

PRESS SUMMARY

The Queen on the Application of Heathrow Airport Limited & Ors -v- Her Majesty's Treasury

NOTE: This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

1. As of 1st January 2021, the Government abolished most “*duty free*” shopping. The decision followed on from a consultation process which occurred during 2020. Abolition affected major airports and retailers who sold duty free items from airport lounges, and certain high street retailers who sold popular luxury branded items often to wealthy visitors from China, South East Asia and the Gulf. The decision was taken as part of a review of fiscal and customs arrangements following the exit of the UK from the EU.
2. The abolition took the form of the withdrawal of two schemes which provided exemptions from the duty to pay VAT on sales of products destined for export from the UK. The first was the “VAT RES” and was statutory in form. The second was called “ESC 9.1” and was operated under an extra-statutory concession made by the Commissioners of Her Majesty’s Customs and Excise (“*the Commissioners*”). These schemes, in effect, created tax exemptions which differed depending upon whether sales were to the EU or to the rest of the world.
3. The Claimants were companies engaged in businesses related to the supply of goods who were affected by the abolition of the VAT exemption schemes. The Claimants challenged the abolition and advanced a number of important points of law.

4. The first concerned the constitutional power of the Commissioners to grant tax concessions without using legislation and the Government's view that the grant of the extra-statutory tax exemption in ESC 9.1 had always been, and remained, outside its statutory powers of collection and management of taxes (Ground I).
5. The second concerned the scope and effect of the General Agreement on Tariffs and Trade 1964 (*"the GATT"*) insofar as it applied to internal taxes affecting the export of goods, such as duty free rules. The GATT lays down rules of international law governing trade between the member states. It is operated under the auspices of the World Trade Organisation (the WTO). The principle of non-discrimination, found in Article I:1 GATT, was relied upon by the Government to curtail the options that it considered were open to it when considering what to do with the tax exemptions following exit for the EU. The Government concluded that under the GATT it could not in the future treat sales to the EU differently from sales to the rest of the world. This meant that it would have been unlawful under the GATT to retain or extend either the VAT RES or ESC 9.1. The Claimants challenged the Government's analysis of the GATT and argued that because of errors made in that analysis the Government had artificially and wrongly constrained the range of possible solutions and ignored alternatives which were favourable, or at least less damaging, to the Claimants (Ground II).
6. The third concerned the impact of the free trade agreement – the Trade and Cooperation Agreement (*"the TCA"*) - which the Government entered into with the EU on 24th December 2020 and which was then implemented into domestic law by the European Union (Future Relationship) Act 2020 which received royal assent on 31st December 2020. It was argued that at all times the Government should have factored into

consideration the existence or possible existence of such a free trade agreement. Had it done so its analysis would have altered and it would have had more options open to it, some of which were far more favourable to the Claimants. The omission of the Government to take the TCA into account represented a serious failure to consider a relevant consideration (Ground III).

7. The fourth concerned the approach taken by the Government to the collection and evaluation of evidence relating to the economic harm to business and the wider economy that it was said would arise from abolition. It was argued that when the abolition decision was taken the Government had failed to collect relevant evidence and had failed therefore to address relevant considerations (Ground IV).
8. Finally, the Government argued that the Claimants were guilty of “*undue delay*” in bringing these challenges and this served to preclude the grant of *any* remedy under Grounds I – IV.
9. For various procedural reasons, the Court had to hear these challenges sitting as both the High Court and the Court of Appeal. Despite this curiosity the Court heard full and seamless argument on all issues arising.
10. In hearing these challenges the Court was expressing no view on the merits of the decision to end the two tax exemption schemes, which was essentially a political decision for the Government to take. The challenges concerned issues of law and procedure only.
11. In the event the Court has held that the challenges fail.
12. It has upheld the Government’s view as to the limits upon the power of the Commissioners to use extra-statutory concessions to create exemptions from VAT. It

agreed that the concessions were outside of these powers and that if tax exemptions were to be retained or extended in the future this would have required legislation. The Government did not therefore make any error in the analysis of the Commissioner's powers.

13. The Court also upheld the analysis of the Government as to the scope and effect of the principle of non-discrimination in the GATT. The Government was correct to conclude that Article I:1 GATT was capable of applying in principle to internal tax schemes that affected exports. It was also correct to conclude that in the future if it retained any form of a tax exemption scheme which differentiated as between sales to the EU and the rest of the world this would have been in breach of the GATT and would amount to a violation of the international law obligations of the UK.
14. The Court also held that the agreement of the TCA between the UK and the EU did not alter the analysis. When the decision to abolish the tax exemptions was taken it was perfectly rational for the Government not to take into account a free trade agreement that was not yet in force and which was still in negotiation and which might never come into being. It was equally a matter for the Government not to decide to revisit its decision to abolish the tax schemes once the TCA was agreed and came into force. Moreover, whilst the TCA does address a variety of matters relating to taxation it does not address rates of tax. The power to set rates of tax was an issue that the Government had deliberately concluded was not to be the subject of agreement with the EU. Finally, the mere fact that the Government had agreed a free trade agreement with the EU of a type that fell within Article XXIV GATT (which provides for certain derogations from GATT rules where a member state concludes a free trade agreement) did not, for that

reason alone, serve to disapply all other trading rules in the GATT, such as the prohibition on discrimination in Article I:1 which still applied.

15. In relation to the challenge to the approach taken by the Government to the collection and evaluation of evidence relating to the wider economic and fiscal impact of abolition it was common ground that the Government had not conducted its own quantitative modelling of the wider impact of abolition. The Court held that the approach taken by the Government to evidence collection was justified and rational in the circumstances. The Government was entitled to conclude that given the large number of uncertainties and imponderables that existed any attempt at modelling or quantifying potential indirect economic and fiscal effects would be an exercise in uncertainty which could not generate reliable results. Nonetheless, the Government recognised that there would be wider economic harm flowing from the decision and this, albeit unquantified, conclusion was taken into account and the Claimant's own evidence of wider economic effects was provided to the Chancellor so that it could also be taken into account when the ultimate decisions were being taken. Overall, the approach adopted by the Government towards the collection and evaluation of evidence was fair and rational.
16. The final issue that the Court had to determine was the submission of the Government that the Claimants had improperly delayed in the commencement of the claims and that this was a reason to reject the claims or otherwise refuse any remedy should the Claimants win any of their legal arguments. The Court rejected this submission. The claims were properly brought, albeit that in the final analysis they did not succeed.