



Neutral Citation: [2024] UKFTT 00497 (TC)

Case Number: TC09195

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

[Taylor House]

Appeal reference: TC/2021/01406

*CUSTOMS DUTY – relief claimed on Personal Protective Equipment imported into the United Kingdom from outside of the EU in reliance on Articles 74 to 80 of Council Regulation (EC) No 1186/2009 and the Commission Decision dated 3 April 2020 (‘the Disaster Relief’) – whether the Goods were of a kind that could benefit from relief – whether the imports were made by, or on behalf of, State organisations, or other philanthropic or charitable organisations approved by the competent authorities of the Member States – whether the goods were received by such organisations – whether the goods were subsequently distributed free of charge – change of use and whether the conditions for entitlement to the Disaster Relief still applied – whether the Appellant was alternatively liable for customs duty in accordance with Council Regulation (EU) No. 952/2013 (‘the Union Customs Code’) – Appeal dismissed*

**Heard on:** 1 to 3 May 2024  
**Judgment date:** 6 June 2024

**Before**

**JUDGE NATSAI MANYARARA  
DUNCAN MCBRIDE**

**Between**

**HAYAT ESTATES LTD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Burhan Hayat, Director

For the Respondents: Ms Charlotte Brown of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The Appellant appeals against HMRC's decision to issue a post-clearance demand note, commonly referred to as a C18 ('the Assessment'), to customs duty in the sum of £71,594.95. The Assessment relates to consignments of Personal Protective Equipment ('PPE'), primarily face masks and surgical gowns ('the Goods'), imported by the Appellant into the United Kingdom (from outside of the European Union) between 10 May 2020 and 22 July 2020. The Appellant claimed customs duty and VAT relief in reliance on arts. 74 to 80 of Council Regulation (EC) No 1186/2009 ('the CSDR Regulations'), and the Commission Decision dated 3 April 2020 ('the Commission Decision'); collectively referred to as "the Disaster Relief". Pursuant to the CSDR Regulations and the Commission Decision, the Disaster Relief applies where the import of goods is made by, or on behalf of, State organisations, or other philanthropic or charitable organisations (an 'Eligible Organisation') approved by the competent authorities of the Member States, for distribution free of charge to victims of disasters.

2. The Appellant imported the Goods in a total of 19 separate consignments ("Import Entries") set out at para. 14 below. HMRC have granted full relief in respect of Import Entry 2 and Import Entry 16, as well as partial relief in relation to Import Entry 18. This was because a full audit trail had been provided by the Appellant to show that the imports were received by an Eligible Organisation. In relation to the remaining Import Entries, the conclusion reached by HMRC was that: (i) the Goods were supplied to an organisation that did not meet the definition of an Eligible Organisation; or (ii) a full audit trail had not been provided by the Appellant to show that the conditions of entitlement to the Disaster Relief applied.

3. A civil penalty was also issued in the sum of £750 and subsequently varied to £300 following the review decision. The penalty is not under appeal and does not form part of this Decision.

4. The documents to which we were referred included: (i) the Hearing Bundle consisting of 764 pages (which included the Statement of Case dated 4 August 2022, the Notice of Appeal dated 23 September 2021 and the Appellant's Further and Better Particulars dated 8 June 2022); (ii) the Authorities Bundle consisting of 75 pages; (iii) the Appellant's Bundle of Documents ("List of Documents") consisting of 157 pages; (iv) HMRC's Skeleton Argument dated 17 April 2024; (v) Annex to HMRC's Skeleton Argument; (vi) Appellant's Skeleton Argument (undated); and (v) HMRC's Disaster Relief Guidance entitled "*Pay no import duty and VAT on medical supplies, equipment and protective garments (COVID-19)*", and published on 31 March 2020.

### ISSUE(S)

5. The issues in this appeal are: (i) whether sufficient evidence has been provided by the Appellant to show that an Eligible Organisation *actually* received the Goods; and (ii) whether the Goods were then distributed free of charge within the United Kingdom, in accordance with the conditions of entitlement to the Disaster Relief.

6. The burden of proof is on the Appellant, pursuant to s 16(6) of the Finance Act 1994 ('FA 1994'). The standard of proof is the civil standard; that of a balance of probabilities.

### BACKGROUND FACTS

7. The Appellant was incorporated on 6 November 2012 and is a property letting management and development company. The director is Mr Burhan Hayat.

8. On 30 January 2020, the World Health Organisation ('WHO') declared the outbreak of COVID-19 (SARS-CoV-2) a public health emergency of international concern. This was upgraded to a pandemic on 11 March 2020.

9. On 3 April 2020, as a result of the pandemic, the Commission Decision implemented provisions to provide customs duty and import VAT relief on PPE and medical equipment imported into the EU and UK in accordance with arts. 74 to 80 of the CSDR Regulation (concerning customs duty), and in accordance with arts. 51 to 57 of Council Directive 2009/132/EC - implemented pursuant to arts. 131 and 143 to 145 of Council Directive 2006/112/EC (concerning import VAT). The Disaster Relief had the consequence that goods which would otherwise be liable to customs duty on release for free circulation in the United Kingdom were not liable for customs duty if they qualified for such relief. The Disaster Relief applies to medical equipment and PPE imported for the purposes of combatting the COVID-19 outbreak.

10. In April 2020, the director of Regal Healthcare Properties Limited (a care home operator) contacted Mr Hayat as he was struggling to buy face masks. The director was a friend of Mr Hayat and Mr Hayat had limited previous experience of exporting medical devices to the Middle East. Mr Hayat, therefore, believed that he could be of assistance. Regal Healthcare Properties Limited subsequently connected Mr Hayat with one of their suppliers, known as Altade Limited t/a Scooterpac ('Scooterpac'), through which orders were to be made by the Appellant in respect of the Goods.

11. On 20 April 2020, Mr Hayat contacted the National Import Reliefs Unit ('NIRU') to seek clarification as to whether his intended imports would satisfy the conditions of entitlement to the Disaster Relief.

12. On 1 May 2020, Mr Hayat submitted an application to NIRU, in order to obtain exemption from customs duties and import VAT. On the same date, Officer Ewing issued the Appellant with a NIRU certificate no. 788/2020. Officer Ewing's email linked to HMRC's Disaster Relief Guidance, published on the gov.uk website, which outlined the conditions for entitlement to the Disaster Relief.

13. The Appellant's NIRU certificate showed that the Goods were originally imported on behalf of NHS Norfolk and Waveney Clinical Commission Group, East Anglian Air Ambulance, John Radcliffe Hospital and Norfolk County Council, via Scooterpac. These organisations cancelled their orders due to issues which we will elaborate on later. The Goods were subsequently supplied to some of the organisations listed in the table at para. 16 below.

14. The Goods were imported by the Appellant between 10 May 2020 and 22 July 2020. The schedule of the 19 Import Entries is as follows:

<b>Import Entry No.</b>	<b>Type of goods</b>	<b>Customs Duty</b>
1	100,00 face masks	£16,104.35
2	11,800 gowns	n/a
3	70,000 face masks	£1,567.29
4	1,160 boxes of gloves	£124.22
5	10,200 gowns	£3,488.40
6	8,925 gowns	£3,052.35
7	19,875 gowns	£6,797.25

8	15,000 gowns	£5,130
9	160,000 face masks	£7,320.51
10	100 face masks	£238.50
11	500 gowns	£330
12	65,000 gowns and 500 face shields	£17,995.25
13	300 face masks and 250 face shields	£23.16
14	1000 boxes of gloves	£170.66
15	200,000 face masks	£5,712.75
16	10,640 gowns	n/a
17	2,100 face shields	£158.93
18	14,960 gowns	£3,118.08
19	2,620 boxes of gloves	£263.25

15. The suppliers of the Goods were:

<b>Supplier</b>	<b>Import Entry</b>
Lokumal & Co. Hong Kong Limited (' <b>Lokumal</b> ')	Import Entry 1, 3, 4, 9, 10, 14, 15 and 19
PIGA KIMYA OTOMOV SAN VE TIC (' <b>PIGA</b> ')	Import Entry 2, 5, 6, 7 and 8
Elsa Pharma Kissel Bakim Ve Sag (' <b>Elsa Pharma</b> ')	Import Entry 12, 16 and 18
TNT Plastik Ve Silikon Sanayi Ye (' <b>TNT Plastik</b> ')	Import Entry 17
Heng Dong Yi Liang Trading Company Limited (' <b>Heng Dong</b> ')	Import Entry 13

16. The total number of organisations which are relevant to this appeal are:

<b>Organisation</b>	<b>Referred to as</b>
NHS Norfolk and Waveney Clinical Commission Group	NHS NWCCG
East Anglian Air Ambulance	East Anglian Air Ambulance
John Radcliffe Hospital	Radcliffe
Norfolk County Council	NCC
Kent County Services	KCS
Regal Healthcare Properties Limited	RHP
IDC Limited	IDC
Phoenix Resource Centre – a charity	Phoenix
Edhi International Foundation UK – a charity	Edhi
West Yorkshire NHS Trust	West Yorkshire NHS Trust

17. On 24 July 2020, Officer Forwood opened an enquiry to check the Appellant's imports.
18. On 4 August 2020, Officer Forwood notified Mr Hayat that he would be commencing a compliance check and requested information relating to the imports made under the Disaster Relief by the Appellant. A telephone conversation was set up for 28 July 2020 to discuss the matter further. During the telephone conversation, it was confirmed that a schedule of imports made under the NIRU certificate would be issued to the Appellant for review.
19. On 21 August 2020, Mr Hayat provided supplier invoices, freight invoices and air waybills.
20. On 26 August 2020, Officer Forwood emailed a letter, schedule and factsheet to Mr Hayat. The letter requested further evidence to support the 19 Import Entries.
21. On 21 August 2020, Mr Hayat provided further documentation.
22. On 26 August 2020, Officer Forwood emailed Mr Hayat a summary of findings based on the evidence supplied. Officer Forwood also attached a spreadsheet to the email, which clarified the Import Entries that required more information to support them. Copies of sales invoices with confirmation of who paid for the Goods was also requested. Officer Forwood advised that without a clear audit trail for the Goods, consideration would have to be made to disallow the Disaster Relief, with the consequence that customs duty and import VAT would be charged at the full rate.
23. Mr Hayat replied on 14 September 2020 providing commercial freight paperwork, suppliers' sales invoices, bank statements and the Appellant's invoices as attachments to three emails.
24. On 1 October 2020, Officer Forwood issued a "Right To Be Heard Letter" to Mr Hayat. Mr Hayat was notified in this letter that insufficient evidence had been provided to support the claim to the Disaster Relief in relation to the Goods. Specifically: (i) there was insufficient evidence that the Goods were supplied to an Eligible Organisation; (ii) there was no clear audit trail of the Goods to the final customers; and (iii) payments made to the Appellant's overseas suppliers in relation to the Goods could not be confirmed.
25. On 30 October 2020, Mr Hayat supplied further information, including invoices from suppliers and purchase orders.
26. On 3 November 2020, Officer Forwood issued a decision letter, confirming the decision that insufficient evidence had been provided to support the claim to relief. The letter advised that the calculated customs duty and import VAT remained unchanged, and that a C18 would be issued for a total debt of £237,647.36.
27. On 13 November 2020, Mr Hayat requested a review of the decision and the case was passed on to Officer Williams.
28. On 11 November 2020, Officer Forwood issued a civil penalty information letter.
29. On 17 November 2020, the C18 was issued. The penalty decision was then issued on 15 December 2020.
30. On 23 February 2021, Mr Hayat provided further information.
31. On 27 March 2021, Officer Danks issued a review decision, varying the decision. The amount of customs duty was varied to £80,854.87. This was because import VAT was not due as zero-rating applied to PPE.

32. On 23 April 2021, the civil penalty was reduced, pro rata, from £750 to £300.
33. By an email dated 9 July 2021, Mr Hayat sent further information, and evidence, relating to the Goods. This included a summary of the supply chains to various organisations, sales invoices, purchase orders and bank statements.
34. On 4 August 2021, Officer McKinnell wrote to the Appellant having considered the recent information provided, and having concluded it was still insufficient to satisfy the claim to the Disaster Relief.
35. On 21 December 2021, the parties entered into ADR discussions. Following the ADR discussions, HMRC accepted that relief was applicable, in full, in relation to Import Entry 2 and Import Entry 16. This was because the supplies made to West Yorkshire NHS Trust, and some of the supplies made to East Sussex NHS Trust, were accepted as having been made to an Eligible Organisation.
36. On 8 June 2022, Mr Hayat served Further and Better Particulars. Following receipt of the information from Mr Hayat, Officer Rankin considered that the Appellant had provided sufficient evidence to claim partial relief in relation to Import Entry 18 as well. The Assessment was, therefore, further reduced to £71,594.95.
37. The information provided by Mr Hayat showed that the supplies that were intended to go to NHS NWCCG, NCC and Radcliffe were not accepted for reasons which we elaborate on later, and the orders were cancelled. The supplies that were then intended to go to KCS were also cancelled by KCS. The Goods were subsequently supplied to: (i) RHP; (ii) IDC – who were then said to have supplied the Goods to care homes; (iii) Phoenix – a charity who then shipped the Goods to Romania; (iv) Edhi – a charity with international links; and (v) family and friends. Some of the Goods were returned to Elsa Pharma (a supplier).

**APPLICABLE LAW**

38. The relevant law, so far as is material to the issues in this appeal, is as follows:
39. The CSDR Regulations setting up a Community system of reliefs from customs duties provide for relief in specified situations and specify those cases in which, owing to special circumstances, relief from import duties - except measures adopted on the basis of art. 133 of the Treaty establishing the European Community ('the Treaty') - would be granted when goods are released for free circulation, or are exported from the customs territory of the Community.
40. The CSDR Regulations provide that:

“TITLE II

**RELIEF FROM IMPORT DUTY**

...

*CHAPTER XVII*

...

**C. For the benefit of disaster victims**

*Article 74*

1. Subject to Articles 75 to 80, goods imported by State organisations or other charitable or philanthropic organisations approved by the competent authorities shall be admitted free of import duties where they are intended:

- (a) for distribution free of charge to victims of disasters affecting the territory of one or more Member States; or

(b) to be made available free of charge to the victims of such disasters, while remaining the property of the organisations in question.

2. Goods imported for free circulation by disaster -relief agencies in order to meet their needs during the period of their activity shall also be granted the relief referred to in paragraph 1, under the same conditions.

...

#### *Article 76*

Granting of the relief shall be subject to a decision by the Commission, acting at the request of the Member State or States concerned in accordance with an emergency procedure entailing the consultation of other Member States. This decision shall, where necessary, lay down the scope and the conditions of the relief.

...

#### *Article 78*

1. The organisations benefitting from the relief may not lend, hire out or transfer, whether for consideration or free of charge, the goods referred to in Article 74(1) under the conditions other than those laid down in that Article without prior notification thereof to the competent authorities.

2. Should goods be lent, hired out or transferred to an organisation itself entitled to benefit from relief pursuant to Article 74, the relief shall continue to be granted, provided the latter uses the goods for purposes which confer the right to such relief. In other cases, loan, hiring out or transfer shall be subject to prior payment of import duties at the rate applying on the date of the loan, hiring out or transfer, on the basis of the type of goods and the customs value ascertained or accepted on that date by the competent authorities.

...

#### *Article 79*

1. The goods referred to in Article 74(1)(b), after they cease to be used by disaster victims, may not be lent, hired out or transferred, whether for a consideration or free of charge, unless the competent authorities are notified in advance.

2. Should goods be lent, hired out or transferred to an organisation itself entitled to benefit from relief pursuant to Article 74 or, if appropriate, to an organisation entitled to benefit from relief pursuant to Article 61(1)(a), the relief shall continue to be granted, provided such organisations use them for purposes which confer the right to such relief.

In other cases, loan, hiring out or transfer shall be subject to prior payment of import duties at the rate applying on the date of the loan, hiring out or transfer, on the basis of the type of goods and the customs value ascertained or accepted on that date by the competent authorities

#### *Article 80*

1. Organisations referred to in Article 74 which cease to fulfil the conditions giving entitlement to relief, or which are proposing to use the goods admitted duty -free for purposes other than those provided for by that Article, shall so inform the competent authorities.

2. In the case of goods remaining in the possession of organisations which cease to fulfil the conditions giving entitlement to relief, when these are transferred to an organisation itself entitled to benefit from relief pursuant to Article 74 or, if appropriate, to an organisation entitled to benefit from relief pursuant to Article 61(1)(a), relief shall continue to be granted, provided the organisation uses the goods in question for purposes which confer the right to such relief. In other cases, the goods shall be liable to the relevant import duties at the rate applying on the date on which those conditions cease to be fulfilled, on the basis of the type of goods and the customs value ascertained or accepted on that date by the competent authorities.

3. Goods used by the organisation benefiting from the relief for purposes other than those provided for in Article 74 shall be liable to the relevant import duties at the rate applying on the date on which they are put to another use, on the basis of the type of goods and the customs value ascertained or accepted on that date by the competent authorities.

...

TITLE IV  
**GENERAL AND FINAL PROVISIONS**

...

*Article 123*

Where relief from import duties is granted conditional upon goods being put to a particular use by the recipient, only the competent authorities of the Member State in whose territory the said goods are to be put to such use may grant this relief.”

41. In accordance with art. 76 of the CSDR Regulations, implementation of Disaster Relief is “*subject to a decision by the Commission*”. The implementing decision was the Commission Decision issued on 3 April 2020, as follows:

*(Non-legislative acts)*

DECISIONS

**COMMISSION DECISION (EU) 2020/491**

**of 3 April 2020**

**on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020**

*(notified under document C (2020) 2146)*

THE EUROPEAN COMMISSION.

*Article 1*

“1. Goods shall be admitted free of import duties within the meaning of Article 2(1)(a) of Regulation (EC) No 1186/2009 and exempted of value added tax (VAT) on the imports within the meaning of Article 2(1)(a) of Directive 2009/132/EC, where the following conditions are fulfilled:

a) the goods are intended for one of the following uses:

i. distribution free of charge by the bodies and organisations referred to in point (c) to the persons affected by or at risk from COVID-19 or involved in combating the COVID-19 outbreak;

ii. being made available free of charge to the persons affected by or at risk from COVID-19 or involved in combating the COVID-19 outbreak while remaining the property of the bodies and organisations referred to in point (c);

b) the goods satisfy the requirements laid down in Articles 75, 78, 79 and 80 of Regulation (EC) No 1186/2009 and Articles 52, 55, 56 and 57 of Directive 2009/132/EC;

c) the goods are imported for release for free circulation by or on behalf of State organisations including State bodies, public bodies and other bodies governed by public law or by or on behalf of organisations approved by the competent authorities in the Member States”.



42. Liability for customs duty is outlined in Council Regulation (EU) No. 952/2013 (the Union Customs Code ('UCC')). Article 15 (1) UCC provides that:

“Any person directly or indirectly involved in the accomplishment of customs formalities or in customs controls shall, at the request of the customs authorities and within any time-limit specified, provide those authorities with all the requisite documents and information, in an appropriate form, and all the assistance necessary for the completion of those formalities or controls.”

43. Pursuant to art. 79(1)(c) UCC, non-compliance with the conditions for the Disaster Relief incurs a customs liability, which arises either at the time the conditions are not fulfilled, or when a customs declaration is accepted (art. 79(2) UCC). The debtor in such circumstances is the person liable to comply with the conditions for Disaster Relief (art. 79(3) UCC):

“TITLE III

**CUSTOMS DEBT AND GUARANTEES**

CHAPTER 1

**Incurrence of a customs debt**

Section 1

**Customs debt on import**

*Article 77*

**Release for free circulation and temporary admissions**

1. A customs debt on imports shall be incurred through the placing of non-Union goods liable to import duty under either of the following customs procedures:

(a) Release for free circulation, including under the end -use provisions

[...]

2. A customs debt shall be incurred at the time of acceptance of the customs declarations

3. The declarant shall be the debtor. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

[...]

*Article 79*

**Customs debt incurred through non-compliance**

1. For goods liable to import duty, a customs debt on import shall be uncured through non-compliance with any of the following:

[...]

(c) A condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of duty

2. The time at which the customs debt is incurred shall be either of the following:

(a) The moment when the obligation the non-fulfilment of which gives rise to the customs debt is not met or ceases to be met

(b) The moment when a customs declaration is accepted for the placing of goods under a customs procedure where it is established subsequently that a condition governing the placing

of goods under that procedure or the granting of a duty exemption or a reduced rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

[...]

3. In cases referred to under point (c) of paragraph 1, the debtor shall be the person who is required to comply with the conditions governing the placing of goods under a customs procedure or the customs declaration of the goods placed under that customs procedure or the granting of a duty exemption or reduced rate of import duty by virtue of the end-use of the goods.

Where a customs declaration in respect of one of the customs procedures referred to in point (c) of paragraph 1 is drawn up, and any information required under the customs legislation relating to the conditions governing the placing of the goods under that customs procedure is given to the customs authorities, which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the customs declaration and who knew, or ought reasonably to have known, that such information was false shall also be a debtor.”

44. The UCC still had effect in the United Kingdom during the period that the Goods were imported into the United Kingdom by the Appellant, which was also within the “transition period” (i.e., 1 January 2020 to 31 December 2020) of the UK’s withdrawal from the EU in accordance with s 1A(3)(e) of the European Union (Withdrawal) Act 2018 (‘the Withdrawal Act’).

45. Pursuant to s 1(1)(c) and s 2(1)(c) of the Value Added Tax Act 1994 (‘VATA’), import VAT was charged on the importation of goods into the UK from outside the EU Member States at a rate of 20% of the value of the goods. However, where an importation meets the conditions contained in the Disaster Relief, the importation is relieved from VAT, pursuant to arts. 51 to 57 of Council Directive 2009/132/EC and art. 5 of the Value Added Tax (Imported Goods) Relief Order 1984.

46. The UK implemented a separate provision for zero-rating PPE imported between 1 May 2020 and 31 July 2020, in respect of VAT. The amended VAT rate was implemented by the Value Added Tax (Zero Rate for Personal Protective Equipment) (Coronavirus) Order 2020/458 (‘the VAT Order’).

47. Section 30(3) VATA, as was in force at the time the Appellant imported the Goods, provided that:

“Where goods of a description for the time being specified in [Schedule 8 VATA], or of a description forming part of a description of supply for the time being so specified, are acquired in the United Kingdom from another member State or imported from a place outside the member States, no VAT shall be chargeable on their acquisition or importation, except as otherwise provided in [Schedule 8 VATA].”

48. HMRC accept that the Goods fall within Group 20 of Schedule 8 VATA and are, therefore, not chargeable to import VAT. Hence, the Assessment only includes sums of customs duty and does not include any sums of import VAT.

49. The Tribunal’s jurisdiction in this appeal is provided for at s 16 FA 1994. This is because the decision to assess the Appellant for customs duty is a relevant decision, as defined within s 13A, as follows:

**“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—

...

(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above.”

50. Section 16 FA 1994 deals with appeals to a tribunal. Section 16 provides that:

**“16 Appeals to a tribunal**

...

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

...

(6) On an appeal under this section the burden of proof as to—

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AA), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.”

[Emphasis added]

**APPEAL HEARING**

51. Mr Hayat (the Appellant’s director) confirmed that he was not expecting a legal representative to attend on the Appellant’s behalf. He added that a friend, who is a contract lawyer, had originally intended to attend the hearing as a Mackenzie friend, but could not do so due to domestic circumstances. Mr Hayat, nevertheless, confirmed that he was ready to proceed with the appeal hearing, having confirmed that he had received all of the documents referred to at para. 4 above, and that there were no variations to the Appellant’s Grounds of Appeal (as set out in the Notice of Appeal and amplified in the Further and Better Particulars).

Preliminary issues

52. At the commencement of the appeal hearing, Ms Brown handed up a copy of HMRC’s Disaster Relief Guidance, as it applied during the period when the Goods were imported. Mr Hayat indicated that he had no objection to this late piece of evidence being submitted by HMRC as a later version of guidance had already been included in the Hearing Bundle. Ms Brown explained that there had been further iterations of the guidance over a period of time. We were satisfied that the guidance was relevant to the issues before us and, therefore, admitted the late evidence having balanced the prejudice to both parties.

53. The Appellant’s Grounds of Appeal assert that there is an inconsistency in HMRC’s interpretation of the Disaster Relief as the guidance has been applied differently in relation to

the Import Entries where relief was granted. Whilst this point was not pursued in the Appellant's Skeleton Argument, Mr Hayat confirmed that he still wished to pursue the point concerning the inconsistency in HMRC's decision-making during the appeal. We explained that the First-tier Tribunal ('FtT') does not have jurisdiction to review the reasonableness of HMRC's decision, in light of the nature of the decision under appeal. We further explained that the FtT does not have any supervisory jurisdiction over HMRC. We will return to this issue later.

54. As Mr Hayat was unrepresented, we asked Ms Brown to open HMRC's case. We have included the opening and closing submissions made by both parties in the following paragraphs:

The Submissions

55. Ms Brown adopted and amplified the submissions made in the Statement of Case, and in her Skeleton Argument. She submitted, in summary, that:

- (1) The appeal solely concerns the eligibility requirements for the Disaster Relief. The commodity codes applied by Officer Forwood were originally contested by Mr Hayat, but are no longer in issue.
- (2) HMRC accept that the Goods were of a kind that could benefit from the Disaster Relief. HMRC further accept that the Goods were originally imported by the Appellant on behalf of an Eligible Organisation.
- (3) The purpose of the Disaster Relief is to enable PPE to be imported as efficiently as possible "*for the benefit of disaster victims*". Member States were required to apply for the Disaster Relief. A key requirement was that goods were to be distributed "*free of charge*" within the United Kingdom.
- (4) In relation to the CSDR Regulations: (i) art. 74 sets out the condition that goods must be for the benefit of disaster victims; (ii) art. 75 sets out the condition that goods must be imported "*by*" an Eligible Organisation; (iii) art. 76 makes provision for a Commission decision to be made; (iv) arts. 78 and 79 deal with changes to the end-user since the goods were imported (which requires notification to be given to competent authorities).
- (5) In respect of changes to the end users, relief will continue to apply as long as the conditions for eligibility are met. Article 80 of the CSDR Regulations makes provision for the consequences of arts. 78 and 79.
- (6) Article 123 of the CSDR Regulations has been considered by HMRC in respect of supplies which were made to charities, and in respect of the issue of whether the Goods were put to the intended use for the benefit of disaster victims within the United Kingdom. Ms Brown explained that the reason that art. 123 was relevant was because the charity, Phoenix, had distributed the Goods outside of the United Kingdom.
- (7) In relation to the Commission Decision: (i) art. 1 sets out the conditions that need to be fulfilled for eligibility for relief; (ii) art. 1(1)(a) is taken from art. 74 of the CSDR Regulations and deals with the "*intended use*" condition (hence the reference to art. 123 of the CSDR Regulations); and (iii) art. 1(1)(c) broadened the requirement that the goods were to be imported by an Eligible Organisation, to the requirement that the goods were imported "*by or on behalf of*" an Eligible Organisation.
- (8) Relief will only be granted if the conditions set out in the Disaster Relief are met. Only competent authorities can grant relief. If the conditions are not met, or the goods are given to family and friends, relief will not be available and the Appellant will be

liable to customs duty under the UCC (in accordance with art. 79(1)(c) and 79(3) of the UCC).

(9) The Appellant needs to prove that the Goods were imported on behalf of an Eligible Organisation, and received by an Eligible Organisation. An intention to deliver the goods to an Eligible Organisation is insufficient to meet the conditions of entitlement to the Disaster Relief.

(10) HMRC have acknowledged the additional information provided by the Appellant, but HMRC's position is that insufficient evidence has been provided by the Appellant to show that the imports in issue qualify for relief. HMRC's Disaster Relief Guidance is wider than the CSDR Regulations in respect of what is meant by "State Bodies". The guidance refers to care homes but RHP, to whom the Appellant made some supplies, comprised of private care homes. In respect of supplies made to IDC, these supplies were not made to an Eligible Organisation as IDC is a commercial enterprise and a full audit trail is lacking in respect of the end-users of the supplies.

(11) The FtT's jurisdiction is derived from s 16(5) FA 1994 and as this is not an ancillary decision under s 16(4), the FtT cannot consider the reasonableness of the decision. The burden of proof is on the Appellant to show that customs duty relief applies, and this is set out at s 16(6).

56. In reply, Mr Hayat submitted, in summary, that:

(1) At the time that the Goods were imported, arrangements were in place for the Goods to be supplied to an Eligible Organisation, as shown in the Appellant's NIRU certificate. There was, therefore, an intention to supply the Goods to an Eligible Organisation, right from the outset.

(2) He followed HMRC's Disaster Relief Guidance, which says that the Goods must be imported by, or on behalf of, an Eligible Organisation; and there is nothing in the guidance about who the ultimate end-user is once goods have been supplied to an Eligible Organisation by an importer. It would be unreasonable to expect the Appellant to know what the Eligible Organisation does with the Goods once they have been supplied. This is because the Eligible Organisation will have ownership of the Goods once the supply has been made.

(3) HMRC have not disputed that some of the imports went to RHP and IDC. RHP is a care home operator and IDC distributed the Goods to care homes. HMRC's Disaster Relief Guidance shows that homes and hostels for the aged are included in the definition of an Eligible Organisation. Moreover, NIRU did not say that the Appellant could not make the supplies to care homes.

(4) HMRC's compliance checks began when there was still a live supply chain and HMRC were informed of changes to the supplies. Supply chain issues resulted in some of the Goods being returned, or destroyed. Some goods had to be tested to ensure that they were safe. It would not have been appropriate for the Appellant to supply goods that did not meet the standards.

(5) HMRC are making a presumption that they cannot confirm in respect of some supplies being distributed outside of the United Kingdom (in relation to the supplies made to Edhi).

(6) There was a lack of clarity from HMRC concerning its guidance, and this must be considered in the context of an ongoing global pandemic. Furthermore, global supply

chains were experiencing the adverse effects of the pandemic and there were issues at ports of entry.

(7) The Appellant had no control over the items included in the various Import Entries. The reason for multiple Import Entries is because there were ongoing supply chain issues.

57. We heard oral evidence from Mr Hayat, Officer McKinnell and Officer Rankin.

### Oral Evidence

58. Mr Hayat had not prepared a witness statement in support of the appeal. In his oral evidence, he adopted the contents of his Notice of Appeal, and the Further and Better Particulars, as being true and accurate. He then explained that he had become aware of the Disaster Relief via the Gov.uk website, whilst researching how to import the Goods. He added that he contacted NIRU to seek clarification about the process involved. He subsequently completed the NIRU application form. Prior to importing the Goods, Mr Hayat says that he had obtained purchase orders from Scooterpac, with details of the qualifying end users that the Goods would be supplied to as he wanted to ensure that the conditions for the Disaster Relief would be met. Mr Hayat's position was that the imports were all based on the NIRU certificate, and that they are all eligible for relief.

59. Mr Hayat further explained that the reality of doing business during the pandemic, particularly with regard to products in high demand, globally, was that "*things did not always go to plan*". This was because there was an upheaval in global supply chains and logistics, and the rules were constantly changing; not just in the United Kingdom, but also in the countries from which the Goods were being purchased. He added that: (i) prices and minimum quantity requirements were fluctuating daily as suppliers were experiencing rising costs in raw materials; (ii) there was an unprecedented demand for PPE; and (iii) deliveries were constantly delayed and, in some cases, the product quantities that arrived were not as expected, or agreed. In his opinion, these issues complicated the supply chain in some instances, and meant that orders were cancelled, or could not be honoured due to quality issues with the items.

60. Despite these challenges, he stated that the evidence provided showed that the Appellant did everything possible to ensure that the conditions of the Disaster Relief were met. His position was that in all instances, the Goods were either delivered to an Eligible Organisation, or the order was cancelled after import due to factors such as substandard quality, or delays in the supply chain; which he submitted was completely out of his control. He was of the view that the reasons why the imports did not go to an Eligible Organisation must be considered in the deciding whether or not relief should be granted.

61. Under cross-examination from Ms Brown, Mr Hayat said this:

(1) NHS NWCCG cancelled its order but the Goods were supplied to RHP and IDC, although some masks were destroyed beforehand.

(2) Supplies were not made to Radcliffe because they were not deemed suitable.

(3) RHP runs private care homes and should be considered to be an Eligible Organisation and not a commercial enterprise. IDC may be a private company but they supplied the Goods on to care homes.

(4) KCS is part of KCC, and, therefore, an Eligible Organisation.

(5) Edhi is a registered charity and they assisted victims of COVID-19. He accepts that he cannot be certain whether Edhi put the Goods to use in the UK.

(6) He gave boxes away to family and friends.

62. We then heard from Officer McKinnell. Officer McKinnell has been employed by HMRC since December 1998. From April 2015 until 5 September 2021, she was employed as a Customs International Trade Higher Officer. She is currently employed as a senior officer in another directorate within HMRC. In her oral evidence, she adopted the contents of her witness statement, dated 22 December 2022, as being true and accurate. She was not asked any further questions in examination-in-chief by Ms Brown.

63. In her witness statement, Officer McKinnell states that she took over the case from Officer Forwood in December 2020. She explained that for Import Entries 3, 4, 10, 13, 14, 15, 17 and 19, the documents provided by the Appellant showed that the Goods were provided to organisations which were not Eligible Organisations. She added that in reaching this conclusion, she conducted internet searches on Gov.uk, Companies' House and the Charities Commission pages. She explained that the searches confirmed that both IDC and RHP were private companies, and that RHP was not a registered charity.

64. For Import Entries 1, 2, 5, 6, 7, 8, 11, 12 and 16, she formed the view that although the Appellant had indicated that the Goods were supplied to NHS NWCCG and Radcliffe (via Rutland), the Appellant had not provided a full audit trail confirming the supply to those organisations, or indeed any other Eligible Organisation. For Import Entry 9, she formed the view that although the Appellant had indicated that the Goods had been supplied to NCC via Scooterpac and Eastpoint, she still required further evidence of the full supply chain which could have included contracts, purchase orders, sales invoices, payment evidence and delivery evidence.

65. Under cross-examination from Mr Hayat, Officer McKinnell explained that officers have access to a senior officer in terms of how the Disaster Relief should be applied. She added that she reached her conclusions as to whether the conditions for the Disaster Relief were satisfied by looking at the information that had been originally been provided by Mr Hayat, as well as the additional information provided after the decision was made.

66. The last witness to be called was Officer Rankin, who adopted the contents of his witness statements dated 23 December 2022 and 21 April 2023, as being true and accurate. Officer Rankin has worked as an Intervention Officer for the Customs and International trade Team since 10 October 2014. In his witness statements, Officer Rankin stated that following ADR discussions, he accepted that Import Entry 2 satisfied the conditions for reliance on the Disaster Relief and, therefore, customs duty did not apply to that import. He also explained that he accepted that the Disaster Relief applied to some goods imported under Import Entry 16 and, as such, no customs duty is due on that proportion of goods; namely 9080 surgical gowns, and partially in relation to Import Entry 18. He, however, maintained that the eligibility criteria for the Disaster Relief were not satisfied in respect of the remainder of the imports which are the subject of the Assessment.

67. Under cross-examination from Mr Hayat, Officer Rankin stated that the imports that had been accepted were attributed to specific entries according to the information that had been provided by Mr Hayat and not randomly, as suggested.

*Further issues that arose during the hearing*

68. During the appeal hearing, Mr Hayat placed reliance on alternative articles of the CSDR Regulations. He submitted that arts. 95 to 101 of the CSDR Regulations apply to the circumstances of this appeal as the Goods had to be examined before they could be released. In this respect, he submitted that this was a reasonable and prudent thing for him to do in

order to see if they met the standards required. He further submitted that art. 23 of the CSDR Regulations is relevant on the basis that goods that were destroyed were of negligible value.

69. Ms Brown, on the other hand, submitted that arts. 95 to 101 of the CSDR Regulations do not apply to the circumstances of this appeal as those articles deal with goods that had been imported for medical examination. She further submitted that art. 23 is not relevant as the Goods were not of negligible value at the time of import.

70. A further issue arose during the hearing as to what the obligation was upon an importer in relation what use goods were put to after they had been delivered to an Eligible Organisation. We asked Ms Brown to shed further light on how an importer might monitor this. Ms Brown submitted that the obligation upon an importer is simply to satisfy itself that at the time that the supply was made, the conditions of eligibility for the Disaster Relief were met by providing a full audit trail to show that goods were received by an Eligible Organisation.

71. There was some discussion about the number of surgical gowns that had been accepted as qualifying for the Disaster Relief under Import Entry 16 (9080 gowns to East Sussex NHS Trust) as Mr Hayat was of the view that there was a balance of 280 gowns that had not been accounted for. Mr Hayat further highlighted that only 10,640 gowns were shown under Import Entry 16 when, in fact, 20,000 gowns had been accepted by East Sussex NHS Trust.

72. Ms Brown submitted that HMRC were willing to concede that a further 280 gowns should be attributed to Import Entry 16. This was not accepted by Mr Hayat in light of the order showing that a total of 20,000 gowns were ordered by East Sussex NHS Trust.

73. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

#### **FINDINGS OF FACT**

74. The following facts were either proved, or accepted:

- (1) The Goods forming the basis of the Assessment were of a kind that fell within the scope of entitlement to the Disaster Relief.
- (2) The Appellant's NIRU certificate shows that the Goods were ordered on behalf of NHS NWCCG, East Anglian Air Ambulance and NCC. The orders were either rejected or cancelled by these organisations.
- (3) Radcliffe, an Eligible Organisation, also cancelled their order.
- (4) The orders were facilitated by Scooterpac, on behalf of the Appellant. The Goods were ordered from various suppliers (as set out at para. 13 above).
- (5) Some of the supplies received from Lokumal were not accepted, and a full refund was issued to the Appellant.
- (6) The intended recipients were dissatisfied with the quality of some of the supplies made by PIGA.
- (7) There were delays and irregularities in relation to the supplies made by Elsa Pharma, resulting in the supplies being returned to Elsa Pharma.
- (8) Some of the orders were tested by the British Standards Institute ('BSI') and were found not to meet the standards. Those orders were subsequently destroyed by Scooterpac.
- (9) The Appellant then supplied the Goods to RHP, IDC, West Yorkshire NHS Trust and East Yorkshire NHS Trust. The supplies made to West Yorkshire NHS Trust, and



some of the supplies made to East Yorkshire NHS Trust have been accepted as meeting the conditions of entitlement to the Disaster Relief by HMRC, resulting in some of the reliefs applied.

(10) RHP is a private company that manages care homes and is not an Eligible Organisation.

(11) IDC is also a private company that has no connection to care homes and a full audit trail is lacking in respect of the supplies said to have been made by IDC to any care homes.

(12) KCS, who were also intended recipients of the supplies, cancelled their order and the issue of whether they are an Eligible Organisation is academic.

(13) A full audit trail is lacking in respect of the supplies made to Edhi (in relation to what use the supplies were put to).

(14) Phoenix shipped the Goods to Romania shortly after the order was delivered to them by Mr Hayat.

(15) Mr Hayat gave some supplies to family and friends.

75. We will elaborate on these findings of fact later.

#### **DISCUSSION**

76. The Appellant appeals against HMRC's decision to issue an Assessment to customs duty, in the sum of £71,594.95. The Assessment relates to consignments of PPE imported under the Disaster Relief. The Appellant imported the Goods using the COVID-19 Disaster Relief CPC code 40 00 C26. The document entitled "European Commission: COVID Disaster Import Relief: COVID-19 Questions and answers on the Commission Decision (Europa.eu)" ("the Questions and Answers document") included in the Hearing Bundle shows that the additional procedure code "C26" (Goods imported for the benefit of disaster victims) is required to be declared in the customs import declarations.

77. The imports made by the Appellant were ordered and facilitated by Scooterpac, the Appellant's intermediary, from the suppliers listed in the table at para. 15 above. A letter, dated 9 June 2021, from Scooterpac, says this concerning the orders:

*"Dear Sir/Madam,*

*I am writing to confirm that Altade Ltd T/A Scooterpac worked extensively with Hayat Estates Ltd in 2020 to source and supply PPE within the UK market. We ordered several items from Hayat Estates Ltd in order to supply them to local councils and the NHS. We also supplied other companies who were then supplying onto local councils and NHS trusts.*

*The items we ordered included:*

*1. Medical gowns – 160,000 units ordered and supplied to:*

*a. John Radcliffe Hospital, Headley Way, Headington, Oxford, OX3 9DU b. NHS Norfolk and Waveney*

*2. FFP3 Masks – 100,000 units ordered to be supplied to:*

*a. East Anglian Air Ambulance*

*b. Norfolk County Council*

*3. Type IIR masks – 150,000 Surgical type IIR faces to be supplied to:*

*a. Norfolk County Council*

There were delays on delivery of the gowns from Turkey which resulted in Hayat Estates supplying them to us later than expected. Due to these issues the orders from John Radcliffe Hospital, Oxford NHS Trust were cut short and we did not require the full amount. Hence, we did not continue with regards to the purchase orders issued to Hayat Estates Ltd. With regards to the FFP3 masks when they arrived there was an issue with the packaging of the goods and they were also delayed. Due to these issues we had to arrange for the goods to be retested here in the UK with BSI. We agreed this cost would be shared with Hayat Estates as well as the repacking costs. We supplied these to the East Anglian air ambulance, NHS Norfolk and Waveney and Norfolk County Council as a trial order and were expecting a much larger quantity subsequently. However following the delays and the issues with the packaging the subsequent orders were cancelled from both East Anglian Air Ambulance, Norfolk County Council and Eastpoint to supply to Norfolk County Council.

[Emphasis added]

78. Prior to making the imports, Mr Hayat contacted NIRU and he obtained a NIRU certificate. Mr Hayat submits that all of the organisations identified in this appeal were specified in the Appellant's NIRU application. This is not correct as the NIRU application, dated 1 May 2020, only referred to NHS NWCCG, East Anglian Air Ambulance and NCC. This is the starting point.

79. The notes attached to the Appellant's NIRU certificate provide that:

*“NOTES*

- 1. If there is a nil rate of duty and VAT on these goods under the Customs Tariff, an application is unnecessary. To determine the duty and VAT rate, please email our Tariff Classification helpdesk...*
- 2. A copy of your order and other supporting documents to support this application may be requested by Customs.*
- 3. Any certificate issued by this office will grant relief from Customs duty and VAT.*
- 4. The goods and their use may be subject to verification by Customs at any time after the import.*
- 5. If the goods are sold on, duty and VAT may be due on the value of the goods at the time of the sale.*
- 6. The goods must not be lent, hired out or transferred whether for payment or free of charge except with the prior consent of this office.*
- 7. If application is to be sent electronically via e-mail to NIRU, the declaration in box 5 does not have to be signed.*
- 8. This application must be sent to: ...”*

80. The Goods were subject to verification by HMRC when the compliance check was opened.

81. Mr Hayat submits that the Goods satisfy the eligibility criteria for the Disaster Relief and, as such, customs duty is not due on the Goods. Ms Brown submits that the Appellant has not discharged the burden of proof it to show that the Goods were supplied to an Eligible Organisation either because: (i) a full audit trail is lacking; (ii) the end user is not an Eligible Organisation (in the cases of RHP, IDC and KCS); (iii) some goods were returned to the supplier or destroyed and/or: (iv) there is a lack of evidence that the supplies made to Edhi and Phoenix were distributed in the United Kingdom.

82. The Appellant imported some of the goods from Turkey. The UCC applies to imports of non-EU goods (i.e., goods which are imported from outside the EU) and customs duty applies to such goods if they do not fall within the conditions of entitlement to the Disaster Relief.

***The conditions for entitlement to the Disaster Relief***

83. This appeal concerns the conditions for entitlement to the Disaster Relief. The Disaster Relief granted by the CSDR Regulations requires goods to have been imported *by* State organisations, or other charitable or philanthropic organisations (i.e., an Eligible Organisation) approved by the competent authorities of the Member State in question. The competent authorities in the circumstances of this appeal are HMRC as the imports were made to the United Kingdom during 2020 (before IP-completion day). In accordance with art. 74(1)(a) of the CSDR Regulations, goods are required to have been imported by an Eligible Organisation “*for distribution, free of charge, to victims of disasters affecting the territory of one of more Member State*”, and “*made available free of charge to the victims of such disasters*” (art. 74(1)(b)). This is the specific/intended use condition of the system established by the Disaster Relief.

84. Article 76 of the CSDR Regulations specifies that customs duty relief is subject to a decision by the Commission. That decision is the Commission Decision dated 3 April 2020. The Commission Decision laid down the scope and conditions of the relief referred to in art. 74 of the CSDR Regulations, and specifies that goods must satisfy the requirements laid down in arts. 75, 78, 79 and 80 of the CSDR Regulations. The Commission Decision further broadened the condition set out in art. 74 of the CSDR Regulations by providing that goods must be imported by *or on behalf of* an Eligible Organisation approved by the competent authorities of the Member State in question.

85. Articles 78 and 79 of the CSDR Regulations can be described as the “change of use” or “change of circumstances” conditions.

86. Article 78 provides that organisations benefitting from the goods are prohibited from lending, hiring out or transferring the Goods – whether for consideration or free of charge – without first notifying the competent authorities. If the organisation to which the goods were lent, hired out or transferred to is also entitled to benefit from the relief granted by reg. 74, the relief will continue to be granted unless that organisation used the goods for purposes other than those specified by the CSDR Regulations.

87. Article 79 provides that organisations referred to in art. 74 which cease to fulfil the conditions giving entitlement to relief, or which are proposing to use the goods admitted duty-free for purposes other than those provided for by that Article, shall inform the competent authorities. Should goods be lent, hired out or transferred to an organisation itself entitled to benefit from relief pursuant to art. 74, the relief shall continue to be granted, provided such organisations use them for purposes which confer the right to such relief.

88. Article 123 of the CSDR Regulations provides that where relief granted is conditional upon the goods being put to a particular use by the recipient, only the competent authorities of the Member State in whose territory the goods are to be put to use may grant the relief. This provides for the situation where goods are distributed outside of the Member State to which the goods were originally imported. In these circumstances, the competent authorities in the Member State cannot grant relief as the goods will no longer be in that Member State. This is the relevance of HMRC’s submission that the Goods were required to be distributed within the United Kingdom as this is the only situation where HMRC will have the power to grant relief.

***The alternative articles of the CSDR Regulations upon which reliance was placed***

89. As mentioned earlier, further issues arose during the appeal hearing in respect of goods that had been destroyed by Scooterpac, following testing by the BSI. Mr Hayat sought to rely on alternative articles of the CSDR Regulations to establish that the conditions for entitlement to customs duty relief still applied, even if the conditions of entitlement to the Disaster Relief were not met.

***Testing by the BSI and goods which were destroyed***

90. Mr Hayat submits that arts. 95 to 101 of the CSDR Regulations apply in respect of goods which were destroyed following testing by the BSI. The relevant provision he relies on is as follows:

“CHAPTER XXII

**Goods imported for examination, analysis or test purposes**

*Article 95*

Subject to Articles 96 to 101, goods which are to undergo examination, analysis or tests to determine their composition, quality or other technical characteristics for purposes of information or industrial or commercial research shall be admitted free of import duties.”

91. We find that this submission by Mr Hayat, and his reliance on art. 95 of the CSDR Regulations, is misconceived. This is because the Goods were not imported for examination, analysis or test purposes, which is what is specifically required by the provisions set out in arts. 95 to 101. The Appellant’s case has always been that the Goods were imported under the Disaster Relief and we have set out the conditions that had to be met under art. 74 of the CSDR Regulations, and art. 1 of the Commission Decision. Prior to importing the Goods, Mr Hayat had completed a NIRU certificate for the purposes of relying on the Disaster Relief. The conditions of entitlement to the Disaster Relief are that at the time of import, goods are imported by or on behalf of an Eligible Organisation for distribution free of charge to victims of disasters (in this case COVID-19). The fact that some goods had to be destroyed because they did not meet the standards required for PPE does not change the purpose for which the Goods were imported in the first place.

92. Mr Hayat alternatively submits that art. 23 of the CSDR Regulations is relevant on the basis that goods that were subsequently destroyed following testing by the BSI were of negligible value. In this respect, he relies upon art. 23 of the CSDR Regulations, which provides that:

“CHAPTER V

**Consignments of negligible value**

*Article 23*

1. Subject to Article 24, any consignments made up of goods of negligible value dispatched direct from a third country to a consignee in the Community shall be admitted free of import duties.

2. For the purposes of paragraph 1, ‘goods of negligible value’ means goods the intrinsic value of which does not exceed a total of EUR 150 per consignment.”

93. We find that Mr Hayat’s submissions in this respect are also misconceived. This is because whilst the consignments may have been of negligible value once they were tested

and destroyed, the consignments were not of negligible value at the time of import under the Disaster Relief, as shown by the invoices submitted prior to their examination by the BSI.

94. Mr Hayat's overall submission in respect of the goods which were examined and destroyed is with reference to art. 125 of the CSDR Regulations, which provides that:

*Article 125*

Where the same person simultaneously fulfils the conditions required for the grant of relief from import or export duties under different provisions of this Regulation, the provisions in question shall apply concurrently.

95. We have found that art. 23 and arts. 95 to 101 are not relevant to the circumstances of this appeal for the reasons given above. Therefore, art. 125 is not relevant as the Appellant does not simultaneously fulfil the conditions for the grant or relief under different provisions of the CSDR Regulations, in light of the purpose for which the Goods were imported.

***The care homes and HMRC's Disaster Relief Guidance***

96. A further issue which arose during the hearing was that concerning supplies made to care homes. Mr Hayat's position was that there was an urgent need to get PPE to care homes during the pandemic and that care homes are included in the definition of an Eligible Organisation. He relies on HMRC's Disaster Relief Guidance, which includes "homes and hostels for the aged" as being organisations approved by HMRC. As we set out in greater detail later, the Appellant made supplies to RHP (a care home operator) and IDC (who were said to have then made supplies of the Goods to care homes), after the orders that were originally intended to go to NHS NWCCG, East Anglian Air Ambulance and NCC were cancelled.

97. Ms Brown's position, on behalf of HMRC, is that RHP and IDC are private companies and commercial enterprises. They are not, therefore, considered by HMRC to be Eligible Organisations. In this respect, Ms Brown submits that a fee is charged by RHP as an organisation with commercial interests, and that there is no audit trail to show that IDC made onward supplies to care homes as claimed by Mr Hayat. We accept that Ms Brown's submission that RHP was a fee-paying organisation was in the context of the fact that residents of care homes operated by RHP would be required to pay a fee for residence, out of which supplies would be made available to residents, and not because an additional fee would have been applied to the distribution of supplies such as PPE.

98. As Mr Hayat places significant reliance on HMRC's Disaster Relief Guidance, we have considered the terms of the guidance, as follows:

***"Who can claim this relief***

*This relief can be claimed by any person importing goods into the UK if the conditions set out below are met.*

*The relief will apply to imports of protective equipment, other relevant medical devices or equipment for the coronavirus (COVID-19) outbreak set out in the COVID-19 Commodity Code list.*

*The goods must be imported by or on behalf of an organisation based in the UK who are:*

- *state organisations, including state bodies, public bodies and other bodies governed by public law*

- other charitable or philanthropic organisations approved by the competent authorities

[...]

*In line with notice 317..., we have given general approval to the following charitable and philanthropic organisations:*

...

- the following, as long as they are non-profit making and their objective is the welfare of those in need:
  - hospitals
  - ...
  - clubs, homes and hostels for the aged

...

Goods can be imported on behalf of one of the organisations if they are to be donated or sold (directly or indirectly) to them....

If you have imported the items on behalf of another organisation, to claim the relief as the importer you must hold clear evidence that demonstrates the end user of the goods was one of the eligible organisations. This evidence must also allow HMRC to trace the goods from their initial import through to their ultimate end use by one of these organisations.

*Failure to provide this evidence, may result in you having to pay duty and import VAT. [...]*

#### **Goods you can claim relief on**

*You can claim this relief on goods that are imported for free circulation and intended:*

- *for distribution free of charge to those affected by, at risk from or involved in combating the coronavirus (COVID-19) outbreak*
- to be made available free of charge to those affected by, at risk from or involved in combating the coronavirus outbreak, while remaining the property of the organisations using them”

-

99. Whilst relevant to a different area of domestic law, at [10] to [11] of his judgment in *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, Lord Brown disapproved the use of guidance documents as an aid. The judgment of Dyson LJ in *MD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 213, at [23], is to the same effect. We bear in mind that the HMRC’s guidance is not an exhaustive code, or a comprehensive edict. Guidance documents and kindred instruments do not have the status of law and, thus, are subservient to legislation. The duty is to take into account all material considerations, weighing them in the round (against the relevant legislative scheme).

100. Whilst HMRC’s Disaster Relief Guidance does not have the status of law, it is clear that the guidance specifically focuses on State bodies/organisations, and excludes profit-making organisations. Furthermore, there is absolutely no reference to a private organisation or a commercial enterprise. The guidance further focuses on the conditions specified in the Disaster Relief. As we set out earlier, under the Disaster Relief, an Eligible Organisation is clearly defined as “State” organisations, or other “charitable” or “philanthropic” organisations.

101. The Questions and Answers document (supra) shows that “State organisations” includes State bodies, public bodies and other bodies governed by the public law including

hospitals, governmental organisations and local governments (as repeated in HMRCs Disaster Relief Guidance. Under the Disaster Relief, the competent authorities (i.e., HMRC) will then take the necessary measures to ensure that the goods imported are, in fact, being delivered to organisations that are eligible for exemption.

102. Having considered the Disaster Relief, we are satisfied that private organisations and commercial enterprises are not included in the definition of an Eligible Organisation, whether or not such organisations have care homes as a business model. The clear requirement is that the organisations must not be profit-making organisations.

103. We now turn to the circumstances of this appeal. A number of questions need to be answered to determine whether the issues referred to at para. 5 above are discharged in this appeal:

***Were the Goods of a kind which can benefit from the Disaster Relief: art. 1(1)(b) of the Commission Decision?***

104. HMRC accept that the Goods imported by the Appellant were of a kind which can benefit from the Disaster Relief. This question can, therefore, be answered in the affirmative and this matter is not in issue between the parties. The Disaster Relief applies to medical supplies, equipment and protective garments following the outbreak of COVID-19.

***Were the Goods imported for free circulation by or on behalf of an Eligible Organisation as defined by art. 1(1)(c) of the Commission Decision?***

105. This question is answered in the affirmative as the Appellant originally imported the Goods on behalf of NHS NWCCG, East Anglian Air Ambulance and NCC (all of which meet the definition of an Eligible Organisation), for free circulation. This was on the basis of the NIRU certificate and the invoices from Scooterpac that were provided by Mr Hayat. The Goods were, however, subsequently supplied to RHP, IDC, Edhi and Phoenix - with some going to Mr Hayat's family and friends - after the orders for NHS NWGGC, East Anglian Air Ambulance and NCC were cancelled. Orders for Radcliffe (which is also an Eligible Organisation) were also cancelled. Relief has been applied in respect of supplies made to the NHS (East Sussex NHS Trust and West Sussex NHS Trust).

106. We are satisfied that the Goods were originally imported for free circulation on behalf of an Eligible Organisation but, as we set out later, not all of the Goods were actually supplied to an Eligible Organisation and full audit trails are lacking in respect of whether the Goods were distributed free of charge.

***At the time of import, were the Goods intended to be made available, or distributed, free of charge to people at risk of, or involved in combatting, COVID-19 by or on behalf of the Eligible Organisation: art. 1(1)(a) of the Commission Decision?***

107. This question is answered in the affirmative for the same reasons as the answer to the preceding question. Once again, however, there was a change in relation to the organisations that actually received the Goods.

***Were the Goods supplied to and accepted by an Eligible Organisation?***

108. The parties had diametrically opposed views about whether all of the Goods were, in fact, supplied to an Eligible Organisation after the orders were cancelled by the NHS NWCCG, East Anglian Air Ambulance and NCC. Radcliffe (a hospital) also cancelled its order.

109. As noted earlier, supplies were made to RHP and IDC by the Appellant. In respect of RHP and IDC, HMRC's conclusion was that these are private companies and do not,

therefore, meet the definition of an Eligible Organisation. In respect of KCS, whilst HMRC concluded that KCS was a commercial enterprise, the supplies that were intended to be made to KCS were not made as the orders were cancelled.

110. The supplies made to Edhi and Phoenix were not accepted by HMRC as meeting the conditions of entitlement to the Disaster Relief, despite HMRC's acceptance that Edhi and Phoenix were charitable organisations and, therefore, Eligible Organisations. This was because a full audit trail was lacking in respect of the supplies made to Edhi in relation to who the end-users of the Goods were. The Disaster Relief provides that the Goods must be distributed for circulation free of charge to victims of disasters. The Disaster Relief further provides that the competent authorities must be not only be notified of any change of use and approve the new organisation, they must also be in a position to grant relief; which is only possible if goods are distributed in the territory of the State in question (hence HMRC's reference to art. 123 of the CSDR Regulations).

111. In respect of Eligible Organisations, whilst we accept that it would be an onerous task for an importer to monitor the use to which the organisation puts the goods, it is clearly the duty of the importer to ensure that the supply is made, in the first instance, to an Eligible Organisation, and that the change of use provisions of the CSDR Regulations (arts. 78 and 79) are observed as it is the importer who has imported the Goods, and not the Eligible Organisation.

112. For the reasons set out below, we are satisfied that the Goods in question in this appeal were not supplied to an Eligible Organisation. We accept that the reasons for this were outside of the Appellant's control. This does not, however, change the incontrovertible facts that: (i) the organisations which ultimately received the Goods either did not meet the definition of an Eligible Organisation; or (ii) a full audit trail was lacking in respect of some of the end-users (the change of use provisions of the CSDR Regulations). We are further satisfied that the requirement to satisfy the conditions of the Disaster Relief is one that cannot be circumvented, or overcome.

113. We now turn to consider the separate Import Entries in this appeal:

***Import Entry 1: 100,000 face masks***

114. The imports made under Import Entry 1 were supplied by Lokumal, in an order facilitated by Scooterpac. The end users of the "FFP3 masks" in relation to this Import Entry were intended to be NHS NWCCG, East Anglian Air Ambulance and NCC. The end users of the "disposable face masks" were intended to be NCC. The Goods arrived in the United Kingdom on 10 May 2020. However, there were concerns with the quality of the masks and the masks were submitted to the BSI for testing. A certificate was issued by the BSI on 8 October 2020 and the masks were rejected as they did not meet the standards. NHS NWCCG and NCC, therefore, cancelled the order. This is accepted by Mr Hayat.

115. Mr Hayat further accepts that Scooterpac instead disposed of 50,000 masks. It is clear that the masks that were destroyed cannot be deemed to have been distributed free of charge. We accept that Mr Hayat was exercising prudence by having the masks tested, in order to avoid supplying substandard PPE to the intended end-users. We find, however, that the conditions for entitlement to the Disaster Relief would not have been met once the masks were destroyed. We have earlier found that goods that were destroyed were not imported for medical examination, but were imported under the Disaster Relief and unfortunately had to be destroyed.

116. Mr Hayat submits that a further 50,000 masks imported under Import Entry 1 were supplied to RHP. In this respect, Mr Hayat relies upon an invoice issued to RHP. The invoice



records RHP's address as 'Brook House, Brook Garden, Norwich, Norfolk, NR15 1JH'. The website for the care home registered at this address indicates that it is owned and operated by Kingsley Healthcare. The website for Kingsley Healthcare shows that it is a privately owned, profit making company which owns and operates care homes on a commercial basis. The available information also indicates that RHP provides commercial services "for profit". Furthermore, there was no evidence that RHP was registered with the Charities Commission. This was accepted by Mr Hayat.

117. Whilst the remaining masks under Import Entry 1 were supplied to RHP, we are satisfied that RHP is a private company that provides commercial services. Accordingly, therefore, RHP is not an Eligible Organisation. As RHP is a private company, we are satisfied that the Disaster Relief does not apply.

***Import Entry 2: 11,800 surgical gowns***

118. HMRC have applied relief to this Import Entry on the basis that a full audit trail had been provided by the Appellant to show that the supplies were made to an Eligible Organisation. This matter is not, therefore, in issue between the parties.

***Import Entry 3: 70,000 disposable face masks***

119. The imports made under Import Entry 3 were also supplied by Lokumal, in an order facilitated by Scooterpac. The Goods were intended to go to NCC, but NCC cancelled its order. The Appellant supplied 50,000 masks to RHP and 20,000 masks to IDC. Mr Hayat submits that IDC made onward supplies of the masks to care homes. We have found that RHP is a private company and IDC is also a private company, as accepted by Mr Hayat. Furthermore, there is no evidence before us to support a finding that IDC made an onward supply of the Goods to care homes as a full audit trail is lacking in this respect.

120. We are satisfied that the Disaster Relief ceased to apply once the Goods were transferred to IDC for the same reasons that the Disaster Relief ceased to apply in respect of the transfers made to RHP (as considered earlier).

***Import Entries 4, 14 and 19: 4,780 boxes of gloves***

121. The imports made under Import Entry 4, 14 and 19 were facilitated by Scooterpac. The orders were placed with Lokumal. The Goods were intended to go to NHS NWCCG, Radcliffe and NCC., but the orders were cancelled. The Goods were, instead, supplied to IDC and Edhi.

***IDC***

122. Mr Hayat submits that 3,175 boxes of gloves were supplied to IDC, who were then said to have supplied the Goods on to care homes. We have found that IDC is not an Eligible Organisation. We have further found that there is no evidence before us to support a finding that IDC made any supplies to care homes as a full audit trail is lacking.

***Edhi***

123. Mr Hayat submits that 1,705 boxes of gloves were supplied to Edhi. Ms Brown submits that HMRC accept that Edhi is an Eligible Organisation as it is registered with the Charities Commission. HMRC's position is, however, that Edhi supports international projects, and that there is no evidence that the supplies made to Edhi were distributed in the United Kingdom. Once again, no audit trail has been provided by Mr Hayat in respect of the end-use of the supplies made to Edhi, which would have been of probative value to the Appellant's case.

***Import Entry 5 (10,200 gowns), 6 (8,925 gowns), 7 (19,875 gowns), 8 (15,000 gowns), 12, 13 and partially 18 (6,000 gowns); and Import Entry 16 (10,640 gowns)***

124. These imports were ordered by Scooterpac on 24 April 2020. The suppliers were PIGA, Elsa Pharma and Heng Dong. The imports arrived in seven consignments between 11 May 2020 and 22 June 2020. The Appellant intended to supply 50,000 gowns to Radcliffe (from Import Entries 5, 6, 7 and 8), but Radcliffe cancelled the order. The Appellant also intended to supply: (i) 50,050 gowns to KCS - as shown in an invoice from Scooterpac to Eastpoint and a despatch note; (ii) 20,000 gowns to East Sussex NHS Trust (9,080 have been accepted by HMRC); and (iii) 6000 gowns to West Yorkshire NHS Trust (HMRC have also applied relief to this supply).

125. Donations were also made to Edhi (2,800 gowns) and to Phoenix, and some orders were returned to Elsa Pharma (18,550 gowns).

#### Radcliffe

126. In respect of the 50,000 gowns intended to be supplied to Radcliffe, Mr Hayat relies upon an email from the head of supply at Radcliffe, which confirms that the hospital placed an order for 50,000 gowns with an organisation referred to as SE Workwear (supplied by Rutland as shown by a purchase order from Scooterpac). Having considered the documentation, we find that Radcliffe pulled out of the order due to supply chain and suitability issues. In this respect, the email from Amos Thomas, dated 5 October 2021, says this:

*“We didn’t actually supply any to the Oxford NHS hospital [Radcliffe] in the end as they didn’t deem the gowns suitable?” [sic]*

127. Therefore, no supplies were actually made to Radcliffe.

#### KCS

128. HMRC submit that KCS is a commercial entity and not an Eligible Organisation. Mr Hayat’s position is that KCS is part of KCS and, therefore, an Eligible Organisation. Having considered the documentary evidence, we note that the email, dated 31 March 2022, from Phil Morgan (Director) states that:

*“KCS is indeed a trading division of KCC. KCS provide resources to education, public sector, charities and NHS.”*

129. This suggests that KCS would qualify to be considered an Eligible Organisation. Whilst there was disagreement as to whether KCS was an Eligible Organisation, we have not gone on to consider this in light of the fact that the order relating to KCS was destroyed, as accepted by Mr Hayat. Any discussion about whether KCS was an Eligible Organisation would, therefore, be academic.

#### East Sussex NHS Trust

130. It is not disputed by HMRC that East Sussex NHS Trust is an Eligible Organisation. HMRC have further accepted that 9080 gowns went to East Sussex NHS Trust under the relief granted. Officer Rankin acknowledged in his evidence that the invoices showed that 10,920 gowns were supplied to East Sussex NHS Trust, and not 10,640, as considered by

HMRC. HMRC were, therefore, willing concede that a further 280 gowns had been supplied to East Sussex NHS Trust.

131. Mr Hayat submits that the Appellant supplied 20,000 gowns to East Sussex NHS Trust. He relies upon a purchase order enclosed in an email dated 31 March 2022 from East Sussex NHS Trust. The purchase order records that East Sussex NHS Trust made an order of 20,000 gowns from Praxis Medical Limited, and the covering email advises that the order was fully invoiced. We find that further relief may be applicable in respect of the supplies made to East Sussex NHS Trust and will return to this point in our conclusions, later.

West Sussex NHS Trust

132. The supplies made to West Sussex NHS Trust have been accepted (Import Entry 18 – partial relief in relation to 6,000 gowns).

Edhi

133. By his own oral evidence, Mr Hayat agreed that he could not be certain that the supplies made to Edhi were, in fact, distributed in the United Kingdom. As earlier considered, distribution in the United Kingdom would enable HMRC to grant relief as the competent authorities in the United Kingdom. We find that the Appellant was already undergoing a compliance check at the time that the supplies were made to Edhi and Mr Hayat would have been on greater notice of the requirements that had to be satisfied under the Disaster Relief. It is, therefore, reasonable to expect that there would be a full audit trail in respect of who the end-user would be following the transfer of the supplies by the Appellant to Edhi.

Phoenix

134. In relation to Phoenix, the despatch note, and the correspondence included in the Hearing Bundle, shows that the donation made to Phoenix was transported on to Romania. The email from Andy Richardson (Trustee/Director) says this:

*“Hi Burhan,*

*I hope you are well.*

*Sorry for the radio silence but this time of year is always our busiest and this year has proven no exception.*

*I have attached the standard thanks and traceability for the items. They are on a final destination into Romania but go via Finland.*

*Thank you again for the donation of Visors and gowns.*

*Kindest Regards*

*Andy”*

135. It is clear that the Goods supplied to Phoenix were shipped to Romania a matter of days after the supply by the Appellant. This was also at a time when the compliance check by HMRC had already commenced and there was clearly an obligation on the Appellant to ascertain how the Goods were to be used by Phoenix, in order for the eligibility requirements of the Disaster Relief to apply. We find that there is considerable force in Ms Brown’s submission that HMRC cannot grant relief in circumstances where goods are released outside of the United Kingdom. It is difficult to see how HMRC would have any power to grant relief for goods which are distributed outside of the United Kingdom. We hold that art. 123 of the CSDR Regulations is applicable in these circumstances and the Disaster Relief cannot apply.

Returns to Elsa Pharma

136. A total of 18,550 gowns were returned to the supplier, Elsa Pharma. An undated letter from the Managing Director of Elsa Pharma is set out in the following terms:

*“Dear Sir/Madam,*

*I am writing to confirm that we have supplied Level II Non Sterile Surgical Gowns to Hayat Estates Ltd. last year between May and June 2020.*

*During this period there were several issues with logistics and unfortunately there were delays with the supply. Unfortunately, we were unable to deliver the gowns in time as agreed with Hayat Estates Ltd. Hayat Estates Ltd. was unable to satisfy the orders they had for NHS trusts and these were subsequently cancelled after part of the quantity requested had been produced and shipped already.*

*We therefore agreed with Hayat Estates Ltd. that the outstanding quantity could be held with them until they are sold for an adjusted market price under the current market conditions at the time of sale. However, as they were not sold, we agreed to take the gowns back and they were returned to our representatives in Tamworth, UK.”*

137. We find that goods returned to Elsa Pharma’s UK representatives would not qualify for the Disaster Relief as the Goods were not supplied to, and accepted by, an Eligible Organisation, but rather returned to a commercial entity.

***Import Entry 9: 160,000 face masks***

138. These imports were facilitated by Scooterpac and supplied by Lokumal. The intended recipients of the supplies were NCC, via Eastpoint (a private company). In this respect, Mr Hayat relies upon;

- (1) a purchase order dated 7 May 2020 issued by Scooterpac to the Appellant for the supply of 160,000 face masks by the Appellant to Scooterpac; and
- (2) a purchase order dated 20 April 2020 issued by Eastpoint to Scooterpac for the supply of 150,000 face masks by Scooterpac to Eastpoint.

139. HMRC’s position is that NCC is not recorded as being a party, or signatory, to either purchase order. Furthermore, HMRC were not satisfied that there was any evidence that either purchase order was copied, or communicated, to NCC. As such, it is HMRC’s position that the Appellant has failed to provide sufficient evidence that there were arrangements in place prior to import to supply, either directly or indirectly, any of the goods imported under Import Entry 9 to NCC (or any other Eligible Organisation).

140. We find that NCC cancelled the order and the issue concerning the audit trail is, therefore, irrelevant. Mr Hayat submits that after the order to NCC was cancelled, Scooterpac supplied the goods to NHS NWCCG. However, there is no audit trail in respect of this transfer.

***Import Entry 10 (1,000 masks), 11 (500 gowns), 15 (200,000 masks) and 17 (2,100 face shields)***

141. The imports relating to these Import Entries were ordered by Scooterpac. The suppliers were Lokumal, Pegasus and TNT Plastik. The supplies were intended to be made to NCC. Once again, NCC cancelled their order. Import Entry 10 was for 1,000 KN95/FFP2 face masks Import Entry 11 was for 500 hooded coveralls (gowns), of which 300 were then

supplied to IDC. Import Entry 15 was for 200,000 face masks, of which 63,000 were then supplied to IDC. Import Entry 17 was for 2,100 face shields, which were donated to Phoenix.

142. We have already found that a full audit trail is lacking in respect of IDC who do not, in any event, meet the definition of an Eligible Organisation. We have further found that Phoenix made onward supplies to Romania.

143. Of the remaining goods imported under Import Entry 15, an amount was given to family, friends, neighbours and the local community. It is clear that this does not satisfy the requirements of the Disaster Relief as family, friends, neighbours and the local community (in general) do not meet the definition of an Eligible Organisation.

### ***Resort to the burden of proof***

144. Mr Hayat, ultimately, submits that HMRC are making a presumption that they cannot prove in respect of some supplies being distributed outside of the United Kingdom, and that HMRC have failed to show that there is no audit trail in relation to NHS NWCCG. The burden of proof, however, rests firmly on the Appellant. As to the burden of proof, and the absence of a clear audit trail in relation to some of the imports, we have considered the circumstances in which a court or tribunal is entitled to determine a disputed issue of fact by resort to the burden of proof, as considered in *Stephens v Cannon* [2005] EWCA Civ 222. There, Wilson J (as he then was and with whom Auld and Arden LJ agreed) held, at [46], that:

“46. From these authorities I derive the following propositions:

(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.

(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue...

(c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary.”

145. These principles were refined in *Verlander v Devon Waste Management & Anor* [2007] EWCA Civ 835 (Auld LJ with whom Rix and Moses LJ agreed), at [19] and [24]:

“19. ...First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort

...

24. When this court in Stephens v Cannon used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice - and a respectable and useful part at that - where a tribunal cannot on the state of the evidence before it rationally decide one way or the other..."

146. It is clear from our considerations above that a considerable amount of documentary evidence was provided in this appeal, including in relation to goods that were destroyed, or never accepted; and goods that went to organisations that did not meet the definition of an Eligible Organisation. Indeed, the factual matrix to this appeal has not been uncomplicated. This resulted in a need to focus on the end users in relation to all of the imports to ascertain whether the Goods were actually received by an Eligible Organisation.

147. We accept that Mr Hayat had no control over the number of consignments received, how those consignments were separated, or indeed the supply chain issues. The fact of the matter is, however, that the conditions of the Disaster Relief were not met. We further find that whilst an Eligible Organisation would have rights of ownership of the Goods once they were delivered, an Eligible Organisation was not the recipient of the Goods in respect of the Import Entries under appeal. Furthermore, we are satisfied that the burden of proof falls firmly on the Appellant, or indeed any importer who seeks to rely on the Disaster Relief in order to obtain relief from customs duty. Such evidence will then allow HMRC to trace the goods from their initial import through to their ultimate end use.

148. We hold that the evidence does not establish the Appellant's case that the conditions for entitlement to the Disaster Relief have been met in relation to the Goods in this appeal.

149. We are satisfied that:

- (1) Under the Disaster Relief, there is a requirement for goods to be imported by or on behalf of an Eligible Organisation that is approved by the competent authorities. HMRC are the competent authorities.
- (2) An Eligible Organisation is defined as a State organisation, or other charitable or philanthropic organisations.
- (3) The goods are required to be distributed free of charge to victims of disasters (i.e., COVID-19).
- (4) The Eligible Organisation is not able to lend, hire out or transfer the goods under different conditions, without prior notification being given to the competent authorities
- (5) If an organisation to which goods are lent, hired out or transferred to is also entitled to benefit from the relief granted by reg. 74, the relief will continue to be granted unless that organisation used the goods for purposes other than those specified by the CSDR Regulations.
- (6) Should goods be lent, hired out or transferred to an organisation itself entitled to benefit from relief pursuant to art. 74, the relief shall continue to be granted, provided such organisations use them for purposes which confer the right to such relief.
- (7) Where relief granted is conditional upon the goods being put to a particular use by the recipient, only the competent authorities of the Member State in whose territory the goods are to be put to use may grant the relief.

***Ancillary matter – HMRC's decision making***

150. Returning to the nature of the FtT’s jurisdiction, Mr Hayat contends that HMRC have demonstrated an inconsistent approach to their interpretation and application of their guidance on the Disaster Relief. In addition, he contends that HMRC have failed to adequately review all evidence relied upon by the Appellant in support of its claim for Disaster Relief.

151. In *Rotberg v R & C Comrs* [2014] UKFTT 657 (TC), the Upper Tribunal held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Upper Tribunal found, at [116], that the jurisdiction of the FtT was limited to considering the application of the tax provisions themselves. Similarly, in *Marks & Spencer plc v Customs & Excise Comrs* [1999] STC 205, at 247, Moses J said this:

“...in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. It jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct.”

152. This principle was applied by Warren J in *HMRC v Abdul Noor* [2013] UKUT 071, at [28].

#### CONCLUSIONS

153. We hold that:

- (1) NHS NWCCG, East Anglian Air Ambulance and NCC, on whose behalf the Appellant imported the Goods, cancelled their orders.
- (2) Radcliffe cancelled their order, despite being an Eligible Organisation.
- (3) Goods which were destroyed due to not meeting BSI standards, or those returned to the suppliers for settlement, do not qualify for the Disaster Relief.
- (4) RHP and IDC are private companies/commercial entities, and not State bodies, philanthropic or charitable organisations.
- (5) A full audit trail was lacking in respect of IDC and the claimed distribution to care homes.
- (6) KCS cancelled their orders and the issue of whether they are an Eligible Organisation is academic.
- (7) A full audit trail was lacking in respect of the supplies made to Edhi, despite the acceptance that Edhi is a registered charity.
- (8) Phoenix made supplies to Romania and art. 123 of the CSDR Regulations applies.
- (9) Family, friends and the community do not qualify for the Disaster Relief to apply.
- (10) Returns were made to Elsa Pharma.

154. Accordingly, therefore, the appeal must fail.

155. It is essential to note that HMRC do not suggest that there was any wrongdoing by the Appellant. The main issue is in relation to whether the conditions for entitlement to the Disaster Relief were met by the Appellant. On the basis of our findings of fact, the Disaster Relief has not been met in relation to the Goods in issue in this appeal. However, in light of HMRC’s concession concerning the supplies made to East Sussex NHS Trust and the relief already applied, we remit that particular aspect of the appeal back to HMRC in order for adjustments to be made to the relief granted (with the consequence that the Assessment is adjusted), with leave to apply to the Tribunal if an agreement on the exact figures cannot be reached. This is only in respect of the supplies made to East Sussex NHS Trust.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

156. 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.

**NATSAI MANYARARA  
TRIBUNAL JUDGE**

**Release date: 06<sup>th</sup> JUNE 2024**