



Neutral Citation: [2024] UKFTT 00194 (TC)

Case Number: TC09100

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video

Appeal reference: TC/2022/13898

*APPLICATION FOR PERMISSION TO MAKE LATE APPEAL – decision notice issued by HMRC that Appellant not “fit and proper” person for purpose of simplified customs declaration process – appeal made one year and ten months late – held – permission refused*

**Heard on:** 1 February 2024  
**Judgment date:** 7 March 2024

**Before**

**TRIBUNAL JUDGE JEANETTE ZAMAN**

**Between**

**SIMS GROUP UK LTD**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: David Bedenham, counsel, instructed by KPMG LLP

For the Respondents: James Abernethy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. Sims Group UK Ltd (“Sims”) applied for permission to make a late appeal against the decision of Officer Arupen Potharatnam (in the “Exclusion Decision” dated 6 November 2020) that Sims was not a fit and proper person for the purposes of regulation 29B of the Customs (Import Duty) (EU Exit) Regulations 2018 (the “Import Duty Regulations”). The Exclusion Decision meant that Sims could not use the Transitional Entry in Declarant’s Records simplified customs declaration process (the “Transitional EIDR process”).
2. Sims gave notice of appeal (which included its application for permission to make a late appeal) to the Tribunal on 26 October 2022. This application is referred to as the “late appeal”, and the substantive appeal (ie against the Exclusion Decision) is the “TEIDR Appeal”. HMRC objected to permission being given.
3. The application for permission to make the late appeal was heard as a standalone application. Both parties referred me to other live appeals which have been made by Sims, which are described further below. The findings of fact set out in this decision are made only for the purpose of determining whether to give permission for the late appeal.
4. For the reasons set out below, permission to make a late appeal is refused.

### HEARING AND EVIDENCE

5. With the consent of the parties, the form of the hearing was a video hearing on the Tribunal video hearing system. A face-to-face hearing was not held because it was considered expedient not to do so.
6. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
7. Each of the parties had provided a written skeleton argument, and I also had a hearing bundle (of 966 pages), a supplemental bundle, an authorities bundle and The Taxation (Cross-border Trade) (Miscellaneous Amendments) Regulations 2024 (the “2024 Regulations”). After the hearing, KPMG sent a further email (on 7 February 2024) relating to the live appeals before the Tribunal.
8. The hearing bundle included witness statements from:
  - (1) Officer Potharatnam, who had made the Exclusion Decision, and dealt with subsequent compliance checks into Sims;
  - (2) David Langley, Shipping, Exports and Logistics Manager for Sims;
  - (3) Kimberley Lee, Acting Group Financial Controller for Sims; and
  - (4) Philip Luty, tax partner at Dains Accountants, Sims’ advisers, relating to a meeting he had attended with Officer Potharatnam on 4 May 2022 and which had been described in the officer’s witness statement.
9. Mr Luty attended the hearing and was available for cross-examination but was not called. His evidence as to matters of fact within his knowledge is accepted as unchallenged. Officer Potharatnam, Mr Langley and Ms Lee were each cross-examined on their evidence. I found them to be credible witnesses, seeking to assist the Tribunal, explaining clearly their involvement at relevant times. I accept their evidence.

10. At the end of the hearing I told the parties that I would reserve my decision and would issue a full decision to the parties after the hearing. Mr Bedenham indicated that Sims would be content with a summary decision, questioning whether a full decision was appropriate or required given the other appeals which had been brought by Sims and were pending before the Tribunal. Mr Abernethy said HMRC would have no objection to a full decision.

11. Rule 35 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 deals with notices of decisions. Rule 35(3) provides that a decision notice must include a summary of the findings of fact and reasons for the decision or be accompanied by full written findings of fact and reasons for the decision. The choice between these is one for the Tribunal, albeit that if a summary decision is issued either party may then apply for a full decision and the unsuccessful party must do so before they can apply for permission to appeal (Rule 35(4)). I have decided to produce a full decision, being particularly mindful of the need to avoid further delay which would result if a summary decision is issued and Sims then applies for a full decision so that it can seek permission to appeal.

#### **BACKGROUND AND CHRONOLOGY**

12. There was no dispute as to the background or chronology set out below.

13. Sims is a UK subsidiary of a multi-national group of electronic and metal recycling companies. Part of their business involves importing (and exporting) scrap metal. Imports are from various countries, into various UK ports. The imports in respect of which there were breaches of customs obligations and to which I was referred were from the Republic of Ireland, and the main ports for such imports are Holyhead, Liverpool and Heysham.

14. HMRC denied Sims £2.2 million of input tax on the *Kittel* basis, in relation to supplies made to Sims by 12 suppliers. These denials were made in 14 decision letters sent by HMRC between November 2019 and January 2021 (the “*Kittel* decisions”); 12 of these decisions preceded the date of the Exclusion Decision. Sims has appealed against these *Kittel* decisions, and the appeal is due to be heard by the Tribunal in September 2024 (the “VAT Appeal”). The *Kittel* decisions were each expressed to be made on the basis that Sims knew or should have known of the connection with fraud. As a result of amendments made to HMRC’s Statement of Case on 9 July 2021, HMRC no longer plead actual knowledge and instead plead that Sims should have known of the connection with fraud.

15. Ahead of Brexit, the UK introduced the Transitional EIDR process, which simplified the full customs declaration process for imports. The requirements of that simplified process (in particular Sims’ understanding thereof) are addressed in the Discussion.

16. Under Regulation 29B of the Import Duty Regulations, a person was eligible to use the Transitional EIDR process unless they were the subject of an Exclusion Decision. Officer Potharatnam gave an Exclusion Decision to Sims on 6 November 2020. That sets out the decision that Sims does not qualify as a “fit and proper” person. The Exclusion Decision includes the following:

- (1) The decision means that Sims is not eligible to use the Transitional EIDR process and will not be allowed to delay declarations on EU-GB movements.
- (2) The decision is made because Sims’ compliance history does not meet the requirements for this process.
- (3) The review of Sims’ compliance history shows that Sims has entered into transactions which Sims knew or should have known were connected with the fraudulent evasion of VAT. Between November 2019 and October 2020, HMRC have notified 12 decisions refusing entitlement to the right to deduct input tax. Sims had entered into these transactions despite several meetings and correspondence from

HMRC warning Sims of VAT fraud in their supply chains. HMRC have told Sims 11 times of fraudulent VAT losses in transactions where the chain commenced with a defaulting trader.

(4) From 1 January 2021 Sims must submit a full customs declaration when moving goods into Great Britain. They will need to use the customs process that applies at the place they are moving goods through, and meet any specific licensing requirements.

(5) If Sims disagree with the decision, they can appeal. They must write to Officer Potharatnam within 30 days telling him why they disagree.

17. Sims did not appeal against the Exclusion Decision within that 30 day period.
18. From 31 December 2020, when the UK left the EU customs union, Sims was required to make full customs declarations in respect of its imports from the EU to Great Britain.
19. Between 1 January and 28 February 2021 Sims imported goods into Great Britain on 55 occasions without submitting a full customs declaration at the time of import (the “55 Contraventions”). For most of these, the declaration was a few days late; there were, however, four where no declaration appeared to have been made by August 2021.
20. On 16 March 2021 Officer Potharatnam wrote to Sims explaining he would be conducting a check to ensure Sims had complied with its customs obligations. That letter attached a factsheet which explained that penalties may be charged if Sims was found to have breached its obligations. HMRC asked for various documentation, and there were subsequent exchanges about the timing and amount of information to be provided, with it being agreed that initially Sims would provide sample documentation.
21. On 20 May 2021 Officer Potharatnam wrote to Sims noting that a spreadsheet provided by Sims contained several entries which were made after the goods’ estimated time of arrival into Great Britain and requesting further information. That letter also attached a factsheet referring to the possibility of penalties.
22. Dains Accountants (“Dains”) acted for Sims and responded to HMRC, and in letters of 1 July 2021 and 30 July 2021 confirmed that some customs declarations had been made after the relevant goods had entered Great Britain.
23. On 24 August 2021 Officer Potharatnam sent Sims a right to be heard letter, setting out his intention to raise a demand for import VAT of £294,278.38. That letter set out the 55 Contraventions and explained that he might also decide to charge a penalty. Officer Potharatnam finalised this decision on 23 September 2021, and that letter also explained he might decide to charge a penalty.
24. The possibility of a penalty being charged was also discussed in meetings (with Sims and/or Dains) on 29 March 2022, 12 April 2022 and 4 May 2022.
25. Officer Potharatnam sent a right to be heard letter on 27 May 2022 explaining he was minded to charge a customs penalty of £25,000 in respect of the 55 Contraventions. Dains sent a response on 27 June 2022, and on 6 September 2022 Officer Potharatnam wrote to Sims stating that he had decided to impose a customs penalty of £25,000 (the “Penalty”). Sims requested a review of that decision on 11 October 2022 and gave notice of appeal against the Penalty to the Tribunal on 14 December 2022 (the “Penalty Appeal”).
26. On 26 October 2022 Sims filed its notice of appeal against the Exclusion Notice with the Tribunal.
27. Sims has applied for the Penalty Appeal to be stayed behind the TEIDR Appeal. That application is agreed by HMRC.

## **EXCLUSION DECISION, THE TRANSITIONAL EIDR PROCESS AND THE TEIDR APPEAL**

28. The Exclusion Decision prevented Sims from being able to use the Transitional EIDR process.

29. The Exclusion Decision is a “relevant decision” for the purposes of Chapter 2 of Part 1 Finance Act 1994 (“FA 1994”) and is an “ancillary matter”. In relation to ancillary matters, s16(4) provides that the powers of the Tribunal are exercisable where the Tribunal is satisfied that the decision-maker could not reasonably have arrived at the decision. Deciding whether a decision is one which could not have reasonably been arrived at involves the Tribunal conducting its own fact-finding exercise and reaching a conclusion as to reasonableness based on the facts as found by the Tribunal (ie not just those as known by the decision-maker). If a decision was not reasonably arrived at, the Tribunal should allow the appeal and require HMRC to undertake a review of its decision, unless it is satisfied that it is inevitable that the same decision would have been reached even if the identified errors had not been present.

30. The above outlines the Tribunal’s jurisdiction in relation to the TEIDR Appeal (if permission is granted). I address in the Discussion below the reasons given by Sims for not only the delay but also in seeking to make an appeal, but set out first the current status of the Transitional EIDR process.

31. Sims’ written skeleton argument referred to Sims’ inability to use the Transitional EIDR process as an unjust continuing detriment in the event that Sims was successful in the VAT Appeal, and HMRC referred in its skeleton argument to Sims having been entitled (since June 2023) to apply to use that simplified process. However, that is now of no practical relevance. The simplified process had already been reduced in scope – since 31 December 2021 it was only available for goods imported from the Republic of Ireland (which I infer would still have been useful for Sims). However, the 2024 Regulations came into force on 31 January 2024 (the day before the hearing of the late appeal) and those regulations provide that the Transitional EIDR process can no longer be used (even for goods from the Republic of Ireland).

32. This means that if I decide to grant Sims permission to make the TEIDR Appeal, the end result, if it were to be successful, would not be for it to use the Transitional EIDR process. Instead, on Sims’ argument, it is about quashing a decision that it is not a “fit and proper” person and avoiding the adverse consequences as regards its relationship with HMRC (including the compliance burden which has resulted); and being able to rely on this as part of its defence in the Penalty Appeal. Sims’ evidence and submissions on this are considered in the Discussion; but I recognise that the TEIDR Appeal is not about enabling Sims to use the Transitional EIDR process.

## **SUMMARY OF SUBMISSIONS OF PARTIES**

33. For Sims, Mr Bedenham’s position can be summarised as follows:

- (1) Sims did not immediately appeal the Exclusion Decision (ie bring an appeal within the 30 day time limit) because although it disagreed with the decision it nevertheless appeared that the Exclusion Decision would be of limited practical consequence. Sims could not have predicted what he submitted was the chaos that would ensue at the ports post-Brexit which led to the Penalty. The practical imperative became clear after HMRC imposed the Penalty (which was not until September 2022), and Sims then filed the TEIDR Appeal promptly. The delay is understandable and a “good” reason.

(2) The TEIDR Appeal has good or very good prospects of success. The Exclusion Decision was flawed for a number of reasons, including that it was made on the basis that Sims had actual knowledge of the connection with fraud, a contention which HMRC now accept cannot be maintained; the *Kittel* decisions made by HMRC were treated as established fact, ie failed to take account of Sims' appeal in the VAT Appeal (an appeal in which HMRC bear the burden of proof); the *Kittel* decisions related to a comparatively small amount of Sims' purchases from a comparatively small number of suppliers; the Exclusion Decision did not take account of Sims' wider compliance history; or the fact that exclusion from the Transitional EIDR process was to be reserved for high-risk cases.

(3) Given the prospects of success, the prejudice of shutting Sims out from making the TEIDR Appeal is all the greater.

(4) The allegations underpinning the Exclusion Decision, ie the *Kittel* decisions, are to be determined by the Tribunal in the VAT Appeal. If Sims is successful, it would be unjust if it continued to suffer a detriment based on the same allegations as those defeated in the VAT Appeal.

(5) In the Penalty Appeal, Sims will want to argue that, but for being unfairly excluded from the Transitional EIDR process, there would have been no breaches (and thus no Penalty). HMRC's position is that Sims are estopped from such an argument given that they did not appeal the Exclusion Decision. Allowing the TEIDR Appeal to proceed will ensure Sims is not prejudiced by way of limitation of the arguments it can raise in the Penalty Appeal.

(6) The Exclusion Decision continues to have an impact on Sims' relationship with HMRC and the level of risk that HMRC attributes to Sims, such that Sims ought to be permitted to challenge that decision.

(7) HMRC will not be prejudiced by permitting the late appeal. The same issue underpinning the TEIDR Appeal will be litigated in the VAT Appeal.

34. For HMRC, Mr Abernethy emphasised the length of the delay in making the TEIDR Appeal, but also the length of time which has elapsed since various events or circumstances which have occurred since the date of the Exclusion Decision. In particular, Mr Abernethy submitted:

(1) Sims was aware that the result of the Exclusion Decision was that Sims would need to make full customs declarations at the time of import, they anticipated compliance checks and were told and understood that if there was a failure to comply then HMRC might decide to impose a penalty.

(2) Whilst challenging the reasonableness of Sims' assumptions as to how the border would operate post-Brexit, in any event, Sims were swiftly disabused of their misapprehension in January and February 2021 when goods passed through without checks. They saw the reality at that time, and received the "minded to" post-clearance demand for the 55 Contraventions in August 2021.

(3) Sims knew throughout that there was a possibility of a penalty being imposed. They knew when the Exclusion Decision was received, and when breaches occurred, that this could give rise to a penalty. It can only have been reinforced by subsequent interactions with HMRC. The Penalty of £25,000 is small compared to the turnover of Sims.

(4) As to Sims' relationship with HMRC, the Exclusion Decision sits alongside the *Kittel* decisions and the 55 Contraventions. If HMRC's conclusion that Sims is not "fit and proper" is a problem, that is the very decision that Sims decided not to appeal at the outset

(5) There is no prejudice to Sims on the basis that Sims can't use the Transitional EIDR process. That scheme no longer exists.

(6) There would be prejudice to HMRC if permission to make a late appeal were granted, as HMRC are entitled to have regarded the Exclusion Decision as final. Allowing the making of the TEIDR Appeal would add to the amount of litigation between the parties.

## **DISCUSSION**

35. Under s16(1B) FA 1994, Sims could appeal against the Exclusion Decision within a period of 30 days beginning with the date of that notice. That 30 day period (which was set out in the Exclusion Decision itself) expired on 6 December 2020.

36. Section 16(1F) FA 1994 grants the Tribunal discretion to permit an appeal to be made late. The Upper Tribunal set out in *Martland v HMRC* [2018] UKUT 178 (TCC) at [44]-[45] that when the Tribunal is considering an application for permission to appeal out of time, the starting-point is that permission should not be granted, unless the Tribunal is satisfied on balance that it should be. In considering that question, the Tribunal can follow this three-stage process:

(1) Establish the length of the delay – If it was very short, then the Tribunal is unlikely to need to spend much time on the second and third stages, but this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason(s) for the default should be established.

(3) The Tribunal should evaluate all the circumstances of the case. This will involve a balancing exercise which will assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

37. I follow that process when deciding whether to exercise my discretion to permit the TEIDR Appeal to be made late.

### **Length of the delay**

38. Sims gave notice of appeal to the Tribunal more than one year and ten months after the expiry of the 30 day time limit. As acknowledged by Mr Bedenham, this is clearly a serious and significant delay.

39. Mr Abernethy submitted that the seriousness and significance of the delay was exacerbated by Sims' failure to mention its disagreement with the Exclusion Decision to Officer Potharatnam during his investigation into Sims' compliance with its customs obligations and consideration of whether to impose a penalty. I do not accept this submission in the context of assessing the seriousness and significance of the delay – Sims accepts that it did not submit a timely appeal, and its submission is that it did not decide to appeal until a much later date. In this situation, I do not consider that Sims was somehow subject to a duty to tell HMRC that whilst it was not appealing the Exclusion Decision it did not agree with such decision; to do so would rather beg the question as to what it was telling HMRC, or

what it expected HMRC to do with this information. I do, however, take account of HMRC's position that it considered the Exclusion Decision to be final in the context of evaluating all the circumstances.

### **Reasons for the delay**

40. I have already set out that the TEIDR Appeal, if permitted and successful, would not allow Sims to use the Transitional EIDR process, as such process no longer exists. Instead, Sims' explanation for making the appeal (and which is also put forward as explaining the timing for making the appeal, ie explaining the delay) is based on:

(1) Sims' understanding as to how the border would operate post-Brexit and how this fit with the full customs declaration process, its contraventions of which led to the Penalty; and

(2) the impact the Exclusion Decision has had on its relationship with HMRC, including the resulting risk reviews and the resources which it has had to devote to dealing with these.

41. On the basis of the evidence before me, I accept:

(1) The import process for scrap was generally initiated by Sims' suppliers. The supplier dealt with export documentation and prepared the commercial invoice, having weighed the scrap itself. The supplier would usually forward the relevant documents to Sims. Those documents included the invoice and transport/movement details – Sims then checked the documentation and sent it to their customs clearance agents, who arranged entry and made appropriate declarations to HMRC.

(2) Sims would therefore usually receive advance notice from the relevant supplier that a shipment was being made. However, pre-Brexit, for imports from outside the EU, if Sims was not aware that scrap had been shipped, the consignment would remain at the port until Sims received notification of the shipment (usually from the container shipping line) and could make the required arrangements.

(3) The full customs declaration process with which Sims was required to comply post-Brexit meant that Sims had to submit declarations and obtain clearance from HMRC prior to any goods entering Great Britain.

(4) Sims thought this would operate in the same way as it had for "rest of the world" shipments pre-Brexit, ie that consignments would be stopped and held at the port until the necessary declarations had been made and clearances obtained. Sims did not appeal the Exclusion Decision when it was received as they did not anticipate problems complying with the full customs declaration process in this situation.

(5) Instead, post-Brexit, whilst some loads were checked at the border, a number of loads were moved through the port without Border Control checking whether or not those consignments were to be delivered to a recipient who was part of the Transitional EIDR process. This caused problems for Sims in relation to 55 shipments that arrived at Sims' sites without having been cleared by customs – Sims did not know that these consignments had been shipped by their suppliers, and had not prepared full declarations prior to them arriving at the border. This resulted in the 55 Contraventions. Sims was aware of the fact of these breaches during January and February 2021, when shipments it was not expecting and in respect of which declarations had not been completed arrived at its sites.

(6) Mr Langley's evidence was that his understanding was that if Sims had been able to use the Transitional EIDR process, then the simplified procedure would have meant



that Sims would make declarations into its own records when goods entered the UK, then submit a full declaration to HMRC some months later. I accept that this was his understanding, but make no findings as to whether making an entry into Sims' own records once goods arrived on site (which would be the earliest they could have done where they had not been told that goods had been shipped) would have been compliant with their obligations.

(7) The Penalty was not issued until September 2022, and Officer Potharatnam confirmed that no decision to issue the Penalty was made at that time. However, Sims was aware from the date of the Exclusion Decision that it was required to comply with the full customs declaration process and that breaches of these obligations could result in a penalty being imposed. That any breaches could result in a penalty being imposed was reinforced by HMRC's letters of 16 March 2021, 20 May 2021, 24 August 2021 and 23 September 2021 and by discussions at meetings with HMRC, eg the Teams call on 29 March 2022.

(8) Since the beginning of 2021, Sims has been subject to compliance checks in relation to the full customs declaration process and multiple risk reviews by HMRC. These are time-consuming to deal with (as resources need to be dedicated to providing the required documentation and information). Its risk rating with HMRC has been affected by the Exclusion Decision as well as by the 55 Contraventions, subsequent Penalty and the *Kittel* decisions (on which the Exclusion Decision was based).

42. Mr Bedenham submitted that this presents a "good" reason for the delay. As to this:

(1) I regard the above explanation as coherent, and the timing of the issue of the Penalty to Sims does help to explain what prompted Sims' decision to make the TEIDR Appeal in October 2022. This is not a case of a taxpayer having ignored a deadline, or forgotten; Sims knew of the deadline to appeal the Exclusion Decision, made a decision not to appeal but later changed its mind.

(2) Sims was under a misapprehension as to how the border would operate following Brexit. There was some evidence that this was not reasonable, based on the published Government guidance. However, Sims itself became aware of the practical reality very early in 2021 when goods started to arrive at its sites without declarations having been made. The breaches by Sims of its obligations, which then resulted in the Penalty being imposed, were known by Sims in January and February 2021.

(3) Whilst the consequence of the Exclusion Decision was that Sims was not eligible for the Transitional EIDR process, it is stated expressly on the face of that decision that HMRC have decided that Sims is not a "fit and proper" person. Sims knew this.

(4) Sims anticipated that HMRC would check its compliance with the full customs documentation process. HMRC have done so. This, coupled with HMRC's risk rating of Sims, means that Sims has been subject to increased compliance checks and/or risk reviews and this has increased the burden on Sims in terms of needing to devote resources to dealing with HMRC's checks.

(5) HMRC did not decide to issue the Penalty until September 2022, but the possibility of such a penalty, and the active consideration being given to a penalty being imposed, was spelt out by Officer Potharatnam in his communications ever since he started the compliance check.

43. In their objections to permission being given, HMRC have emphasised not only the delay of one year and ten months, but also the length of time that has elapsed since the various events after the Exclusion Decision, including Sims' awareness of the 55

Contraventions, the compliance check, and the references by HMRC to the possibility of a penalty being imposed. I consider that these points are well made – whilst the Penalty was not issued until September 2022, Sims had knowledge at earlier stages of the breaches, the checks and risk reviews by HMRC, and information requests relevant to the issue of a penalty, that could have prompted Sims to seek to bring the TEIDR Appeal. It would still have been late, and required permission, but the length of the delay could have been considerably shorter.

### **Evaluation of all the circumstances**

44. The Tribunal should evaluate all the circumstances of the case and this involves a balancing exercise, as set out in *Martland*.

45. The need for statutory time limits to be respected is a matter of particular importance to the exercise of the Tribunal’s discretion to allow an appeal to be made out of time. There is a public interest in ensuring that time limits set by Parliament in legislation are observed and not extended without good reason. In addition, it is well-recognised that this Tribunal should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost.

46. However, these matters, whilst important, need to be weighed alongside all of the circumstances, and here that includes my consideration of the reasons given by Sims for the making of the late appeal, the potential prejudice to the parties of giving or refusing permission and taking account of the other “live” appeals which have been made to the Tribunal, namely the VAT Appeal and the Penalty Appeal. This may also include the merits of the TEIDR Appeal if they are obviously strong or obviously weak.

47. If I refuse permission, then Sims will not be able to pursue the TEIDR Appeal. It is evident that this prejudice will be all the greater if Sims has an obviously strong case. Mr Bedenham submitted that Sims has (at a minimum) good prospects of success in the TEIDR Appeal; Mr Abernethy submitted that the case is weak. Taking account of all of the submissions, I consider the position as follows:

(1) The Exclusion Decision is an ancillary matter, and the Tribunal can only quash that decision if it is satisfied that it was one that Officer Potharatnam could not reasonably have made. This is a relatively high hurdle.

(2) The Exclusion Decision does not mention the fact that the *Kittel* decisions were being appealed by Sims in the VAT Appeal, although Officer Potharatnam was aware of this appeal.

(3) I heard no submissions or evidence on the merits of the *Kittel* decisions themselves (which must be the correct approach in the context of an application to make the late appeal).

(4) The *Kittel* decisions were expressed as being made on the basis that Sims knew or should have known of the connection to fraud, this language being that used in *Kittel* itself and expressing the position in the alternative. This pleading on alternate grounds encompasses both possibilities, ie that Sims knew of the connection to fraud or that it should have known of the connection to fraud. It was not a pleading that both were satisfied. In this situation, Officer Potharatnam’s reference in the Exclusion Decision to the basis of the *Kittel* decisions, and his reliance on them, is not shown to be obviously wrong now that HMRC rely only on the “should have known” limb.

48. Taking account of all of the submission on the merits, I am not persuaded that Sims’ prospects are obviously strong such that there would be clear prejudice in them not being able

to appeal the Exclusion Decision. This does not, however, mean there would be no prejudice to Sims.

49. As a separate point, I recognise that if I refuse permission and Sims is ultimately successful in the VAT Appeal, Sims would then be faced with a situation where the Exclusion Decision, which relies on the *Kittel* decisions, is final and cannot be challenged even if HMRC has been unable to satisfy the burden of showing that those decisions were correct. That would certainly be a strange outcome; but it is also one that is the predictable consequence of Sims having decided, at the end of 2020, not to appeal the Exclusion Decision in circumstances where it was already appealing the *Kittel* decisions.

50. HMRC submit that they would be prejudiced if permission were to be given, as they would be required to defend an appeal against a decision which they had considered to be final, and that this would add to the body of litigation between the parties. Mr Bedenham submitted that the very same matters that underpin the Exclusion Decision will be considered by the Tribunal in other appeals. Considering those appeals in this context:

(1) The VAT Appeal is listed for a hearing by the Tribunal in September to October 2024. The VAT Appeal is Sims' substantive appeal against the *Kittel* decisions, and the Tribunal will determine whether or not HMRC have satisfied the burden of establishing that Sims should have known that certain transactions were connected with the fraudulent evasion of VAT. It is those decisions on which Officer Potharatnam relied when making the Exclusion Decision. However, this commonality does not mean that the outcome of the VAT Appeal will inevitably determine the outcome of any TEIDR Appeal, nor that defending the TEIDR Appeal would not involve additional resources for HMRC. The TEIDR Appeal will involve the Tribunal exercising a modified supervisory jurisdiction, assessing the reasonableness of the decision made by Officer Potharatnam several years after such decision was made.

(2) There is similarly a degree of overlap between the Penalty Appeal and any TEIDR Appeal. Mr Bedenham's submissions included that Sims would seek to argue in the Penalty Appeal that the circumstances giving rise to the Penalty would not have arisen if Sims had not been wrongly excluded from the Transitional EIDR process. It is, however, clear that HMRC are seeking to preclude such an argument, taking the position that Sims are estopped from challenging the Exclusion Decision in the context of the Penalty Appeal. The scope of the grounds raised by Sims in the Penalty Appeal would need to be determined by the Tribunal hearing that appeal. The issues are not the same in any event, as the Penalty Appeal will need to address whether Sims has a reasonable excuse for the 55 Contraventions in January and February 2021, which may bring into play the reasonableness of Sims' beliefs as to how the border would operate post-Brexit as well as HMRC's position as to the requirements of the Transitional EIDR process and the timing at which they must be satisfied.

51. The overlap between the TEIDR Appeal and the matters which arise in the VAT Appeal and the Penalty Appeal means that I consider there would be less prejudice to HMRC in my granting permission for a late appeal than there would be if the other appeals had not been made. However, giving permission would nevertheless increase the resources HMRC has to devote to the various matters (in totality), and it cannot be said that there would be no prejudice to HMRC. HMRC will have to devote additional resources to the TEIDR Appeal, in circumstances where it had (reasonably) considered the Exclusion Decision to be final.

52. The reasons for seeking to bring the TEIDR Appeal (which also encompass the reasons for the delay), addressed above, relate to the Penalty which has been imposed and Sims' ongoing relationship with HMRC (including the burden of the compliance checks and

risk reviews to which it is subject). I have set out my findings and my consideration of those reasons at [41] and [42] above. Whilst the explanation presented (considered in the light of my findings) is coherent, I am not persuaded that it presents a strong reason for permitting a late appeal:

(1) the practical reality in relation to the operation of the border was known to Sims in early 2021;

(2) Sims knew that HMRC would seek to check its compliance with its customs obligations, and the Exclusion Decision is expressly based on HMRC's conclusion that Sims was not a "fit and proper" person for this purpose. That such a conclusion might then result in further checks and risk reviews should not have been a surprising outcome;

(3) Sims was forewarned of the possibility of a penalty on several occasions in 2021 (and subsequently), yet still chose not to seek to appeal the Exclusion Decision; and

(4) my decision as to whether or not to allow a late appeal does not preclude Sims from pursuing the Penalty Appeal.

53. Taking account of all of the circumstances, I am not satisfied that the prejudice to Sims of refusing permission to make a late appeal, having regard to the length of the delay and the reasons for that delay, outweighs the importance of complying with statutory deadlines and the prejudice to HMRC of permitting a late appeal to be made (notwithstanding the degree of overlap with other appeals). I have not taken account of the merits of the TEIDR Appeal for this purpose, as I had concluded that they were not obviously strong. I recognise that my decision does raise the possibility that the adverse consequences of the Exclusion Decision may outlast a successful outcome (for Sims) in the VAT Appeal and that this may appear counterintuitive, but that is a consequence of Sims' decision not to bring a timely appeal in circumstances where it knew it was appealing the *Kittel* decisions.

54. Permission to make a late appeal is refused.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

55. 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.

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**Release date: 07<sup>th</sup> MARCH 2024**