive judicial review jurisdiction on the FTT "without any of the procedural safeguards, in particular the filter of permission to bring judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject" (paragraph 76). The UT also cited this passage from the judgment of Nicholls LJ in an income tax case, *Aspin v Estill* [1987] STC 723 (at 727):

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

21. Mr Ramsden did not attempt to persuade us that the UT was wrong in *Noor*. Were, however, his contentions as to the ambit of section 84(10) of the VATA well-founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims. The jurisdiction would, moreover, have been conferred through a provision introduced in response to the *Corbitt* decision (viz. section 84(10)) ("by the back door", as Miss Mitrophanous would say), rather than under section 83, the main appeals section. Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial

review (see CPR 54.4 and 54.5). It is highly improbable that Parliament intended this when it enacted what has now become section 84(10)."

197. In other words, the Court in *MIS* agrees that the approach in *Noor* is the correct one.

198. In *Henryk*, the Tribunal commented at [46] to [48] on the approach adopted in *Noor*:

> 46. This approach – which draws a distinction between determining of the amount of tax due (which falls within the appeal jurisdiction), and other matters (which do not) – echoes that in other decisions. An example involving section 83 is *C&E Comms v National Westminster Bank* [2003] EWCA 1822 (Ch), a case involving section 83(1)(t). The Commissioners had invoked the defence of unjust enrichment against the appellant's claim for repayment of VAT, but had not invoked that defence in relation to the claims by other parties. Jacob J considered whether the appellant's complaint of unfair treatment was within the jurisdiction of the tribunal under section 83(1)(t). He concluded not, because the essence of the unfair treatment case was not that the VAT was not due, but that even though it was due, it should be repaid because the appellant's trade rivals had been repaid. That was outwith section 83(1)(t).
>
> 47. Another, earlier example from a different context is *Aspin v Estil* [1987] STC 723. This case concerned a taxpayer who claimed that he had relied on information given to him by the Revenue over the telephone that certain income would not be subject to tax in the United Kingdom. He argued that as a result it was unfair and oppressive for the Revenue to assess him to tax on the income. The context was a claim for income tax where section 31 TMA 1970 provided for an appeal against an assessment, but section 50 provided that if it did not appear to the tribunal that the appellant was overcharged or the assessment excessive the assessment should "stand good." The Court of Appeal held that the General Commissioners' jurisdiction was only *"to see whether the assessment has been properly prepared in accordance with [the] statute"*. Nicholls LJ drew the following distinction:
>
> > "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."
>
> 48. We think it is inappropriate to generalise, however. Cases are likely to differ depending on the statutory language in question. In *Aspin*, given the limitation in section 50 on the actions the General Commissioners could take, it is not surprising that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation. Likewise in *NatWest*, Jacob J's reading of section 83(1)(t) was that it conferred an appeal jurisdiction only where the challenge was that an amount of VAT was not in fact due. It did not confer jurisdiction in a case where the relevant VAT amount was due but was said to be repayable for an extraneous reason."

199. The authorities indicate that the jurisdiction of this Tribunal to consider public law issues such as legitimate expectation is a matter of statutory construction.

200. It seems clear, from *Noor* and the comments on that case in *MIS* and *Henryk* that the FTT does not have jurisdiction to consider legitimate expectation where the appeal in question relates to the amount of tax due and HMRC has no discretion. The provisions of section

83(1)(b) and the corresponding provisions for customs duty seem to me to fall within that category. The appeal lies with respect to "the VAT chargeable…on the importation of goods". That relates to the amount of VAT which is due and the same applies in relation to the customs duty.

201. In the passage from Henryk set out at [184] the Tribunal quotes Nicholls LJ in *Aspin v Estil* where he said:

> "[the taxpayer] is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

202. It seems to me that this is precisely what Caerdav are seeking to argue in the present case. I have found that the customs duty and VAT are due and the legitimate expectation argument is only relevant in that event. The Appellant is seeking to argue that, notwithstanding that the duty and tax are due, they should not be collected because it had a legitimate expectation that it would not be so collected. It is clear from the authorities referred to above that that is not a matter within the jurisdiction of this Tribunal.

203. Although that deals with the legitimate expectation ground, both parties made submissions on the substantive matter and I will consider that below in case I should be wrong on the jurisdiction point.

**Legitimate expectation: the substantive issue**

204. The legitimate expectation argument arises from the two "right to be heard" letters issued by HMRC on 10 October 2017 and 10 November 2017 respectively.

205. A schedule was attached to the October letter setting out the errors discovered during the audit in May `2017. There is a list of "Monetary Errors" which related to an import entry to end use where the Appellant did not produce the correct documentation. The VAT assessed was £4,708.18.

206. There is a further list of "Non-Monetary Errors" where it states

> "The following entries had errors, but these have not caused any underpayments of Customs Duty or Import VAT:
>
> …
>
> 290-01544F-15/11/2016 [the aircraft]
>
> Each of these entries were aircraft entered to End Use. However a full audit trail of the goods was not presented during the audit. As the goods are qualifying aircraft for VAT relief, there is no underpayment on these goods,"

207. The schedule to the November letter was in a similar format. The "Monetary Errors" referred to five entries and stated:

> "All of the above entries were entered to End Use Authorisation EU/0909/218/16 and had Import VAT suspended at the time of import. However, the End Use Authorisation EU/0909/218/16 expired on 31st October 2016. Therefore, the Import VAT that was suspended under the use of an expired authorisation is also now due."

208. The total VAT assessed had increased to £12,222.70.

209. Under "Non-Monetary Errors" it stated:

> "The following entries had errors, but these have not caused any underpayments of Customs Duty or Import VAT:
>
> …
>
> 290-015444F-15/11/2016 [the aircraft]
>
> Each of these entries were aircraft entered to End Use. However, a full audit trail of the goods was not presented during the audit. As the goods are qualifying aircraft for VAT relief, there is no underpayment on these goods."

210. Ms Choudhury submits that the statements in these letters that the errors which included the aircraft "have not caused any underpayments of Customs Duty or Import VAT" led the Appellant to believe that HMRC would not seek any duty or VAT in relation to the aircraft, even though it was entered to End Use under an expired EUA.

211. Those comments were made in error. Mr Jones did not, at the time, realise that the entry code used for the aircraft was the customs code for entry under a valid EUA, although he was aware that the EUA had expired. The code used gave rise to no duty or VAT. The correct code, for an entry where there was no valid EUA, carried customs duty of 2.7%. The error was noted by Mr Jones' colleagues and when this was drawn to his attention, the correct duty and VAT amounting to £330,633.45 was assessed following the third right to be heard letter issued on 13 March 2017. The schedule to that letter stated:

> "On 31st October 2016, the End Use authorisation EU/0909/218/16 help (sic) by the company expired. As a result, the following entries were entered to an expired authorisation and were not subject to End Use relief:
>
> …
>
> 290-015444F-15/11/2016 [the aircraft]
>
> …
>
> Most of the entries used the commodity code 88033000 10, with the entry 290-015444F-15/11/2016 using the commodity code 88024000 10. These commodity codes are only applicable with a valid End Use authorisation. As the company did not have a valid End Use authorisation at this time, these entries should have been entered to the commodity codes 8803300099 and 8802400090 respectively, each of which carries a 2.7% rate of duty. As a result a customs debt of £330,633.45 has been established."

212. Caerdav had overlooked the fact that the EUA had expired, but it (in the person of Ms Green) was aware of this by March 2017, in time to apply for a new EUA with retrospective effect (although there was no guarantee that the new EUA would be backdated).

213. Ms Choudhury referred to the statement of Bingham LJ (as he then was) in *R v Board of Inland Revenue ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 ("*MFK*") at 1569 B-H which sets out the conditions which must be satisfied to establish a claim to legitimate expectation in UK domestic law. Bingham LJ said:

> "I am, however, of the opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all-important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: *Reg. v. Attorney-General, Ex parte Imperial Chemical Industries Plc.* (1986) 60 T.C.I, 64G, per Lord Oliver of Aylmerton. Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of "One should be taxed by law, and not be untaxed by

> concession:" *Vestey v. Inland Revenue Commissioners* [1979] Ch. 177, 197 per Walton J. No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the revenue is of a less formal nature a more detailed inquiry is in my view necessary. If it is to be successfully said that as a result of such an approach the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say "ordinarily" to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here**. First, it is necessary that the taxpayer should have put all his cards face upwards on the table.** This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the revenue the ruling sought. It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. **Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification**." [Appellant's emphasis]

214. Ms Choudhury submits that all these requirements are met in the present case. She states that the Appellant had provided all the information which Officer Jones had requested in respect of the aircraft, that is, the commercial invoice which was provided before the October letter.

215. The statement in both right to be heard letters that the entries which included the aircraft "…had not caused any underpayments of customs duty or import VAT" were "clear, unambiguous and devoid of relevant qualification".

216. Those statements therefore gave rise to a legitimate expectation that no further action would be taken by HMRC in respect of the aircraft.

217. The fact that the statements were made in error does not prevent the doctrine of legitimate expectation applying.

218. Further, the Appellant relied on those statements to its detriment. Caerdav understood from those letters that the expiry of the EUA would not result in any serious consequences (the amount assessed being a modest sum). The Appellant also understood that in a few months, it would no longer be necessary to have an EUA in respect of aircraft. As a result, the company did not proceed to renew the expired authorisation within a year of the aircraft's arrival in the UK. Ms Choudhury asserts that had it done so, the demand would not have been raised (because the entry would have been covered by the new EUA). This assumes that the EUA would have been backdated to the relevant time, which was by no means guaranteed.

219. Mr Duffy submits that even if this Tribunal has jurisdiction to consider a legitimate expectation claim (which he denies is the case and which I have found to be correct) legitimate expectation in not made out on the facts.

220. He points out that legitimate expectation is not just a matter of what HMRC has said to the taxpayer, but also depends on what the taxpayer has said to HMRC.

221. Mr Duffy also referred to the passage from MKF cited above at [213] and submitted that it, together with other authorities mentioned below, establish that six conditions must be satisfied where "HMRC has agreed to forgo, or represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation". The conditions are:

> (1) The taxpayer must have sought a ruling from HMRC about a specific transaction and must have given full details of it. The taxpayer must make plain that a fully considered ruling is sought.
>
> (2) The Taxpayer must indicate the use he intends to make of the ruling, so that the request can be considered at the appropriate level.
>
> (3) The ruling or statement relied on must be clear, unambiguous and devoid of relevant qualification.
>
> (4) The authority must act consistently.
>
> (5) The taxpayer must rely on the statement to his detriment.
>
> (6) The authority cannot create a legitimate expectation that is in breach of the law.

222. Conditions (1) and (2) are derived from the above passage in MFK and Mr Duffy submits are not present in Caerdav's case.

223. Ms Choudhury submitted that a legitimate expectation can also arise from a general statement made by HMRC such as an Extra Statutory Concession or on an application for a statutory clearance as in *R (on the application of Boulting and another) v HMRC* [2020] EWHC 2207 (Admin).

224. The review conclusion letter also indicated that HMRC's practice as set out in its Administrative Manual included the following requirement:

> "HMRC is only bound by incorrect advice in circumstance where all of the following tests are met:
>
> • The customer made it plain he or she was seeking fully considered advice and indicated what it would be used for…"

225. Officer Robinson (who wrote the review conclusion letter) appeared to think this requirement was satisfied (although the other requirements were not). It is unclear why he thought this as the Appellant had not sought advice at all. The October and November right to be heard letters were not issued in response to a request by the Appellant for a ruling, but represented HMRC's conclusion about the duty and VAT owing following the audit visit and provision of information by the Appellant.

226. Whilst Ms Choudhury considers that the statement "The following entries had errors, but these have not caused any underpayments of Customs Duty or Import VAT:" is "clear unambiguous and devoid of relevant qualification, Mr Duffy submits that, at best, it is confusing and unclear when read in context. It is not a clear representation that the issue of the aircraft being entered against an expired EUA had gone away. Mr Duffy said that the expired EUA was not mentioned in the letters, but the November letter did state that the increased VAT assessment arose because entries had been made against an expired EUA. Mr Duffy went on to say that there was no suggestion that the requirement for renewal of the EUA as set out in Mr Jones' letter of 7 June 2017 and his email of 10 July 2017 no longer applied. The Appellant was aware of the need for an EUA and its importance to the business. The Bundles contained a letter from Mr Coleman to the freight forwarder asking for information about the aircraft,

including its value, which had a handwritten note saying "Need the below filled out ASAP! This is to prevent us having to pay a substantial Tax bill!" The Appellant had realised that the EUA had expired in March 2017 and had been told repeatedly that it needed to make a new application. Officer Jones' letter sent after the audit on 7 June 2017 stated:

> "I will be able to provide a covering letter explaining the recent audit, which should negate you having to provide your records etc. so that you can make a request for retrospection back to the entries made in November 2016, which were made on an expired Authorisation.
>
> As discussed during the audit, I will grant the company until 30th June 2017 without taking any action in regards to the entries made under an expired Authorisation. If the company have not completed all parts of the application in full, including the details regarding the guarantee, and submitted it to the Authorisation and Returns Team in Leeds by this date, then **I will issue the company a Post-Clearance Demand Notice for the entries that were made on the expired Authorisation, i.e. all entries made on or after 01/11/2016.**" [emphasis added].

227. Although the specific mention of the aircraft in this letter related to a request for the commercial invoice, the first paragraph from the letter quoted above should have alerted the Appellant to the fact that the aircraft had been imported against the expired EUA and the Appellant was aware that it was worth millions, so that there was potentially a very large tax bill-as Mr Coleman had noted on the letter to the freight forwarder. Mr Coleman had also said in cross-examination that he understood the EUA was important to the business because it deferred duties on planes arriving from outside the EU for maintenance and that aeroplanes were high value. Mr Duffy put it to Mr Coleman that it was recognised within the company at the time that without an EUA, the import of an aeroplane for repairs and export would give rise to an unsustainable tax bill. Mr Coleman had not, as noted, been involved at the time, but agreed it was a "fair assumption".

228. Mr Duffy submitted that requirement for consistency is not met. In *R (on the application of Drax Power Ltd) v HM Treasury* [2016] EWCA Civ 1030 the Court said, at [58] quoting from the case of *ADJ Tuna Ltd v Direttur ta-Agrikoltura u s-Sajd* [2011] ECR I-1655:

> "71. It should be noted that the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation in which it appears that the Community administration has led him to entertain reasonable expectations (see, to that effect, Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v EEC* [1987] ECR 1155, paragraph 44, and Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70).
>
> 72. In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes such assurances (see Case C-537/08 *P Kahla Thüringen Porzellan v Commission* [2010] ECR I-0000, paragraph 63). However, a person may not plead breach of that principle unless he has been given precise assurances by the administration (see Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147, and judgment of 25 October 2007 in Case C-167/06 *P Komninou and Others v Commission*, paragraph 63)" (emphasis supplied)."

229. Mr Duffy submits that the statement that the relevant entries had not caused an underpayment of duty or VAT was inconsistent with Mr Jones' June letter mentioning the aircraft and requiring an application for a new EUA.

230. The requirement for a person relying on legitimate expectation to show that they relied on the relevant statement to their detriment is set out at [48] and [49] of *Oxfam*. Mr Duffy contends that the Appellant did not rely on Officer Jones' statement to its detriment. There are two aspects to this:

> (a) The statement in question must be what caused the Appellant not to apply for the EUA; and
>
> (b) That failure to apply must have caused the detriment. I.e. if Caerdav had applied, the new EUA would have been retrospective to cover the import of the aircraft so that the duty and VAT would not have been due.

231. Mr Duffy submits that the reason the company abandoned its application for a new EUA was the information obtained at the Strong & Herd training session that EUAs for aircraft would not be needed from January 2018 and that it was this, in September 2017, which caused Caerdav not to pursue the EUA and not Mr Jones' letter which arrived a month later.

232. Turning to the issue of detriment, in order to avoid duty and VAT on the aircraft, it would have been necessary for the new EUA (had the application been pursued) to have been granted retrospectively, to take effect from the beginning of November 2016. It was by no means a forgone conclusion that that would have been the case. The Appellant would have to demonstrate "exceptional circumstances" and satisfy other requirements including showing that all the other requirements of end use have been met during the period. Mr Duffy submits that the Appellant has not shown that if it had applied for a new EUA in October 2017, after Mr Jones' letter, it would have obtained the new authorisation backdated for 12 months.

233. Mr Duffy argued that the fact that the latter application for an EUA in 2018 was only backdated to the date of application was significant. I do not place any weight on this. By that time, the EUA could not have been backdated to cover the liability in question and there was no reason to seek further backdating.

234. Mr Duffy argues that *Noor* at [23] and [24] shows that a legitimate expectation cannot arise in breach of law. That is, there can be no legitimate expectation that an authority will act unlawfully. This is also a principle of EU law. In *Drax*, the Court of Appeal said at [62]:

> "That *Plantanol* did not establish any different test is also clear from Case T79/13 *Accorinti v ECB* (judgment of 7 October 2015), in which the usual conditions necessary for invoking the principle of the protection of legitimate expectations were set out and the Court referred to, among other cases, *Plantanol*, as follows:
>
> > "75. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectation extends to any person in a situation where an EU authority has caused him or her to have justified expectations. Nevertheless, the right to rely on that principle requires that three conditions be satisfied cumulatively. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, **the assurances given must be consistent with the applicable rules** …" [emphasis added].

235. In the present case, Mr Duffy submits, to allow a legitimate expectation claim would require HMRC to act in breach of its obligations under law. Under the UCC, HMRC is required to collect customs debts which are due; it has no discretion in the matter, so to remit the

Appellant's customs debt on legitimate expectation grounds would be to act in breach of the law.

236. The Appellant's legitimate expectation arguments had already been reviewed and rejected by Officer Robinson in the review conclusion letter. The Appellant had also argued that the fact that the CHIEF computer system had not rejected the entry using an out of date EUA supported its contention. Officer Robinson pointed out that the burden of making accurate declarations falls on the importer and that Caerdav cannot argue that it has a legitimate expectation that it would not be liable for any duties due to the errors because CHIEF did not reject an entry based on inaccurate information. This was repeated in Officer Jones decision letter of 16 April 2018.

237. I agree with Mr Duffy that the Appellant's submission that all the elements for Caerdav's legitimate expectation are made out are not borne out by the facts.

238. The Appellant had not sought any sort of ruling from HMRC and it had not said the use to which it was to be put, because it had not sought a ruling! The statements in the right to be heard letters were not made in response to anything the Appellant had asked, but were Mr Jones' (erroneous) conclusions following the audit.

239. It might be argued that, on the face of it, the statements "The following entries had errors, but these have not caused any underpayments of Customs Duty or Import VAT:" were "clear, unambiguous and devoid of relevant qualification" but this has to be viewed in context. The letters also referred to the expiry of the EUA and that some of the entries related to aircraft. Given the earlier correspondence, this should have at least raised a doubt in the Appellant's mind as to whether this really meant that duty was not to be pursued on the import of the aircraft, especially as the non-monetary errors were stated to related to a failure to produce documents.

240. The very fact that HMRC issued a right to be heard letter in October saying that £4,708,18 VAT was due in respect of one entry and then issued another right to be heard letter in November, stating that VAT was due on a further five entries because of the expired EUA, so that the liability was now £12,222.34 indicates that HMRC might change its mind about the amount of liability and emphasised the inconsistency between the Monetary Errors where the expired EUA had given rise to a liability and the Non-Monetary Errors where the expired EUA had not, in relation to the aircraft, apparantly triggered a liability. Nor did the letters specifically state that, despite the expired EUA, HMRC did not propose to seek duties or VAT on the aircraft.

241. It is also relevant that these were "right to be heard" letters which set out HMRC's current view and invited the Appellant to provide any further information and comment on their findings. It was not a decision letter.

242. The decision letter was issued on 15 December 2017 and referred to the 10 November letter. As was pointed out in the review conclusion letter, immediately underneath the heading "Check of your records-our decision" it said:

> **"We've issued this decision without prejudice to any further action that we may take in relation to this matter"** [emphasis in original]

243. "This matter" refers back to the 10 November 2017 letter and so refers to errors made by Caerdav in relation to its EUA and the expired EUA (which was also the "matter" dealt with in the October letter. This left it open to HMRC to take the action which it subsequently did take, on discovery of Officer Jones' mistake, to assess the duty and VAT on the aircraft which had been imported under the expired EUA.

244. HMRC had changed its mind about the amount of the liability between October and November, albeit in relation to other entries, but this indicates a lack of consistency.

245. Both the October and November letters were issued before the first anniversary of the import of the aircraft which is relevant to the Appellant's ability to apply for backdated EUA which would cover that import. The decision letter was, however, issued after that point.

246. Mr Coleman's evidence about the reasons why the company did not renew its EUA is important, although I bear in mind that Mr Coleman was not directly involved until the issue of the third right to be heard letter on 13 March 2018.

247. In his witness statement, Mr Coleman said:

> "Having been made aware of the impending termination of the End Use Certificate requirement for aircraft [at the Strong & Herd training], and in the belief that next-to-no liability hinged upon its renewal, it is my understanding that the company effectively ceased to pursue the renewal of the End Use Certificate at that stage".

248. In cross-examination Mr Coleman confirmed that before that training the company was progressing the EUA application, although it was having difficulties because of the requirement for the CCG to be obtained first. Mr Coleman also confirmed that had it not been for the advice at the training that an EUA would no longer be required for aircraft from January 2018, the Appellant would have proceeded with its application for an EUA and that there was time for the application to be made with the request that it be backdated for 12 months although it would be necessary to show exceptional circumstances.

249. There were other reasons for the non-application set out in Mr Coleman's witness statement.

250. The company had been trying to obtain the CCG which was necessary before they could apply for the EUA and this was, in Mr Coleman's words "exceptionally arduous, complicated and time-consuming, involving numerous steps".

251. Before the 10 October letter, "the company was unaware that any significant liability was to hinge upon the renewal of the End Use Certificate. There had been no indication that anything other than minor liabilities would arise". Mr Coleman regarded this as being confirmed by the 10 October letter: "… and indeed in his letter of 10 October 2017 Officer Jones specifically stated there was no issue with aircraft 290-015444F".

252. A key member of staff, Mr Cook, who was handling the application for the CCG and would have handled the subsequent EUA application left the company on 15 September 2017. It was this that triggered the company to send eight member of staff on the Strong & Herd training course.

253. All this indicates that Officer Jones' October and November 2017 letters were not the reason, or at least not the only reason, for the Appellant failing to pursue a new EUA. It seems that the decision was made earlier, at the time of the training, in the belief that little liability turned on it or at least, following Mr Cook's departure, no-one else continued with the application. Further, Mr Coleman indicates that the EUA application could not have been made at the time anyway as the company was still struggling to obtain the CCG.

254. Mr Jones' October letter might have reinforced the Appellant's belief that a failure to pursue the EUA would not result in significant consequences, but based on the evidence it did not cause the Appellant to take that view in the first place. In other words, the Appellant did not decide not to pursue the EUA application in reliance on the letter.

255. Secondly, even if the Appellant had relied on the letter, was it that reliance that caused the detriment to the Appellant i.e. the liability to pay the customs debt?

256. The Appellant would have to show that if it had not relied on the letter and had made the application in October, the EUA would have been granted with retrospective effect to cover the import of the aircraft. It has not done this.

257. Article 211 of the UCC requires the customs authority to authorise the use of the end use procedure. In order for the authorisation to be granted with retroactive effect, a series of conditions must be met. Article 172 of the Delegated Regulation provides that where an authorisation is granted with retroactive effect, it "shall take effect at the earliest on the date of acceptance of the application". That is, the default position is that the authorisation is only backdated to the date of application, as was the case with the EUA granted in 2018. Article 172 (2) provides:

> "2. In exceptional circumstances, the customs authorities **may** allow an authorisation referred to in paragraph 1 to take effect at the earliest one year, …, before the date of acceptance of the application." [emphasis added]

258. So before the Appellant could obtain an EUA backdated for 12 months, they must first be eligible for backdating to the date of application by satisfying the conditions in Article 211 UCC and to obtain the further backdating, they must establish that there are exceptional circumstances and persuade HMRC to exercise a discretionary power to backdate the authorisation for a further period.

259. Although Officer Jones offered to write a letter about the audit to support an application for a retrospective EUA, it is far from certain that the Appellant would have obtained the authorisation with the retroactive effect required to prevent the liability arising. The Appellant has not shown, on the balance of probabilities that, even if it had relied on the statement in the October letter, that reliance would have caused detriment.

260. Finally, HMRC are required by EU and domestic law to collect a customs debt if due. They have no discretion to agree to forgo it. The review conclusion letter suggested that HMRC's practice according to the Administrative Manual was that HMRC would only be bound by incorrect advice if:

> "• To apply the correct statutory position would be so unfair as to constitute an abuse of power (see ADML1400)."

261. Officer Robinson concluded, in my view rightly, that this test was not met.

262. Taking all the above into account, I do not consider that the Appellant can claim that it should not be required to pay the Post-Clearance Demand Note on the grounds of legitimate expectation.

**SUBMISSIONS ON THE NEW GROUND OF APPEAL RE VALUE OF THE AIRCRAFT**

263. On the morning of the third day of the hearing, Ms Choudhury sought to introduce a new ground of appeal: that the value of the aircraft was not, as declared by the Appellant on import, $12.5 million, but was only $4 million, the value stated on the Import Declaration into Sophia, provided by the Bulgarian authorities.

264. She submitted that she was able to raise the point at this stage on the basis of "the venerable principle" set out in *Investec Asset Finance plc and another v Revenue and Customs Commissioners* [2020] EWCA Civ 579 at [60] where the Court quoted Henderson J in *Tower McCashback v HMRC* as follows:

> "'[115] … There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it

> is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest. … For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50 [TMA], and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative.
>
> [116] That is not to say, however, that an appeal against a closure notice opens the door to a general roving enquiry into the relevant tax return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return.'"

265. Ms Choudhury argued that as this Tribunal has a full appellate jurisdiction in this case, it can take account of the evidence and determine the correct amount of tax.

266. She further submitted that, based on the venerable principle and the Tribunal's overriding objective to determine cases fairly and justly, the Appellant does not need formally to amend its grounds of appeal to include an argument based on value, but if it does need to do so, she was making the application that morning.

267. The Appellant only received the Bulgarian documents in August 2021 which included the Sophia Import Declaration stating that the value of the aircraft was $4 million. The point had not previously been made because, Ms Choudhury admitted, she had missed it given the amount she had to do and the documents she had to review since receipt of the Bulgarian documents in August.

268. Ms Choudhury had already applied to make one late amendment to the grounds of appeal to take account of the Bulgarian documents and the possibility that the aircraft was already subject to a special procedure when it was imported to the UK. This application was made on 1 October, a few days before the start of the hearing. It was in response to HMRC's application to submit further evidence as a result of the Bulgarian documents and included an application by the Appellant to admit further evidence. I allowed both HMRC's and the Appellant's applications, despite their lateness as it was clearly in the interests of justice that both sides should be able to address the significant developments raised by the Bulgarian documents.

269. That application included the principles to be applied in considering whether to allow a party to rely on a new argument made at a late stage in the proceedings which are set out in the High Court judgement in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) applied by the Upper Tribunal *in Denley v HMRC* [2017] UKUT 340 (TCC). In *Quah*, Carr J stated at [38]:

> "…the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able

> to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

270. Ms Choudhury points out that there would be considerable prejudice to the Appellant if it cannot rely on the evidence as to value. She submits that there is no need for further witness evidence; the documents speak for themselves.

271. Had HMRC approached the Bulgarian authorities earlier, the documents would have been available earlier.

272. Her primary point is that the Appellant does not need to make a formal application to amend and on the basis of the venerable principle as referred to in *Goldman Sachs*, the Tribunal can take the value into account even without amending the grounds of appeal.

273. Mr Duffy opposed the Appellant's submission that she could introduce this new argument at this stage.

274. *Goldman Sachs* was about the ability of a party to introduce new arguments at a late stage and indicates this is possible, although it is stated that the ability to change the arguments is:

> "Subject always to the requirements of fairness and proper case management…"

275. However, *Quah*, places a heavy burden on the Appellant to show why she should be allowed to raise the point now.

276. There was no good reason for the argument being introduced at such a late stage. Ms Choudhury frankly admitted she had missed the point in the pressure of the other work occasioned by the Bulgarian Documents. She has had the Bulgarian documents since August 2021 and although this is not a long time, they were still available for several weeks before the hearing. The relevant documents were also included with Officer Jones' amended witness statement which was filed on 1 September 2021, over a month before the hearing.

277. Mr Duffy submits that there has been no formal application to amend. The amount of the demand note has never formed part of the appeal. When the point was raised, on the morning of the resumed hearing, 12 days after a two day hearing of the evidence, there was no notice of application and nothing had been sent to HMRC or the Tribunal.

278. In addition, the Appellant had sent a 270 page Supplementary Authorities Bundle to HMRC the night before the resumed hearing which had to be considered overnight in the absence of written submissions.

279. The lateness is extreme.

280. Nor was the value issue put to the witnesses or mentioned in the Appellant's skeleton argument. There was no opportunity for HMRC to respond and no opportunity for witness or other evidence to be produced about the true value. Mr Duffy submitted that it was not credible that the aircraft was worth only $4 million.

281. The value on which the duty and VAT were based was the figure provided by the Appellant itself. I acknowledge that the Appellant did not itself know what the value was and used the figure given to them by the freight forwarder in the import entry. If, however, they had any doubt about the value, they have had five years to query it. The Sophia Import Declaration was available to the Appellant in August/September 2021 but the value was not picked up at that point. Mr Jones was questioned in the evidence hearing about the basis of valuation in the that document, but the point was not even raised then.

282. There was no good reason why the value was not challenged following receipt of the Bulgarian documents.

283. Nor can it be said that the actual value can be established without further evidence. There are at least three different values given for the aircraft by different people in different contexts at different times:

> (1) $12.5 million stated by the freight forwarder and used in the import entry. This figure came from an email of 7 November 2016 from BBAM, the leasing company to the freight forwarder, stating "please assume $12,500,000 for the purposes of the customs invoice".
>
> (2) $4 million stated in the Sophia Import Declaration and Fastjet's proforma invoice of 3 August 2016 and on a further pro-forma invoice dated 1 November 2016 which states "value for customs purposes only".
>
> (3) The sales invoice from BBAM, the leasing company to the new purchaser Sunrise Asset Management states that the "base purchase price" is $10,523,000.

284. I have considered the submissions carefully in the light of *Quah* and I have also considered the importance of the overriding objective. In view of the extreme lateness of the application-two thirds of the way through the hearing, the lack of a good reason for the lateness, the uncertainty about the actual value of the aircraft which would require a further hearing or submissions and further evidence to resolve, I have decided not to allow the Appellant to argue this new ground of appeal, challenging the amount of the assessment on the basis of the value of the aircraft.

**DECISION**

285. For the reasons set out above, I have decided:

> (1) That the aircraft was imported under an expired EUA and that it was not subject to the Inward Processing procedure on arrival in the UK. Accordingly, the customs debt and VAT are due;

(2) The principles of *Terex* do not apply to require HMRC to remit the customs debt and VAT. Nor can the Appellant require remission on the ground of equity under Article 120 UCC. To the extent that the Appellant seeks to rely on the EU principle of legitimate expectation, this Tribunal does not have jurisdiction in the matter.

(3) This Tribunal does not have jurisdiction to consider the *ultra vires* ground which would not assist the Appellant in any event; and

(4) This Tribunal does not have jurisdiction to consider the UK legitimate expectation ground in the context of this appeal and, in any event, the conditions for legitimate expectation are not made out.

286. Accordingly, I dismiss the appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**MARILYN MCKEEVER**
**TRIBUNAL JUDGE**

**Release date: 16 MARCH 2022**