[2016] UKFTT 283 (TC)

TC05057

Appeal number: TC/2013/3854

VAT – import VAT – Channel Islands – appellant granted low value bulk import approval – whether conditions of approval met – appellant issued with demand for import VAT as a customs debt – low value consignment relief ("LVCR") for customs duty and import VAT – whether packages sent to the same recipient and listed on the same manifest must be added together for the purposes of customs duty LVCR – whether same approach applies to VAT LVCR – if a customs debt, whether appellant is the debtor – whether waiver provisions at Article 220(2)(b) of the Customs Code apply to import VAT – whether separate waiver appeal required – whether Tribunal has jurisdiction on this issue – whether debt should be waived – appeal against assessment allowed – whether penalty charged should be upheld, discharged or varied – penalty reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

CITIPOST MAIL LIMITED (FORMERLY CITIPOST DSA LIMITED) **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR JULIAN STAFFORD

Sitting in public at the Royal Courts of Justice on 25-29 January 2016

Jeremy White of Counsel, instructed by Thrings LLP, for the Appellant

Sarabjit Singh of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. This appeal concerns a relief from import VAT known as Low Value Consignment Relief ("LVCR"). LVCR allows items of "negligible value" to be imported into the EU without suffering import VAT. For the first part of the period at issue in this appeal the LVCR negligible value threshold was £18; from 1 November 2011 it reduced to £15.

2. At the relevant time, imports below the LVCR threshold could therefore be imported into the UK from the Channel Islands ("CI") without payment of import VAT. Citipost Mail Limited (formerly Citipost DSA Limited) ("Citipost") relied on the LVCR in relation to imports from the Channel Islands.

3. Although this appeal only concerns import VAT, a type of LVCR also applies to customs duties, with a threshold of €150. This was originally treated as equal to £105 but later was set at £135. A key issue in this appeal is the extent to which the two LVCRs are the same.

4. As a matter of standard customs procedure, a consignment of imported goods has to be accompanied by a "single administrative document" (a "SAD" or a "C88"). The C88 sets out details of the importation, including any customs duty and import VAT. HM Revenue & Customs ("HMRC") grants Low Value Bulk Imports ("LVBI") approval to certain importers, allowing them to list a number of separate negligible value packages on a manifest attached to a single C88.

5. Citipost was given LVBI approval on 17 July 2009. Its understanding of that approval was that separate packages to the same recipient could be included on the same manifest without attracting import VAT, as long as the value of each package was below the LVCR threshold.

6. On 22 January 2013, HMRC issued Citipost with a civil penalty for £2,500. The next day HMRC issued two post-clearance demand notes ("PCDNs" or "C18s") for £911,739.80 and £24,488.50, being the import VAT which HMRC decided should have been paid on importations where the total value of goods to the same recipient on the same manifest exceeded the LVCR threshold. The period covered by the two C18s ran from 19 September 2011 through to 30 March 2012.

7. Citipost asked for a statutory review of the C18s and the penalty. HMRC's Review Officer upheld all three decisions, and Citipost appealed to the Tribunal.

The issues

8. The issues before the Tribunal were:

   (1) whether Citipost had failed to comply with the LVBI; and if so

   (2) whether that failure caused a liability to import VAT to arise by way of a customs debt;

   (3) if there was a customs debt, whether Citipost was the debtor;

(4) if Citipost was the debtor, whether the Tribunal has the jurisdiction to consider whether the debt should have been waived under Article 220(2)(b) of the Community Customs Code ("the Code");

(5) if the Tribunal does have that jurisdiction, whether the debt should have been waived; and

(6) whether the penalty charged should be upheld, set aside or reduced.

9. The parties should note that the numbering of the Issues in this decision differs slightly from that in the Statement of Issues provided to the Tribunal before the hearing.

10. The parties agreed that matters of quantum should be stayed until the final determination of the Issues set out above.

11. Although a number of other points were raised in correspondence between the parties, HMRC confirmed that no part of either C18 had been calculated on the basis that:

(1) sales to non-EU customers had been included in the manifests;

(2) the value of some imports exceeded the customs duty LVCR threshold; or

(3) more than 99 items had been included on many of the manifests, although HMRC said this breached a condition of the LVBI approval, known as the "99 items rule."

12. HMRC also confirmed that neither (1) nor (2) above had been taken into account in relation to the penalty, but their position in relation to breaches of the 99 items rule was less clear, and we return to this at Issue 6.

Outline of the Tribunal's decision

13. We decided that Citipost had failed to comply with the LVBI approval (Issue 1). However, there was no customs debt because the VAT LVCR applies to the individual parcel, not to grouped parcels sent to the same recipient on the same manifest. Citipost's appeal therefore succeeds on Issue 2.

14. As a result, Issues (3) to (5) fall away. However, in case this appeal goes further and as the other Issues were very fully argued, we have set out in the main body of this decision, the parties' submissions and our reasoning. In summary, had we decided Issue 2 in favour of HMRC, we would then have found that Citipost was the customs debtor (Issue 3); that the Tribunal had the jurisdiction to consider the waiver provisions at Article 220(2)(b) of the Code (Issue 4); but on the facts of this case there should be no waiver (Issue 5). Citipost's success in its appeal against the C18s therefore rests on our answer to Issue 2.

15. We reduced the penalty from £2,500 to £500 (Issue 6).

The evidence

16. Citipost provided a helpful bundle of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) documents relating to Citpost's application for a Jersey Postal Operator's Licence;

(3) documents consisting of, or relating to, agreements between businesses based in the CI ("CI companies") and either Citipost or Citipost DSA Jersey Limited ("Citipost Jersey"); and

(4) documents relating to the supply of services by Ferryspeed (CI) Limited ("Ferryspeed") and/or Condor Ferries Limited ("Condor") including emails, C88s and manifests.

17. Mr Garrie Francis, currently Head of International Services at Citipost, and Mr Robert Jones, who worked as a consultant to Citipost at the relevant time, each provided two witnesses statements, gave evidence in chief, and were cross-examined by Mr Singh.

18. Mr Anthony Allsop, an employee of Citipost at the relevant time, and Mr Michael Goddard, a director of Citipost until December 2010, provided witness statements which stood as their evidence in chief, and were cross-examined by Mr Singh.

19. Ms Vivienne Burch, a Higher Officer of HMRC, joined HMRC in 1990 and has wide experience, including as an Assurance Officer in CITEX (Customs International Trade and Excise) and as a Caseworker in Customs Policy. She provided a witness statement, gave evidence in chief and was cross-examined by Mr White.

20. We found all the witnesses to be honest and straightforward.

21. From that evidence, we find the following facts. These are not in dispute other than where expressly identified. We make further findings of fact later in our decision.

The facts

Liberalisation of postal services

22. On 15 December 1997, Directive 97/67/EC on "common rules for the development of the internal market of Community postal services and the improvement of quality of service" ("the Postal Directive") was issued. This began the deregulation of EU postal services, and was followed by Directives 2002/39/EC and 2008/6/EC. These are known as the Second and Third Postal Directives.

23. Against this background of change within the EU, Jersey and Guernsey both established new regulatory frameworks for postal services. These allowed for possibility of competition with Jersey and Guernsey Post, hitherto monopoly providers of postal services in those islands.

24. Users of Jersey Post, in common with most universal postal services, were allowed to use a very short customs declaration when importing goods into the UK.

Additionally, in around 2004, Jersey Post, Royal Mail, HMRC and Jersey Customs signed a Memorandum of Understanding ("MOU") which allowed for the fast-track clearance of goods imported into the UK via Jersey Post.

25. The Tribunal was not provided with a copy of the MOU, which was confidential to the parties. However, Mr Jones, who had been the Sales and Marketing Director of Jersey Post from 1999 to the end of 2006 and was one of the authors of the MOU, described how it worked. An Officer of Jersey Customs was based on site with Jersey Post, was authorised to visit the warehouses of companies participating in the MOU and he sample-checked the mail being sent to the UK to ensure that it satisfied the requirements of the LVCR. Before a Jersey business was allowed to participate in the MOU, it had to be approved by Jersey Customs.

26. Mr Jones described the MOU as giving Jersey Post access to the equivalent of the green channel at Customs, whereas other businesses would have to import their goods to the UK by attaching a C88 to each parcel, and then using Royal Mail's "inward processing facility": this was the equivalent, he said, of having to go through the "red" channel. We understand him to mean that the normal method of importing goods was slower than under the MOU and it also carried the risk that goods would be stopped on importation and subjected to customs checks.

Citipost and the Channel Islands

27. Citipost is a company in the Citipost Group. It was incorporated on 21 April 1999. Mr Francis described it as "the UK's leading privately owned fulfilment and delivery organisation for paper based products and packets."

28. In 2006, following the deregulation of Royal Mail in the UK, Citipost began to specialise in "downstream access." This is the collection of mail by a company such as Citipost; that company then transports the mail to a postal hub near its final destination, where it is handed over to a universal postal service (such as Royal Mail) for the final stage of its delivery to recipients.

29. Citipost identified a business opportunity in the CI, because those islands had seen rapid growth in the number of "fulfilment service companies" which "pick, pack and despatch" items customers have ordered over the internet or by phone. Part of the reason for the growth of those businesses was the LVCR, which allowed low value items, such as CDs or contact lenses, to be imported into the UK without VAT.

30. On 1 December 2008, Citipost applied for a postal licence to provide postal services in Jersey. Its plan was to compete with Jersey Post on the basis of being able to offer a similar service at a cheaper price.

31. In around June 2009, Citipost was granted a Jersey postal operator's licence. However, as Mr Allsop put it in his witness statement, the licence was "worthless unless Citipost could offer the Jersey based fulfilment companies a competitive service and pricing." The MOU was perceived to be a key barrier to Citipost's success.

32. Mr Francis had considerable business experience of the mail order and distribution business. In March 2009, he began working for Citipost for two days a week, and from June 2009 was engaged on a full time basis.

33. On 11 June 2009 Mr Francis, Mr Goddard (a director of Citipost) and others met Mr Jones, who explained how the MOU worked. Mr Jones said that it was very unlikely that Citipost and other third party providers of competitor services would be given access to the MOU. As a result, at least a day would be added to the delivery time for the goods, making Citipost's service uncompetitive with that provided by Jersey Post. It was agreed that Citipost needed to discuss with HMRC whether it too could access the MOU.

Meeting with HMRC

34. On 24 June 2009, a meeting took place at HMRC's offices in Southend. Mr Goddard and Mr Allsop attended for Citipost. Mr Tony Borton and Mr David Exton, both of HMRC's Excise, Customs, Stamps and Money team, attended for HMRC along with Andrew Coulsey, a member of HMRC's Large Business Service team.

35. There was no dispute that (a) the purpose of this meeting was to discuss the competitive disadvantages which would face Citipost because of the MOU, and (b) Citipost were told during the meeting that they could not access the MOU. However, HMRC did not accept the account of that meeting given by Mr Goddard and Mr Allsop, in so far as it concerned the LVBI.

36. Mr Allsop's witness statement said that at this meeting:

> "HMRC provided an outline of two options available to Citipost. The first option was the standard import procedures using a full declaration. This option was not commercially viable to Citipost, as Citipost would have to use Royal Mail Inward Office of Exchange which would make Citipost's services uncompetitive.
>
> As a second option, HMRC proposed that the Low Value Bulk Import scheme ('LVBI') would be a suitable alternative for Citipost. I must stress that HMRC were very positive towards this option, and advised us that Citipost should apply for LVBI approval. HMRC were of the opinion that the LVBI would be comparable with the MoU, and would provide a 'level playing field' to the parties who did not have the benefit of the MoU, unlike the first option HMRC proposed."

37. In oral evidence, he added that HMRC had told the Citipost representatives at the meeting that the manifests would give HMRC more information about the UK recipients of the parcels than was obtained under the MOU, with the result that the LVBI would provide advantages to HMRC as well as to Citipost. Mr Goddard's evidence was entirely consistent with that given by Mr Allsop.

38. HMRC did not put forward any of Mr Borton, Mr Exton or Mr Coulsey as witnesses, but sought to rely on an email from Mr Borton to Mr Allsop dated 29 January 2013. This reads:

> "My recollection is that the meeting you refer to took place in 2009 with you and one other from your side with Andrew Coulsey, David Exton and me representing HMRC. The main thrust of the meeting was how goods could be entered and released to free circulation. HMRC provided you with an outline of the options available to you, including the low value bulking concession. I must admit in the absence of a contemporaneous note of the meeting I am unable to provide further information."

39. Mr Singh robustly cross-examined Mr Allsop and Mr Goddard on their witness statements, but they stood by what they had written. Mr Allsop said that Citipost had never heard of the LVBI before the meeting, and added that the senior person attending from HMRC's side had said that the "LVBI would provide what we [Citipost] were looking for and we should apply for the licence and he would ensure it would be granted." Mr Goddard described HMRC as "very enthusiastic" about Citipost using the LVBI.

40. Mr Singh invited the Tribunal to find that HMRC only "provided an outline of the options available" to Citipost, and did not "recommend" the LVBI. We were, however, convinced by the transparent honesty of both Mr Allsop and Mr Goddard and we accept their evidence.

41. We find that HMRC's staff at this meeting did (a) inform Citipost about the LVBI; (b) say it would be equivalent to the MOU in the sense that it would be just as efficient and so allow Citipost to compete with Jersey Post on a "level playing field"; (c) state that if Citipost applied, the LVBI would be granted; and (d) tell Citipost that the LVBI would also benefit HMRC because it would provide more information than could be obtained under the MOU.

Obtaining the LVBI

42. On 7 July 2009, HMRC sent Citipost a letter approving its use of the LVBI. The first page said that Citipost had been "successfully authorised" to use the LVBI for twelve months from the date of the letter.

43. Citipost were given an "approval reference number" to use on documents and correspondence, and instructed to enter that number in Box 44 of the C88s. This asks for "Additional information/documents produced/certificates and authorisation." We consider Box 44 further at §219.

44. The second page of the LVBI approval letter, under the heading "General conditions and obligations attached to the Approval" states: "as the authorised holder of the Approval you are responsible for complying with the conditions and obligations of the procedures." Under the heading "Entry of goods to the Low Value Bulking Importation Procedure (LVBI)" it says that Citipost was authorised to use Customs Procedure Codes ("CPC") 40 00 003; 49 00 003; 40 00 005 and 49 00 005.

45. We return to CPC Codes 49 00 003 and 49 00 005 when we consider Issue 1. The other two CPCs were not at issue in this appeal.

46. The approval letter also informed Citipost that there was more about the use of these Codes in Volume 3 of the UK Tariff ("the Tariff"), and that (original emphases) use of these CPCs:

> "constitutes a declaration that: each consignment:
>
> - is not liable to excise duty,
> - has an intrinsic value of less than £105 for duty relief; and less than £18 for VAT relief;
> - has been despatched direct from a third country to the consignee in the UK;
>
> Consignments to **different** recipients can be bulked in accordance with Volume 3, New Part 4B.1 of the SAD Harmonised Tariff, but for each recipient the total intrinsic value must not exceed £105 for duty relief…
>
> The procedure must not be used for:
>
> - consignments with an intrinsic value of more than £105 for duty relief purposes
> - more than one consignment destined for the same importer where the combined value of the consignments for that importer exceeds £105 excluding freight and insurance…"

47. The LVBI approval letter expired on 17 July 2010 and was automatically renewed for a further year.

48. Mr Francis used the first page of the LVBI approval letter as a "sales aid" to show potential customers that HMRC had approved the bulking arrangement. He did not read the rest of the approval letter. Neither he nor any other witness said that they had read the parts of the Tariff relevant to the CPC Codes. On the balance of probabilities, given that Mr Francis had not even read the rest of the approval letter, we find that no-one working for Citipost had read those parts of the Tariff to which they were directed by the letter. We return to this again when we consider Issue 1.

Ferryspeed and Condor

49. On 22 September 2009, Mr Francis and Mr Jones met with the three freight forwarders operating in Jersey, namely Ferryspeed, Condor and Huelin Renouf Group Ltd. After that meeting Mr Francis contracted with Ferryspeed to supply freight and related services.

50. Mr Francis gave evidence that this was an oral contract. Although he accepted this was "surprising," he told the Tribunal that this was how business was done in the CI at that time. He said that the terms of the contract included acceptance by Citipost of Ferryspeed's rates for each load, and that all goods would be shipped under the Road Haulage Association's ("RHA") conditions of carriage. The latter condition is referred to on Ferryspeed's invoices to Citipost.

51. We find that the agreement was a part-oral, part-written contract which incorporated the RHA conditions of carriage. We further find that the parties were Citipost and Ferryspeed, because:

(1) at the time the contract was made, Citipost Jersey (see the next section) had not been incorporated;

(2) the invoices for Ferryspeed's services were addressed to Citipost in Erith, Kent;

(3) as explained at §71, it was Citipost which instructed Ferryspeed to collect items from the CI companies on a day to day basis and transport them; and

(4) on 22 November 2011, a letter was sent from Ferryspeed addressed to Mr Francis (an employee of Citipost) at Citipost's head office, advising that shipping rates would be increased and to thank him for the business provided to Ferryspeed throughout 2011.

52. Ferryspeed told Citipost that it would use Condor as its agent to deal with the import procedures for the goods, including completing the C88s. Citipost's case was that there was no contract directly between Condor and any Citipost entity; this was not contested by HMRC and we accept that this was the position.

53. Mr Francis said that "to start off with" the paperwork was sent to Ferryspeed, who forwarded it to Condor, but after "three or four weeks" Ferryspeed asked that the paperwork be copied to Condor, and that subsequently it was sent directly to Condor, bypassing Ferryspeed. However, the Bundle also contained examples of C88s completed by Ferryspeed. Mr Francis was unable to explain why this was and we had no witness evidence from Condor or Ferryspeed.

54. We find as facts that Ferryspeed had responsibility for the C88s; that it sometimes completed them itself but usually subcontracted the task to Condor. When we refer in this decision to "Ferryspeed/Condor" in the context of completing the C88s, we mean either or both of those companies.

55. Citipost initially envisaged that only items below the VAT LVCR threshold would be transported, but soon realised that the service offering needed to be able to cope with items above that threshold. It applied to HMRC under the "duty deferment scheme" or DDS. This allows importers to accrue their debt to HMRC up to a pre-arranged threshold, and pay over the accumulated import VAT and customs duties once a month, rather than on each importation. While Citipost was waiting to be approved for duty deferment it used Ferryspeed's DDS.

56. As time went on, and the volume of Citipost's trade increased, the Citipost DDS threshold was frequently reached before the end of each month. Mr Jones' evidence was that Citipost then used Ferryspeed's deferment account, because Ferryspeed had a higher threshold; Mr Francis said that Citipost used Condor's deferment account. We find that one or both companies provided Citipost with this facility.

57. If individual packages exceeded the LVCR threshold, Citipost subsequently invoiced the relevant CI company to recover the VAT it had paid over to HMRC on that company's behalf.

Citipost Jersey

58. On 7 April 2010 Citipost DSA Jersey Limited ("Citipost Jersey") was incorporated and registered in Jersey. Citipost Jersey was an associated company of Citipost.

59. Citipost Jersey operated from a serviced office supplied by Regus plc. Mr Jones said that the only employees of Citipost Jersey were himself and one part-time employee who worked for 2-3 hours a day. It was not disputed that Citipost Jersey employed a local part-time employee. However, Mr Jones signed his contract to work for Citipost in January 2010, before Citipost Jersey was incorporated; when this was pointed out he agreed that he must therefore have been employed by Citipost, and we so find.

60. Citipost Jersey therefore had a single part-time employee. In contrast, Citipost had around 50-60 employees in the UK including a customer services team of around 9 people who dealt only with the CI.

The contracts with the CI companies

61. Before Citipost Jersey had been incorporated, Mr Francis and Mr Jones approached some CI companies inviting them to transfer their business away from Jersey Post.

62. Mr Francis told the Tribunal that when meeting with a CI company he provided a document describing how the service would be delivered and a rate card setting out the cost, and "it was verbal from that point." During the meeting he agreed the price and the collection arrangements with the representative of the CI company at the meeting. This was also Mr Jones's evidence: he said that after he and Mr Francis had explained how the business operated "the conversation then moved on to agreeing commercial and credit terms with the prospective customer, the start date for the service, and logistics as to how the items would be transported." We accept this evidence as to the contractual process.

63. The Tribunal was provided with twelve single page proforma "Customer Service Agreements" ("CSAs") headed "Citipost DSA (Jersey) Limited" signed by representatives of CI companies, and of these:

(1) ten were signed on behalf of Jersey CI Companies; these had account numbers began with "J" running from J001 through to J013, but without J005 or J009; and

(2) two CSAs were signed by companies based in Guernsey; these had account numbers beginning "G", being G004 and G010.

64. We infer from the gaps in the numbering that more than twelve CI companies used the service, and that the others did not sign a CSA.

65. Mr Francis's witness statement says, and we accept, that:

> "the CSA set out very basic information confirming the names and addresses of the parties, and referred to the current price list. The CSA did not set out in writing the processes agreed with each customer, including the options agreed. That detail was agreed verbally with each customer."

66. The CSA includes the words "we agree to adhere to the Citipost DSA (Jersey) Ltd Terms and Conditions ["T&C"] which will follow." In reliance on evidence given by Mr Francis during the hearing, we find that the T&C were in fact only sent out to CI Companies "on request." On the balance of probabilities we find that of those CI companies which signed the CSA, some never saw the T&C.

67. The T&C include a very wide entire agreement clause which states that oral or written instructions will not be taken as varying those written terms even when acceptance may be indicated by conduct. In addition, Clause 4 of the T&C states that Citipost Jersey is "entitled to subcontract on any terms the whole or any part of the carriage."

The process

68. The service began in April 2010 and operated as set out in the following paragraphs.

69. The CI company received an order from a customer, usually via their website or by phone. It printed the invoice, located the item, placed it into an envelope or postal bag and applied an address label to the outer packaging. The only information on the exterior of the package was that address label, which identified the recipient's name and address.

70. The CI company created a despatch document and a daily electronic manifest, listing each item line by line (a "line manifest") detailing the order number reference, number of items, number of packages, name, address, brief description of the contents, value of the goods excluding VAT, the VAT value and total package value, VAT status and commodity code. The CI company emailed this line manifest to Citipost's accounts team in Erith by 2:00pm each day, and sent a copy to Ferryspeed.

71. Citipost checked these line manifests, totalled up the VAT due and emailed Ferryspeed with "Details of Despatch." This acted as Ferryspeed's instructions to collect the items from the CI companies and transport them.

72. The items were collected from the CI companies by a Ferryspeed vehicle, and taken by ferry to the docks in Portsmouth. From there, they were transported by road to Citipost's delivery hub in South Normanton, Derbyshire, where they were sorted by destination and delivered to Royal Mail inward mail centres for "final mile" delivery to the recipient.

73. If CI companies had questions about the service, they called Citipost; if they called Mr Francis or Mr Jones, the call would be referred to Citipost.

74. Soon after the commencement of the business, one of the loads was held at Portsmouth for a customs inspection. Ms Burch had no information about the scope or nature of this check. Mr Francis could not remember whether the goods had been examined, whether the manifests had been checked, and/or whether any manifest included more than one package for the same recipient, but said that some of the manifests would have contained more than 99 items, as that was Citipost's normal practice.

75. From this evidence we find that one of Citipost's loads was, for whatever reason, stopped at customs, and that some or all of the manifests included more than 99 items.

Ms Burch and the change in the law

76. Until June 2011, Citipost's main HMRC contact was a Ms Diane Evans. On 8 June 2011 Mr Francis contacted Ms Evans to discuss Citipost's plans, and was referred to Ms Burch, with whom a meeting was arranged. This took place on 24 June 2011 in Citipost's office in Erith, Kent.

77. At the meeting Ms Burch told Citipost that the inclusion of more than one package to the same recipient on the same manifest was not permitted by the LVBI and that the maximum number of items allowed on a manifest was 99, but she had noted that Citipost was including many hundreds of items on a single manifest.

78. Mr Francis provided Ms Burch with further manifests and information, but said that the 99 item limit would make their operation uneconomic because a charge was made for each manifest.

79. On 17 July 2011, Citipost's LVBI approval expired. This was overlooked until Ferryspeed found that it was unable to clear Citipost's loads through customs.

80. On 20 July 2011 Mr Francis contacted Ms Burch with an urgent application for renewal of the LVBI approval. Ms Burch said that freight was piling up at the port, causing "an immediate logistical problem." She took advice from senior colleagues and it was decided to renew Citipost's approval while HMRC's audit of the manifests continued. On 22 July 2011 Citipost received a letter renewing the LVBI approval for a further six months.

81. On 24 August 2011, having analysed the sample manifests and considered the matters discussed during her June visit, Ms Burch wrote to Mr Francis saying that "it is apparent that Citipost is not currently complying with the conditions for the approval." She set out the reasons why she considered this to be the case, being:

(1) the use of more than 99 items on each manifest;

(2) the failure to link consignments made to the same customer, so that some customers were receiving consignments in excess of the VAT LVCR threshold and/or the customs duty LVCR threshold;

(3) Citipost's record keeping and management checks were insufficient to identify either these multiple items, or individual items above those thresholds; and

(4) some of the packages were for customers outside the EU, where a different procedure was required.

82. Ms Burch also reminded Mr Francis that Citipost's LVBI approval had been renewed for six months "during which time these compliance issues need to be addressed" and that failure to do so "will result in your approval being revoked." She told Mr Francis that she was issuing a Civil Penalty Warning Letter. This followed on 17 September 2011.

83. Citipost contacted its CI customers and reminded them (a) of the £135 customs duty LVCR threshold, and (b) not to use Citipost for goods destined for non-EU recipients.

84. On 26 September 2011, Mr Francis replied to Ms Burch's letter, saying that:

(1) Citipost had been unaware of the 99 items rule; Mr Francis asked for further information;

(2) Citipost understood the importance of VAT being due on consignments above the £18 or £135 threshold and "will ensure full compliance";

(3) Ms Burch's point about single items over the threshold was "fully understood and processes will be reinforced to ensure compliance for the future";

(4) Citipost "fully accepted" Ms Burch's point on record keeping and management checks and "will review its procedures and ensure a more robust application that meets HMRC policy"; and

(5) her point about non-EU customers was also "fully accepted."

85. On 4 October 2011, Ms Burch responded. Her letter included the paragraph "this letter is to advise you that I will be raising an assessment for the amount of £4,153.89 (import VAT)." This was the VAT she had calculated, from the manifests provided, to be due as a result of Citipost sending more than one item to the same recipient on the same manifest. That assessment was not appealed within time and permission to appeal late was refused.

86. On 3 November 2011 Mr Francis replied, saying:

> "in response to your letter dated 4 October 2011, we have been working hard to accommodate all of the requirements that you have raised in your letter dated 24 August 2011.
>
> I am pleased to inform you that we have changed our procedures so that your requirements detailed in your letter will be met moving forward."

87. As indicated in that letter, Citipost had begun examining how it could comply with HMRC's requirements. A software company called Navistar indicated that it could provide a system which would sort the parcels to identify those addressed to the same recipient which together were valued at more than the VAT LVCR threshold; those would then be placed on separate manifests. Each manifest would be subject to the 99 item cap. However, before the system could be implemented, Navistar went into liquidation.

88. On 9 November 2011 the UK Government announced that from 1 April 2012 the LVCR would no longer be available for goods sent to the UK from the CI. After Navistar went into liquidation, Citipost decided not to invest in any other solution to the problems identified by Ms Burch, but continued its previous practice.

89. On 19 December 2011 Mr Francis asked Ms Burch for an application form so Citipost could renew its LVBI approval, which was due to expire in January 2012. This was provided and the application was sent to HMRC at the beginning of January 2012. HMRC extended the LVBI approval to 21 July 2012. Ms Burch said in oral evidence that all applications for LVBI renewal were approved at that time, because there was a backlog and it was taking too long to check each application.

90. Meanwhile, on 15 March 2012, Mitting J dismissed a judicial review application against the proposal to remove the LVCR from goods imported from the CI to the UK, see *R (oao the Minister for Economic Development of the States of Jersey v HMRC; R (oao the States of Guernsey v HM Treasury* [2012] EWHC 718 (Admin) ("the LVCR JR case").

91. On 29 March 2012, Citipost decided to stop trading with CI customers. On 1 April 2012 the law changed and on 3 April 2012 Mr Francis informed HMRC that Citipost had closed its CI business.

The assessments and the penalty

92. On 9 March 2012, in response to a request from Ms Burch, Mr Francis provided the manifests from 17 September 2011 to March 2012.

93. On 27 July 2012, Ms Burch told Citipost the manifests had been analysed, and requested further information. She wrote again on 19 November 2012, saying she had had no record of receiving a reply to her July 2012 letter and that:

> "in the absence of this data and due to the length of time that has now passed, additional VAT due has now been calculated on the basis of the information we do have, which is for a total of £911,739.80…I intend to raise a post-clearance demand note (C18) for £911,739.80…"

94. On 24 November 2012, Citipost provided further manifests, and on 27 November 2012, Ms Burch said she also intended to issue a penalty of £2,500. She attached a draft penalty notice. The box labelled "category/type of intervention" contains the words "poor compliance."

95. On 11 December 2012, Ms Burch told Citipost that the further manifests had been analysed and she intended to raise a further PCDN for £24,488.50. Citipost instructed Thrings LLP ("Thrings").

96. On 19 December 2012, Thrings wrote to HMRC setting out their client's case. On 22 January 2013 Ms Burch replied, saying that "the assessments notified to Citipost in my letters of 19 November and 11 December 2012…will now be issued, as well as the civil penalty of £2,500 as notified on 27 November 2012."

97. The penalty was issued on 22 January 2013. In the box labelled "category/type of intervention" is "serious error." The two C18s were issued on the following day. Thrings requested a statutory review of Ms Burch's decisions, which were upheld. Citipost appealed to the Tribunal.

ISSUE 1: WHETHER CITIPOST FAILED TO COMPLY WITH THE LVBI

98. Key paragraphs of Citipost's LVBI authorisation are set out at §42ff. In particular, Citipost was told that there was more detail about the use of CPC Codes 49 00 003 and 49 00 005 in Volume 3 of the Tariff.

99. Under the heading "CPC 49 00 003", the version of Appendix E2 to Volume 3 of the Tariff included the following requirements.

1.	Goods covered	Consignments of an intrinsic value (ie excluding freight, insurance etc charges) not exceeding £18…for which relief from VAT is claimed. The consignments must have been despatched from the special territories…to a consignee in the UK to qualify for this relief.
3.	Specific fields in the declaration/ notes on completion	**3.4** Only a maximum of 99 items may be entered on a single bulked entry.
4.	Additional documents required	The single bulked entry must be supported by a manifest identifying the individual items in the consignment…
9.	Notes	**9.1** where a consignment consists of several items to a single recipient, the total intrinsic value of those items must not exceed £18 in order to qualify for relief under this CPC. Where the total intrinsic value exceeds £18, this CPC must not be used.
		9.2 use of the CPC constitutes a declaration that the consignment: - is not liable to excise duty - does not exceed £18 intrinsic value…
		9.5 consignments to different recipients can be bulked [under the LVBI] but for each recipient the total intrinsic value must not exceed £18.

100. Appendix E2 to Volume 3 of the Tariff contained similar requirements for CPC 49 00 005, other than that paragraph (1) began by saying that the CPC applied to

"consignments of an intrinsic value…in excess of £18, liable to customs duty and/or VAT, and not being liable to excise duty, for which relief from customs duty only is claimed."

Submissions

101. Mr White made the following submissions:

(1) the approval letter refers only to the customs LVCR threshold: it specifies that "consignments to different recipients can be bulked but for each recipient the total intrinsic value must not exceed £105 for duty relief." There is no mention of any restriction in the context of the VAT LVCR threshold. This can only be found by referring to paragraph 9.5 of the Tariff;

(2) the 99 items requirement was not referred to in the approval letter but only in the Tariff;

(3) the word "consignment" is used both to refer to an individual parcel, as in "each consignment [having] an intrinsic value of less than £105 for duty relief; and less than £18 for VAT relief" but is also used to refer to all the items on the manifest taken together, as in "a manifest identifying individual items in the consignment";

(4) the Tariff was equally confusing. Although the word "consignment" generally means "individual parcel", it is also used to refer to all the items on the manifest taken together, as in: "the single bulked entry must be supported by a manifest identifying the individual items in the consignment."

102. Mr Singh said it was implicit in the LVBI approval letter that goods to the same recipient could not be bulked for VAT any more than they could be for customs duty. But even if that were not the case, Citipost had been directed to the Tariff, where paragraphs 9.1 and 9.5 made the requirement explicit.

103. He acknowledged that the word "consignment" was not used consistently in either the approval letter or the Tariff, but said this didn't matter, because the Tariff clearly stated that "where the total intrinsic value exceeds £18, this CPC must not be used" and "for each recipient the total intrinsic value must not exceed £18." It was, he said, clear that Citipost had not complied with their obligations under the LVBI.

Discussion

104. The LVBI approval authorised the use of CPC Codes 49 00 003 and 49 00 005. The approval letter directed Citipost to Volume 3 of the Tariff for more detail about those Codes. Compliance with the LVBI must therefore include compliance, not only with the words of the approval letter, but also with the requirements set out in the Tariff.

105. It therefore does not matter whether the statement in the letter that goods to the same recipient could not be bulked for customs duty should or should not have been read as extending to VAT. As Mr Singh says, the position was made explicit by paragraphs 9.1 and 9.5 of the Tariff: namely that these CPCs cannot be used if the total of goods being sent to a single recipient on the same manifest exceeds the

relevant LVCR. For the same reason, it is irrelevant that the approval letter does not mention the 99 item rule, because it is clearly set out at paragraph 3.4 of the Tariff.

106. Although inconsistencies of usage exist, they do not assist Citipost, because paragraphs 9.1 and 9.5 can have only one meaning.

107. We therefore find that Citipost failed to comply with the obligations of the LVBI approval, both in respect of (a) using the CPC codes for packages on the same manifest to the same recipient which when considered together exceed the LVCR threshold and (b) the 99 item rule. We decide Issue 1 in favour of HMRC.

108. It is of course possible that the differences in wording between the letter and the Tariff, and/or the inconsistent terminology used in both, may give Citipost grounds for waiver of the debt and/or a reasonable excuse for the penalty. We return to these at Issues 5 and 6. But they are not relevant to Issue 1.

109. It is also arguable that HMRC's requirement that goods to the same recipient on the same manifest must not exceed the LVCR threshold, is unreasonable in the light of our decision on Issue 2. But that is not a matter over which we have jurisdiction.

ISSUE 2: GIVEN CITIPOST'S FAILURE TO COMPLY WITH THE LVBI, IS THERE A CUSTOMS DEBT?

110. Mr Singh submitted that "because the Appellant used CPC 49 00 003 when it should not have done, it wrongly claimed relief on approximately £1million of import VAT. Import VAT was accordingly due from the Appellant." In other words, HMRC's case was that Citipost's failure to comply with the LVBI gave rise to a customs debt equal to the VAT which should have been paid, had the LVBI been correctly implemented.

111. Mr White's position was that the LVBI was an administrative measure. A failure to comply with the LVBI could not give rise to a customs debt, because EU law exempted consignments of goods below the LVCR thresholds. It is only if consignments exceed those thresholds that a customs debt can arise.

112. We have considered Issue 2 under the following headings :

(1) The EU legal framework.

(2) UK legal provisions.

(3) The meaning of "consignment" in the customs duty LVCR.

(4) Whether the same meaning applies for the purposes of the VAT LVCR.

(5) The legal status of the LVBI.

(6) The EU principle of equal treatment.

The EU legal framework

113. The relevant EU legal framework for customs duty and import VAT exemptions has remained substantially the same for many years, but the various Regulations and

Directives have been revised and replaced at different times. In order properly to understand the legislation as it applies today, it is necessary to set out some of those earlier provisions. The current position is then summarised at §134.

Customs duty

114. Regulation 918/83/EEC of 28 March 1983 set up "a Community system of reliefs from customs duty." Title 6 of that Regulation is headed "Consignments of negligible value", and within that Title Article 27 provided that:

> "Subject to Article 28 [which excluded alcohol, perfumes and tobacco], any consignment dispatched to its consignee by letter or parcel post containing goods of a total value not exceeding 10 ECU shall be admitted free of import duties."

115. On 7 November 1991, Regulation 3357/91/EEC amended Article 27. The Recital to the Regulation said:

> "Whereas the administrative simplification provided for in Article 27 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty…must, if it is to be effective, be applied to all imports of consignments made up of goods of negligible value
>
> Whereas Article 27 of Regulation (EEC) No 918/83 should be amended accordingly…"

116. The Regulation replaced the text of Article 27 by the following:

> "Subject to Article 28, 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.
>
> 'Goods of negligible value' means goods the intrinsic value of which does not exceed a total of ECU 22 per consignment."

117. The effect of the amending Regulation was therefore (a) to remove the reference in Regulation 918/83/EEC to "letter or parcel post" and (b) to increase the customs duty LVCR threshold from ECU 10 to ECU 22.

118. Regulation 274/2008/EC of 17 March 2008 further increased the threshold to €150.

119. On 16 November 2009, Regulation 918/83/EEC was replaced by Regulation 1186/2009/EC. Chapter V of that Regulation is headed "Consignments of negligible value"; within that Chapter Article 23 provides as follows:

> "1. Subject to Article 24 [which excludes alcohol, perfumes and tobacco], 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."

120. It can be seen that this new Regulation simply restated Article 27 of Regulation 918/83/EEC, as amended by subsequent Regulations. It is this version of the customs duty LVCR which was current during the relevant period.

VAT

121. Article 14 of Directive 77/338/EC ("the Sixth Directive") is headed "exemptions on importation." So far as relevant to this appeal, it reads:

> "1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemption and of preventing any possible evasion, avoidance or abuse:
>
> (a)-(c) …
>
> (d) final importation of goods qualifying for exemption from customs duties other than as provided for in the Common Customs Tariff or which would qualify therefore if they were imported from a third country. However, Member States shall have the option of not granting exemption where this would be liable to have a serious effect on conditions of competition on the home market;…"

122. The scope of the exemption in Article 14(1)(d) was provided for by Council Directive 83/181/EEC. The Recitals to the Directive included the following:

> "While it is deemed desirable to achieve the greatest possible degree of uniformity between the system for customs duties and that for value added tax, account should be taken, nevertheless, in applying the latter system, of the differences as regards objective and structure between customs duties and value added tax.
>
> Whereas arrangements for value added tax should be introduced that differs according to whether the goods are imported from third countries or from other member states and to the extent necessary to comply with the objectives of tax harmonisation; whereas the exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the market."

123. Title III to that Directive is "Imports of Negligible Value." Within that Title, Article 22 provides that "member states may allow exemptions on imports of goods of a total value not exceeding 22 ECU."

124. On 13 June 1988, Directive 88/331/EEC was issued, amending Directive 83/181/EC. The Recital included the following paragraphs:

> "Whereas the arrangements for exemption from 'the value-added tax of certain imports, as laid down by Directive 83/181/EEC, …refer to the greatest possible degree of uniformity between the system for customs duties and that for value-added tax;…
>
> Whereas Directive 83/181/EEC determines not only the scope of Article 14(1) of Directive 77/388/EEC…but is aimed also at establishing Community tax rules for VAT exemption on the final

import of goods, which go beyond the scope of the said Article; whereas these rules should be amended or supplemented in such a way as to bring about a more uniform application thereof at Community level…"

125. The Directive replaced the existing Article 22 by the following text:

> "Goods of a total value not exceeding 10 ECU shall be exempt on admission. Member States may grant exemption for imported goods of a total value of more than 10 ECU, but not exceeding 22 ECU.
>
> However, Member States may exclude goods which have been imported on mail order from the exemption provided for in the first sentence of the first subparagraph."

126. As can be seen by looking back at §114, the then current customs duty LVCR was also ECU 10. Directive 88/331/EEC therefore:

(1) made the VAT LVCR compulsory up to the value of the customs duty LVCR exemption; and

(2) retained the permissive rule in VAT Directive 83/181/EEC allowing Member States to set the threshold for the relief at up to ECU 22.

127. Some three years later, as we have already noted at §116, Regulation 3357/91/EEC increased the customs duty LVCR threshold from 10 ECU to 22 ECU. The Recital to that Regulation said that this was so "the administrative simplification" provided by the Article should be "applied to all imports of consignments made up of goods of negligible value." It is reasonable to infer from this that increasing the customs duty LVCR to 22 ECU was a further alignment between the two LVCRs.

128. As a result, for the 16 years between 1991 and 2008, the LVCR for customs duty and the maximum LVCR for VAT were both 22 ECU.

129. However, when Regulation 274/2008/EC increased the customs duty LVCR to €150 (see §118), there was no corresponding change to the VAT LVCR; from that point onwards the two thresholds parted company.

130. In 2006 the Sixth Directive was replaced by Directive 2006/112/EC ("the PVD"). Article 143 of the PVD reads, so far as relevant to this Issue:

> "1. Member States shall exempt the following transactions:
>
> (a) …
>
> (b) the final importation of goods governed by Council Directives 69/169/EEC, 83/181/EEC, and 2006/79/ EC;
>
> (c) the final importation of goods, in free circulation from a third territory forming part of the Community customs territory, which would be entitled to exemption under point (b) if they had been imported within the meaning of the first paragraph of Article 30;…"

131. Directive 83/181/EC was replaced by Directive 2009/132/EC, issued on 19 October 2009. Article 96 repealed the earlier Directive and also states that "references to the repealed directive shall be construed as references to this Directive." As a result, the requirement in the PVD that Member States apply the LVCR as set out in Directive 83/181/EC is to be read as extending to the LVCR as set out in Article 23 of new Directive.

132. Recitals (4) and (5) to the new Directive read:

> "(4) While it is deemed desirable to achieve the greatest possible degree of uniformity between the system for customs duties and that for value added tax, account should be taken, nevertheless, in applying the latter system, of the differences as regards objective and structure between customs duties and value added tax
>
> (5) Separate arrangements for value added tax should be laid down for imported goods to the extent necessary to comply with the objectives of tax harmonisation. The exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the market."

133. Article 23 of the Directive replicates Article 22 of Directive 83/181/EC, and the words are unchanged.

134. The EU law position at the relevant time can therefore be summarised as follows:

(1) Member States are required by Regulation 1186/2009/EC to exempt from customs duty, importations of "any consignments made up of goods of negligible value" being those worth less than €150 (which is taken to be £135).

(2) Member States are *required* by Article 23 of Directive 2009/132/EC read together with Article 143(1) of the PVD, to exempt from import VAT "goods of a total value of €10" imported from the Channel Islands (being a "third territory forming part of the Community customs territory").

(3) Member States are *permitted* by Article 23 of Directive 2009/132/EC, read together with Article 143(1) of the PVD, to exempt from import VAT "goods of a total value…not exceeding €22 (£15)."

(4) Member States are also permitted by the same Article to exclude from that exemption "goods which have been imported on mail order."

(5) The Recital to Directive 2009/132/EC states that, as a matter of general principle, it is "desirable to achieve the greatest possible degree of uniformity" between customs duties and import VAT, but account should nevertheless be taken of differences in their objectives and structure.

(6) Between 1991 and 2008 the LVCR thresholds were aligned at ECU22/€22, but the customs threshold was compulsory, whereas Member States were only required to exempt the first 10 ECU/€10 of the VAT LVCR.

(7) The customs duty Regulation 1186/2009/EC and its predecessors use the word "consignment," whereas the VAT Directives refer to "goods." We also

considered the French language versions of the current provisions, being the customs duty Regulation 1186/2009/EC and the VAT Directive 2009/132/EC (we have not researched the earlier law). We found that these also use different terms: in the French version of the customs duty Regulation the word "consignment" is "un envoi" in the phrase "les envois composés de marchandises d'une valeur négligeable." The word "goods" in the VAT Directive is "les biens" in the phrase "les importations de biens dont la valeur globale n'excède pas 10 EUR."

135. We discuss these similarities and differences further at §177, when we consider whether the word "consignment" used in the customs duty LVCR means the same as the word "goods" in the VAT LVCR.

UK legal provisions

136. The Value Added Taxes Act 1994 ("VATA"), s 1(4) states that "Import VAT is to be "charged and payable as if it were a duty of customs" and VATA s 16(1) provides:

> "**Application of customs enactments**
>
> (1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears–
>
> (a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom;
>
> (b) the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community,
>
> shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, EU customs duties."

137. VATA s 37(1) provides:

> "The Treasury may by order make provision for giving relief from the whole or part of the VAT chargeable on the importation of goods from places outside the member States, subject to such conditions (including conditions prohibiting or restricting the disposal of or dealing with the goods) as may be imposed by or under the order, if and so far as the relief appears to the Treasury to be necessary or expedient, having regard to any international agreement or arrangements."

138. The Value Added Tax (Imported Goods) Relief Order 1984 ("the Order") was made under the similar powers at s 17(1) of the Value Added Tax Act 1983, which was consolidated into VATA 1994 and continues to have effect by virtue of the consolidation provisions. The preamble to the Order reads:

> "Whereas it appears expedient to the Treasury that the relief from value added tax provided by this Order should be allowed with a view to conforming with certain of the provisions of Council Directive No. 83/181/EEC, determining the scope of Article 14(1)(d) of Council Directive No. 77/388/EEC as regards exemption from value added tax on the final importation of certain goods…"

139. Article 5 to the Order reads:

> **"Relief for goods of other descriptions**
>
> (1) Subject to the provisions of this Order, no tax shall be payable on the importation of goods of a description specified in any item in Schedule 2 to this Order.
>
> (2) Schedule 2 shall be interpreted in accordance with the notes therein contained, except that the descriptions of Groups in that Schedule are for ease of reference only and shall not affect the interpretation of the descriptions of items in those Groups."

140. Group 8 of Schedule 2 is headed "Articles sent for miscellaneous purposes" and Item 8 of that list is "Any consignment of goods (other than alcoholic beverages, tobacco products, perfumes or toilet waters) not exceeding £15 in value [sent by post]."

141. The words in square brackets were deleted by The Value Added Tax (Imported Goods) Relief (Amendment) (No. 2) Order 1988 (SI 1988/2122), Reg 7(a) with effect from 1 January 1989. The preamble to that statutory instrument said

> "Whereas it appears necessary to the Treasury that the relief from value added tax provided by this Order should be allowed with a view to conforming with certain of the provisions of Council Directive No. 83/181/EEC (as last amended by Council Directive No. 88/331/EEC) determining the scope of Article 14(1)(d) of Council Directive No. 77/388/EEC as regards exemption from value added tax on the final importation of certain goods..."

142. The threshold was reduced from £18 to £15 with effect from 1 November 2011, by Finance Act 2011, s 77(1). At the time of that change, the Notes on Clauses said that the €22 threshold in Directive 2009/132/EC was equivalent to £20. For the first part of the relevant period, the LVCR threshold for importations from the Channel Islands was therefore £18, and for the second part it was £15.

The meaning of "consignment" in the customs duty LVCR

The parties' submissions

143. As can be seen from the legislation set out above, the EU customs duty provisions consistently use the term "consignment." Mr White submitted that each individual parcel was a "consignment" so that, if several parcels were grouped together and entered on a single manifest, the customs duty LVCR threshold applied to each parcel.

144. He relied on the CJEU decision in *Har Vaessen Douane Service BV v Staatssecretaris van Financiën* [2009] (Case C-7/08) STC 2671 ("*Har Vaessen*"). The facts of that case were that CDs and tapes, each worth less than €22, were sent from Switzerland in individually addressed parcels. These were then grouped together and taken by Har Vaessen to a distribution centre run by a company called PTT in the Netherlands. PTT delivered the parcels to the individual recipients and was named as the consignee on the SAD.

145. Har Vaessen did not pay import VAT or customs duty on the basis that the value of each parcel was below both LVCRs, but the Netherlands Customs authority assessed the company to duty and VAT on the basis that "consignment" meant all the goods delivered in one batch to PTT.

146. The CJEU held that the LVCR applied on an individual parcel basis, not to the grouped consignments. It referred at [32] to the removal of the words "letter or parcel" from the original wording of the relief in Regulation 918/83/EEC, saying:

> "Although the original wording of art 27 of Regulation 918/83 restricted relief to consignments of goods of a value not exceeding EUR 10 dispatched by post, art 1 of Regulation 3357/91 removed the condition relating to the method of dispatch, so that other modes of transport can result in the grant of the relief referred to in art 27 of Regulation 918/83 as amended. Thus, the transport of goods by a consignor such as Har Vaessen, which, for logistical reasons, groups individual parcels before their presentation to customs cannot result in those goods being denied admission free of duty, where they were not dispatched by post, but fulfil the conditions of art 27 of Regulation 918/83 as amended."

147. The CJEU also said that this interpretation was consistent with the purpose of Regulation 3357/91/EEC, namely administrative simplification, as was clearly stated in the Recital to that Regulation. It went on to say at [36]:

> "the refusal to grant the relief provided for in art 27 of Regulation 918/83 as amended to consignments such as those at issue in the main proceedings, even though the parcels taken individually are of a value not exceeding EUR 22, could lead to the consignor presenting each parcel individually to customs in order to be able to obtain relief. However, such an increase of procedures is not compatible with the objective of administrative simplification."

148. Mr Singh said that *Har Vaessen* was not an authority on the point at issue here, because HMRC's case was that the LVCR threshold applied to all parcels sent to the same recipient and listed on the same manifest. That issue was not considered in *Har Vaessen*; rather the customs authorities added together all the parcels delivered to PPT, which was the equivalent to Citipost. The CJEU simply did not consider whether more than one parcel was being sent to the same individual recipient in the same batch.

149. Mr White said that the case was nevertheless relevant, pointing to [49] of the judgment, which set out the CJEU's conclusion. This reads (his emphasis):

> "art 27 of Regulation 918/83 as amended must be interpreted as meaning that it does not preclude grouped consignments of goods, with a combined intrinsic value which exceeds the value threshold laid down in Article 27, but which are individually of negligible value, from being admitted free of import duties, provided that each parcel of the grouped consignment is addressed individually to a consignee within the European Community…"

150. Mr White submitted that the CJEU was here emphasising the addressing of the parcels; there was no suggestion that any parcels held by PTT should be aggregated to form some intermediate "grouped" consignment consisting of parcels to the same individual.

151. He added that HMRC were not suggesting that lorry loads of parcels sent via the post office should be checked to see if more than one parcel was being sent to the same recipient. HMRC therefore accepted that "consignment" meant "individual parcel" when the parcels were being carried by the postal services and the word must have the same meaning when parcels were being delivered by firms such as Har Vaessen or Citipost.

152. Mr Singh did not deny that HMRC accepted that each parcel sent by post was a separate "consignment" within the meaning of the customs duty LVCR.

Discussion

153. In *Har Vaessen* the CJEU decided that the LVCR applies where "groups of individual parcels" are transported together for logistical reasons, with each individual parcel being below the LVCR threshold, and that this conclusion was consistent with:

> (1) the administrative simplification which is the aim of that part of the Regulation; and
>
> (2) the removal of the words in the earlier provision restricting the LVCR to "letter or parcel post."

154. On HMRC's case, a distribution firm, such as Har Vaessen or Citipost, must sort through the individual parcels listed on the same manifest, and add together those addressed to the same recipient to see if the customs duty LVCR threshold has been breached.

155. We agree with Mr White that this runs counter to the aim of administrative simplification. To paraphrase *Har Vaessen*, interpreting the LVCR in that way could lead to the consignor company presenting parcels to customs individually rather than as a bulked consignment, in order to benefit from the relief. Like the CJEU, we find that "such an increase of procedures is not compatible with the objective of administrative simplification."

156. Although Mr Singh is right that *Har Vaessen* did not deal directly with whether or not a single lorry load of parcels contained more than one addressed to the same recipient, because that was not directly in issue, we nevertheless find that requiring Har Vaessen to check whether there was more than one parcel sent to the same

recipient within the entire grouped consignment would run counter to the overall *ratio* of the judgment as well as undermining the purpose of the Regulation, namely administrative simplicity.

157. HMRC's meaning of the term also undermines the purpose of widening the relief beyond "letter or parcel post" in November 1991. The LVCR now makes no distinction between carriers, and it cannot apply in any different way. In the context of the postal services HMRC accept that the word "consignment" in Article 23 means "individual parcel." It is simply not possible to read the word in one way when the carrier is the universal postal services, and in another when it is a commercial firm such as Citipost.

158. We have also looked at other usages of the word "consignment" in Directive 1186/2009/EC, and find that these are consistent with our reading of its meaning within Article 23.

159. We begin with Chapter 1 of Title 2, which deals with personal property belonging to natural persons moving to the EU from a third country. Within that Chapter, Article 7 provides:

> "(1) Except in special cases, relief shall be granted only in respect of personal property entered for free circulation within 12 months from the date of establishment, by the person concerned, of his normal place of residence in the customs territory of the Community.
>
> (2) The personal property may be released for free circulation in several separate consignments within the period referred to in paragraph 1."

160. There is similar phrasing in relation to goods imported on the occasion of a marriage (Article 15(2)) and personal property acquired by inheritance (Article 19(2)). In all of these usages, personal property can be divided up and sent in separate consignments, as long as the 12 month period is not exceeded, and the word "consignment" here must mean "parcel."

161. Chapter VI is headed "goods sent by one private individual to another" and within that Chapter Article 25(1) provides:

> "Subject to Articles 26 and 27, goods contained in consignments sent from a third country by a private individual to another private individual living in the customs territory of the Community shall be admitted free of import duties, provided that such importations are not of a commercial nature."

162. Article 26 reads:

> "1. The relief referred to in Article 25(1) shall apply to a value of EUR 45 per consignment, including the value of goods referred to in Article 27.
>
> 2. Where the total value per consignment of two or more items exceeds the amount referred to in paragraph 1, relief up to that amount shall be granted for such of the items as would, if imported separately,

> have been granted relief, it being understood that the value of an individual item cannot be split up."

163. The threshold of €45 here applies "per consignment." This is a low threshold and cannot realistically have been intended to apply to anything other than an individual parcel. Article 26 expressly extends the relief to individual items within the parcel, making it clear that it is not to be applied on a "per consignment" or "per parcel" basis.

164. Article 88 comes under the heading "printed matter and advertising material, and provides a customs duty exemption for certain printed matter. Two of the conditions are as follows:

> "(b) each consignment must contain no more than one document or a single copy of each document if it is made up of several documents; consignments comprising several copies of the same document may nevertheless be granted relief, provided their total gross weight does not exceed one kilogram;
>
> (c) printed matter may not be the subject of grouped consignments from the same consignor to the same consignee."

165. This Article makes it unambiguously clear that a "consignment" is the individual parcel, but then goes on to state expressly that the relief does not apply to "grouped consignments from the same consignor to the same consignee."

166. HMRC is asking us to find that Article 23 was intended to be read in the same way, even though the Article does not contain the limiting provision which has been expressly included in Article 88. We decline to read in such a limitation; had that been intended, we find that it would have been included in Article 23 just as it is in Article 88 .

167. In summary, we find that "consignment" means "single parcel" and not any sort of "group of parcels", because the latter meaning is inconsistent with:

(1) the Regulation's express purpose of administrative simplification;

(2) the removal of the earlier limitation to "letter or parcel post";

(3) the approach taken by the CJEU in *Har Vaessen;*

(4) the meaning being "single parcel" in the context of the universal postal system; and

(5) the other usages of the term within Regulation 1186/2009/EC.

Whether the same meaning applies for the purposes of the VAT LVCR

Mr White's submissions

168. Mr White said that the PVD provides that Member States "shall exempt" the goods within Directive 2009/132/EC, and this includes the LVCR at Article 23.

169. Recital 4 to that Directive says that "it is deemed desirable to achieve the greatest possible degree of uniformity between the system for customs duties and that for value added tax." Although that Recital continues by saying that "account should be taken, nevertheless, in applying the latter system, of the differences as regards objective and structure between customs duties and value added tax," there was no such difference here. Neither has HMRC sought to argue that Recital 5, which refers to exemptions on importation being granted "only on condition that they are not liable to affect the conditions of competition on the market" was relevant to the facts of this case.

170. When UK law is considered, VATA s 1(4) provides that import VAT will be charged as a duty of customs, and VATA s 16(1) states that EU customs law relating to imports "shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods" from outside the EU. Although that provision is "subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears," there is no such exception, adaptation or contrary intention here.

171. It follows that when EU customs law refers to a "consignment" of negligible value, and EU law and UK statute provide for "imports of negligible value" to be exempt from import duty, the exemptions are different only in relation to the applicable threshold. It is not possible to hold that the customs duty LVCR relates to single parcels, but the VAT LVCR relates to grouped parcels to the same recipient.

172. Although the VAT Directive does not use the word "consignment," this is the word used in the Order, which at Item 8 of Group 8 of Sch 2 exempts from import VAT "any consignment of goods (other than alcoholic beverages, tobacco products, perfumes or toilet waters)" which is below the threshold for the LVCR. And the purpose of the Order, as set out in the Preamble, is to provide "relief from value added tax…with a view to conforming with certain of the provisions of Council Directive No. 83/181/EEC."

173. Mr White concluded by reiterating his submission that as HMRC did not seek to argue that the "grouped consignment" approach should be used for postal packages, they therefore accepted, in a postal context, that EU and UK law had the meaning for which Citipost contended.

Mr Singh's submissions

174. Mr Singh accepted that HMRC took a different approach to the legal position when postal packages were considered, but said that this was because of the LVBI. In other words, HMRC's case was that Citipost had failed to comply with the LVBI, and it was that failure which triggered the liability in question.

175. We return to that point at §185. At this stage we are considering whether there is a difference between the customs duty meaning of "consignment" in Article 23 of Regulation 1186/2009/EC and the "goods" which are exempted from import VAT by Article 23 of Directive 2009/132/EC as transposed in UK law by VATA s 37 and the Order. Mr Singh confirmed that this was not HMRC's submission.

176. HMRC also did not seek to argue that this was a case where the normal position – that import VAT should be charged and payable as customs duty – does not apply, whether because of any regulation or contrary intention, or for any other reason.

Discussion

177. Although Mr Singh did not submit that there was any difference between the customs duty meaning of "consignment" and the "goods" which were exempted from import VAT by EU and UK law, we were initially concerned by this difference in wording.

178. We note in particular that where the word "consignment" appears in the customs duty Regulation 1186/2009/EC, the same word is used in the VAT Directive 2009/132/EC, with the sole exception of this negligible value provision. For instance, the word "consignment" in the customs duty reliefs for personal property, inheritances, wedding presents, and printed matter, which we set out at §158ff, are all carried over into the equivalent import VAT exemptions. The LVCR provisions are exceptional in that they use a different term.

179. However, where the two LVCRs differ, the legislation makes this explicit. For example, since 1988 the VAT LVCR has allowed Member States to exclude goods imported on mail order from the scope of the relief, but there is no such exclusion in the customs duty reliefs, and the difference is clear. The same is true of the thresholds for both LVCRs.

180. Both LVCRs are administrative simplifications, and it would be extraordinary if traders were expected to realise, from a slight difference in wording alone and without any explanatory words, that "consignment" in the customs duty LVCR means something different from "goods" in the VAT LVCR. We find further comfort in the fact that Item 8 of Group 8 to Schedule 2 of the Order (see §140) and the Tariff (see §99) both refer to "consignment" in the context of the VAT LVCR.

181. Despite our anxiety on this point, we therefore find that there is no difference in meaning as between the use of the word "goods" in Directive 2009/132/EC and the word "consignment" in Regulation1186/2009/EC.

182. The purpose of Directive 2009/132/EC is to achieve "the greatest possible degree of uniformity between the system for customs duties and that for value added tax" and we agree with Mr White that no difference in objective or structure has been identified. We also note that, over time, these two LVCRs have moved closely together, even to the extent of seeking to mirror, at least to some extent, the thresholds to which the reliefs apply, see §128.

183. We therefore find that "consignment" in the customs duty LVCR is the same as "goods" in the VAT LVCR, and that, following *Har Vaessen*, it applies to individual parcels and not to grouped parcels.

184. We move on to the question of whether this answer is changed by the LVBI, and we begin by considering its legal status.

The legal status of the LVBI

Mr White's main submissions

185. As already set out above, Mr White submitted that the LVCR for customs and VAT were essentially the same, other than where the provisions were expressly distinguished, such as in relation to the threshold and the right to exclude mail order from the VAT exemption.

186. He went on to say that both LVCRs were therefore "an enforceable Community right." Member States have no power to limit the scope of the VAT LVCR other than as expressly provided for in Directive 2009/132/EC. It followed that import VAT did not attach to the parcels transported by Citipost in the relevant period. Non-compliance with the LVBI could not create a liability to import VAT, because as a matter of community law the importations were free of VAT.

187. In his submission, the LVBI was granted by HMRC under an administrative discretion provided for by Regulation 2454/93/EEC, which provides implementing provisions for the Community Customs Code and is commonly referred to as the Implementing Regulation. Article 205 of the Implementing Regulation opens as follows:

> "1. The official model for written declarations to customs by the normal procedure, for the purposes of placing goods under a customs procedure or re-exporting them in accordance with Article 182(3) of the Code, shall be the Single Administrative Document.
>
> 2. Other forms may be used for this purpose where the provisions of the customs procedure in question permit.
>
> 3. The provisions of paragraphs 1 and 2 shall not preclude–
>
> – waiver of the written declaration prescribed in Articles 225 to 236 for release for free circulation, export or temporary importation,
>
> – waiver by the Member States of the form referred to in paragraph 1 where the special provisions laid down in Articles 237 and 238 with regard to consignments by letter or parcel-post apply,
>
> – use of special forms to facilitate the declaration in specific cases, where the customs authorities so permit…"

188. It was common ground that the UK had implemented Article 205(1) by prescribing that customs declarations be made using the C88.

189. Mr White said that the LVBI procedure fell under the third indent of Article 205(3). The different procedures used by the postal services such as Guernsey and Jersey Post came under the second indent.

190. If Citipost had failed to comply with the terms of the LVBI, this was a failure to follow the procedure to which it had been given access as a matter of HMRC's

discretion. A proper remedy for such a failure would be for HMRC to withdraw Citipost's right to use the procedure. Failure could not give rise to an import VAT liability, because that was precluded by the VAT LVCR.

HMRC's submissions

191. Mr Singh limited his submissions to disagreeing with Mr White in relation to Article 205(3). He said that there was no "special form" here, but rather the use of a standard C88 with an attached manifest.

192. We had some further help from the LVBI approval letter, which sets out HMRC's understanding of its jurisdiction to issue an LVBI approval:

> "Under European Community law, the bulking of low value consignments is permitted in respect of the summary declaration by Article 44(1) of Council Regulation (EEC) 2913/92 and in respect of full customs declaration by allowing the release of the goods against an incomplete declaration under Commission Regulation 2454/93/EEC Article 253(1) of the same Regulation."

193. The first source here referred to is Article 44(1), although it was common ground that there was no "summary declaration" in this case.

194. The second source is Article 253 of the Implementing Regulation. This Article comes under Section 1, Chapter 1, of Title IX, which is headed "Simplified Procedures." The first two paragraphs of the Article read:

> "(1) The procedure for incomplete declarations shall allow the customs authorities to accept, in a duly justified case, a declaration which does not contain all the particulars required, or which is not accompanied by all documents necessary for the customs procedure in question.
>
> (2) The simplified declaration procedure shall enable goods to be entered for the customs procedure in question on presentation of a simplified declaration with subsequent presentation of a supplementary declaration which may be of a general, periodic or recapitulative nature, as appropriate."

195. Neither party sought to argue that the LVBI was a "simplified declaration procedure" as referred to in Article 253(2).

Mr White's submissions in relation to Article 253(1)

196. Mr White argued that the LVBI procedure did not involve an incomplete declaration and so Article 253(1) was not in point. He referred to Article 62 of the Code, which reads:

> "1. Declarations in writing shall be made on a form corresponding to the official specimen prescribed for that purpose. They shall be signed and contain all the particulars necessary for implementation of the provisions governing the customs procedure for which the goods are declared.

> 2. The declaration shall be accompanied by all the documents required for implementation of the provisions governing the customs procedure for which the goods are declared."

197. He said that the C88 was the declaration, and it included a reference to the relevant CPC, which allowed details of the goods to be listed on the manifest.

198. As a result of the CPC, Article 198 of the Implementing Regulation applies. This states that "where a customs declaration covers two or more articles, the particulars relating to each article shall be regarded as constituting a separate declaration." Here, the C88 covered a large number of items, all of which were listed in the manifest. There was nothing "incomplete" about the C88 or the declarations on the manifest.

Discussion

199. We found it difficult to be confident that we had correctly identified the source of HMRC's power to issue the LVBI. From the information and submissions provided to us, we found that there were four possibilities:

(1) The LVBI procedure was a "summary declaration" under Article 44(1) of Regulation (EEC) 2913/92. This is the first possibility referred to in the LVBI authorisation letter. However, that Article was repealed in 2005, and the summary declaration procedures which then came into force operate as a form of pre-entry check used for risk management purposes and do not replace the C88s. The LVBI cannot have been issued under the powers given by that Article, and neither party contended this was the case.

(2) The LVBI was issued as "a procedure for incomplete declarations" under Article 253(2) of the Implementing Regulation, being the second possibility in the LVBI letter. As we have noted, that Article falls under Title XI of that Regulation. Although not cited to us, Section 1 Chapter 2 of the same Title is headed "incomplete declarations", with Articles 254 to 259 being the relevant provisions. These refer to "missing" documents and "the late production of particulars or of a supporting document." The purpose of the incomplete declaration procedure is to allow HMRC to accept declarations even though something which should have been included or attached has been omitted. To take an example from a completely different area of customs law, an importer of bananas requires a certificate confirming their weight, but Customs Information Paper 50 (2015) advises that "if your certificates are not available at the time you make your declaration to customs, you can use the 'incomplete declaration' facility and declare a provisional weight." Here there is nothing incomplete about the declarations.

(3) The LVBI was a simplified declaration under Article 253(2) of the Implementing Regulation. However, we agree with the parties that this is not correct, as it requires "presentation of a simplified declaration with subsequent presentation of a supplementary declaration." Moreover, there is a specified procedure for such simplified declarations, set out in Annex 67 of the Implementing Regulation, and the LVBI process neither follows that procedure nor refers to it.

(4) The LVBI was a permission under the third indent of Article 205(3) of the Implementing Regulation. Mr Singh invited us to reject this, on the basis that the LVBI required completion of the C88, which was not a "special form." However, the Article refers to "the use of special forms to facilitate the declaration in specific cases." Here, the manifest facilitates the declaration: as Mr White said, under Article 198 of the Implementing Regulation "where a customs declaration covers two or more articles, the particulars relating to each article shall be regarded as constituting a separate declaration."

200. We therefore find that the third indent of Article 205(3) is the source of HMRC's jurisdiction to authorise the use of the LVBI.

201. Even if we are wrong, and the source of the jurisdiction is in fact Article 253(2) of the Implementing Regulation (as HMRC said in their letter authorising the LVBI) it makes no difference to the outcome, because both Article 205(3) or Article 253(2 give a discretion to HMRC.

202. A failure to comply with a permission given under either Article does not remove the LVCR, which is, as Mr White says, an enforceable Community right. HMRC cannot remove that right simply because a person has not complied with the terms of the LVBI. There is no provision in EU law making the LVCR conditional upon compliance with the stipulations set by individual Member States. More generally, that would also run entirely counter to the purpose of the single market and the "community system of reliefs" provided for by EU law.

The EU principle of equal treatment

Mr White's submissions

203. Mr White said that if there was any doubt about the correctness of his submissions on Issue 2, the question was resolved in his favour by reference to the EU principle of equal treatment. He relied on *Lietuvos geležinkeliai AB v Vilniaus teritorinė muitinė* [2013] (Case C-250/11) STC 31 at [44]-[45] where the CJEU said:

> "44. It should be observed in that regard that the court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (*R (on the application of International Air Transport Association) v Dept for Transport* (Case C-344/04) [2006] ECR I-403, para 95).
>
> 45. According to settled case law, the principle of equal treatment, which applies in matters relating to VAT through the principle of fiscal neutrality, precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, *inter alia*, *Revenue and Customs Comrs v Rank Group plc* (Joined cases C-259/10 and C-260/10) [2012] STC 23, para 32 and the case law cited)."

204. It was common ground that universal postal services such as Guernsey and Jersey Post were not required to identify, within their sorting offices or bags or lorries,

whether there were any parcels being sent at the same time to the same recipient. Mr White said that requiring competitor parcel delivery firms to bear the extra burden of detailed sorting and checking would breach the principle of equal treatment.

205. He also sought to rely on the three Postal Directives to which we have already referred at §22. The first Recital to the Postal Directive reads:

> "Whereas measures should be adopted with the aim of establishing the internal market in accordance with Article 7a of the Treaty; whereas this market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;"

206. Recital 29 of the Second Postal Directive said:

> "The universal service providers normally provide services, for example to business customers, consolidators of mail for different customers and bulk mailers, enabling them to enter the mail stream at different points and under different conditions by comparison with the standard letters service. In doing this, the universal service providers should comply with the principles of transparency and non-discrimination, both as between different third parties and as between third parties and universal service providers supplying equivalent services. It is also necessary for such services to be available to private customers who post in similar conditions, given the need for non-discrimination in the provision of services."

207. Mr White said that it was clear from these Directives that companies such as Citipost were in competition with universal postal service providers, and that it would breach the principle of equal treatment if they were to be subjected to import VAT for failing to comply with an onerous requirement that did not apply to their postal competitors.

Mr Singh's submissions

208. Mr Singh argued that there was no breach of the equal treatment principle, which required that like be compared to like. Here, the comparison is between the short-form declaration completed by users of a universal postal service, and the bulk declarations allowed by the LVBI. These are entirely different, and there is no valid comparison.

Discussion

209. During the hearing both parties referred to the fact that the LVCR JR case had been decided in favour of the UK government, see §90. As that decision was not in the Bundle of Authorities, for the sake of completeness the Tribunal provided copies on the final day of the hearing, but neither party referred to the judgment in their submissions. The Tribunal only identified after the end of the hearing that that the decision engaged the issue of equal treatment.

210. In the LVCR JR case, Jersey and Guernsey submitted that the withdrawal of the LVCR was a breach of the principle of equal treatment, because importations from the CI would be treated less favourably than importations from other non-EU states.

Mitting J decided at [75] that Member States "may, for any reason or none, discriminate against non-EU states in relation to the import of goods from them; even in the field of indirect taxation" because the principle of equal treatment simply didn't apply to non-EU states such as Jersey and Guernsey.

211. That decision is binding on us and we therefore decide this particular argument against Citipost. We appreciate that we have done so for reasons other than those put forward by Mr Singh. Had this point been material to our decision, we would have asked the parties for further submissions. But as we have decided Issue 2 in Citipost's favour for the reasons already set out, no such further submissions were necessary.

Conclusion on Issue 2

212. Citipost succeeds on Issue 2 and so its appeal against the assessments also succeeds. However, in case this appeal goes further and as the other Issues were very fully argued, we have set out the parties' submissions and our reasoning on Issues (3) to (5).

ISSUE 3: IF THERE IS A LIABILITY, IS CITIPOST THE DEBTOR?

213. It was common ground that if there was an import VAT liability, this was a "customs debt." HMRC assessed Citipost on the basis that it was liable for the debt; Citipost did not agree.

214. The Tribunal observed at the beginning of the hearing that no other person, such as Ferryspeed or Condor, had been joined to the proceedings as interested parties. Mr Singh confirmed that, if there was a customs debt but Citipost was not the debtor, HMRC were not seeking to pursue any other party and was in any event out of time to commence any such recovery action.

The legal provisions

215. Article 201(3) of the Code provides that "the debtor shall be the declarant." The term "declarant" is defined in Article 4(18) of the Code as "the person making the customs declaration in his own name or the person in whose name a customs declaration is made."

216. Article 64 of the Code provides, so far as relevant to this decision:

> "1. Subject to Article 5, a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.
>
> 2. However:
>
> (a) where acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on his behalf…"

217. Article 5 of the Code reads, again so far as relevant to this case:

"1. Under the conditions set out in Article 64(2)…any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representation may be–

– direct, in which case the representative shall act in the name of and on behalf of another person, or

– indirect, in which case the representatives shall act in his own name but on behalf of another person…

3. Save in the cases referred to in Article 64(2)(b) and (3), a representative must be established within the Community.

4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.

A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.

5. The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative."

218. On the basis of the above provisions, our understanding of the legal position is as follows (all Article references are to the Code):

(1) The person liable for the debt is the declarant (Article 201(3)).

(2) A wide range of people can be the declarant – anyone who is able to present the goods, or have them presented, together with all the required documents (Article 64(1)).

(3) However, that wide scope is narrowed if "acceptance of a customs declaration imposes particular obligations on a specific person" because that person is either the declarant or must appoint a representative to act for him (Article 64(2)(a)).

(4) A representative can either be acting in a "direct" or "indirect" capacity (Article 5(2)).

(5) Where a person ("A") empowers another ("B") to be his direct representative, and B states that he is acting in that capacity, then A is the declarant (Article 64(1) and Article 5(2)).

(6) Where A empowers B to be his indirect representative, B is the declarant albeit acting on A's behalf, with the result that A and B are jointly liable (Article 64(1) and Article 5(2)).

(7) If B says he is A's direct or indirect representative, but has not been empowered to act as such, B is the declarant (Article 5(4)).

The C88s: the law and further findings of fact

219. Annexes 37 and 38 to the Implementing Regulation set out how the C88 must be completed. So far as relevant to this decision, Column I of the Table below sets out the Box Number on the C88, and Columns II and III summarise the requirements in Annex 37 and/or 38. Column IV contains further findings of fact on the C88s in issue.

I	II	III	IV
1.	Consignor/ Exporter		Citipost Jersey
8.	Consignee		Citipost
14.	Declarant/ Representative	Insert one of the following codes before the full name and address to designate the declarant or the status of the representative: 1 Declarant 2 Representative (direct representation within the meaning of the first indent of Article 5(2) of the Code) 3 Representative (indirect representation within the meaning of the second indent of Article 5(2) of the Code).	[2] Ferryspeed/ Condor
37	Procedures	Detailed guidance on particular codes; Code 49 being "entry for home use of community goods…"	490003 or 490005
44	Additional information/ documents produced/ certificates and authorisation	National documents, certificates and authorisations produced in support of the declaration must be entered in the form of a code…	Citipost's LVBI number "as per agreement with Diane Evans"

220. Title II to Annex 37 has several parts. Under "A" are "formalities relating to export/despatch…" Under "C" are "Formalities for release for free circulation…". Both parts specify what must be included in each box of the C88. Much of the wording is identical. However, in relation to Box 14, Part A says "if the exporter and the consignor are the same person, enter 'exporter' or 'consignor.' Part C says (our emphasis "if the declarant and the consignee are the same person, enter the word consignee." The difference in wording was not drawn to our attention during the hearing, although we of course accept that it is Part C which is relevant here, not Part A.

221. We also observe that the guidance in the Tariff refers to neither requirement. Ms Burch's evidence was that Box 14 normally contained "the name of the declaring agent" rather than the name of the consignee. When challenged by Mr White in cross-examination, she said "I can only talk about the entries I routinely see." Ms Burch is an experienced customs officer and we accept that the name of the representative is routinely included in Box 14.

222. Mrs Burch was also asked if she was familiar with the term "bare consignee" and she said she had never heard it used. Again, we accept her evidence as being that of an experienced customs officer.

The parties' submissions

223. Mr White's case was that (a) Citipost was not liable for the customs debt because it was not the declarant, and (b) Ferryspeed/Condor were acting as an indirect representative.

224. Mr Singh submitted that (a) Citipost was liable for the customs debt because it was the declarant, and (b) Ferryspeed/Condor were acting as Citipost's direct representative.

225. Mr White and Mr Singh approached Issue 3 in different ways, and we have summarised their arguments under a number of headings.

Article 64(2) of the Code

226. Mr Singh relied on Article 64(2)(a) of the Code, which provides that "where acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on his behalf." Here, the LVBI authorisation imposed particular obligations on Citipost, so it followed that the C88s must have been made on behalf of Citipost. It was not possible to hold that the C88s were submitted on behalf of another person, such as Citipost Jersey, or the CI companies.

227. Mr White said that the LVBI did not impose "particular obligations" within the meaning of that Article, because the term must be understood by reference to an obligation arising under the Code, or at least under EU law. The LVBI does not arise under the Code, but is instead a permission granted by HMRC.

Article 64(1) of the Code

228. Mr White said that the relevant provision was not Article 64(2), but Article 64(1), which provides that the declarant is the person "who is able to present the goods in question or to have them presented." To identify that person, the contractual obligations must be considered. On the facts of this case:

(1) The goods were sold by the CI companies to certain UK buyers ("the Buyers"). The terms of trade between the CI companies and the Buyers were not known to Citipost, but it could reasonably be inferred that either:

(a) they were equivalent to Incoterms 2010 Delivered At Place (DAP) terms, under which the CI companies agreed to arrange clearance on behalf of the Buyers. Under those standard terms, the Buyers did not give authority for direct representation, so the declarations must have been made on behalf of the Buyers by way of indirect representation; or

(b) there were no express terms of trade, so standard mail order terms of trade were implied. These are Incoterms 2010 Delivered Duty Paid

(DDP), under which the CI companies are the importers and responsible for customs clearance.

(2) The CI companies had signed the CSAs, so had contracted with Citypost Jersey to provide carriage and customs clearance.

(3) They had done so either as agent for the Buyers (if acting under DAP terms) or as principal (if acting under DDP terms).

(4) The T&C attached to the CSAs allowed Citipost Jersey to subcontract its services.

(5) Citipost Jersey therefore subcontracted carriage and customs clearance to Ferryspeed, which on-subcontracted customs clearance to Condor.

(6) The Tariff states in relation to Box 14 that:

> "where an agent delegates the making of a declaration to a sub-agent in an indirect capacity on behalf of the first agent, then the sub-agent becomes the customs debtor. The original agent ceases to be the customs debtor because they neither make the declaration nor have responsibility for performing the acts and formalities laid down by customs rules."

(7) As a result, Ferryspeed/Condor was not representing Citipost Jersey, because that company was merely a link in the contractual chain. Either the Buyers or the CI companies were the declarants, with Ferryspeed/Condor as their sub-agents and representatives.

(8) Citipost is not part of this contractual chain at all. Its only role is to be the "bare consignee" of the goods. In other words, it was a "consignee" because the goods were later transported from the UK port of arrival to Citipost's depot in England, but it had no beneficial interest in the goods.

229. Mr Singh said that the facts were inconsistent with Mr White's submissions. Mr Francis had referred to Ferryspeed as "Citipost's agent" and it was Citipost (and not, for example, Citipost Jersey) which contracted with Ferryspeed. There is no evidence that either the CI companies or the Buyers instructed Ferryspeed or Condor to act as their representatives.

230. Furthermore, Ferryspeed/Condor was using Citipost's LVBI to complete the C88s; Citipost's authorisation number and the relevant CPC numbers were included on those forms. Ferryspeed/Condor could only have done this if acting as Citipost's representative. They were not representing the CI companies, Citipost Jersey, or the Buyers.

231. The same conclusion followed from the fact that, when the LVBI had expired, Ferryspeed was unable to clear the goods through customs until Ms Burch renewed Citipost's LVBI.

232. Mr Singh also said that Citipost was not acting as "bare consignee." No authorities had been put forward by Mr White to support the use of that term in customs law, and Ms Burch told the Tribunal she had never heard it used.

Box 14 of the C88s

233. Mr Singh said that Ferryspeed/Condor were not only Citipost's representatives, they were Citipost's direct representatives. The person completing the C88 is required to state, in Box 14, whether they are acting in a direct or indirect capacity. Ferryspeed/Condor completed the C88s by including the number 2 in that box and the use of that number signified that they were acting as in a direct capacity.

234. Mr Singh added that this had been the position throughout the entire period of Citipost's CI operation, and Ferryspeed/Condor's insertion of number 2 in Box 14 had never been challenged; Citipost had never suggested that Ferryspeed or Condor were acting as indirect representatives and there was no reason why Ferryspeed or Condor would take the commercial risk of incurring that extra liability.

235. Mr White said that when seeking to identify the declarant, it was not correct to begin with the C88 and work backwards, although he conceded that this might be possible if the C88 was "comprehensive and clear." In relation to Box 14, he said that Ferryspeed/Condor had used the incorrect code. Instead of "2" denoting direct representation, they should have used "3" for indirect representation, because there was no evidence that Ferryspeed or Condor had been given authority to make declarations by way of direct representation.

Box 8 of the C88s

236. Mr Singh said that Box 8 of the C88s gave Citipost as the "consignee" of the goods, and this was consistent with it being the declarant.

237. Mr White accepted that Citipost was identified as the consignee in Box 8, but said that had Citipost been the declarant, Box 14 should have been completed "consignee" as required by Annex 27, Title II, part B. In fact, Box 14 gives either Ferryspeed's name or Condor's name. It follows, he said, that Citipost was not the declarant.

238. Mr Singh responded by relying on Ms Burch's evidence that, as a matter of practice, Box 14 is commonly completed with the name of the agent, whether or not that is technically correct.

Discussion

239. Issue 3 requires us to identify the person liable for the customs debt. We first considered whether Article 64(2)(a) applied. Mr Singh said that LVBI imposed "particular obligations" on Citipost. Mr White disagreed, on the basis that the term referred only to an obligation arising under the Code, or at least under EU law.

240. Article 64(2)(a) contains no limitations, and we see no reason to restrict the natural meaning of the provision, so as to exclude obligations attached to an approval such as the LVBI, given by a national customs authority in accordance with its powers under EU law. Here, the C88 is completed in reliance on the LVBI approval; without it, Box 37 could not include Codes 49 00 03 or 49 00 05; these are only available because of the LVBI. This is made explicit by the additional information provided on the C88s. It would be surprising if someone other than Citipost or a

person acting on its behalf could make a declaration which relied on the LVBI approval. We therefore agree with Mr Singh that Article 64(2)(a) applies.

241. It follows that Citipost is liable for any customs debt resulting from the C88s, unless Ferryspeed/Condor either:

(1) did not state it was acting as a representative; or

(2) was not empowered to act as Citipost's representative.

242. In either situation, Ferryspeed/Condor would be deemed to have acted on its own behalf by virtue of Article 5(4).

243. We can quickly dismiss the first possibility, because Ferryspeed/Condor invariably completed Box 14. The next question is whether it was empowered to act as Citipost's representative.

Was Ferryspeed/Condor empowered to act as Citipost's representative?

244. Mr White submitted that Citipost had not given Ferryspeed/Condor authority to complete Box 14. Instead, their authority to complete the C88s was derived from the CI companies (acting either as principal or as agent for the Buyers) via Citipost Jersey and that Citipost was merely the "bare consignee."

245. We do not accept those submissions. On the facts as found, it was Citipost (not Citipost Jersey) which contracted with Ferryspeed. Under the terms of that contract Ferryspeed completed the C88s or subcontracted their completion to Condor. Ferryspeed/Condor were therefore empowered to act as Citipost's representative under the terms of that contract. There was no contract between Citipost Jersey and either Ferryspeed or Condor.

246. It follows that Article 5(4) cannot apply so as to deem Ferryspeed/Condor to be acting on its own behalf. Citipost therefore remains liable for any customs debt.

Did the CI companies contract with Citipost, or with Citipost Jersey?

247. Whether the CI companies contracted with Citipost or with Citipost Jersey is therefore irrelevant to Issue 3. This is because we have already found that Citipost gave Ferryspeed/Condor the authority to complete the C88s.

248. However, as Mr White's analysis of the contractual structure was core to his submission on Issue 3, we deal with it briefly.

249. On the facts as found, Mr Francis and Mr Jones both worked for Citipost, not Citipost Jersey; they agreed terms orally in the context of a sales brochure and a rate card; they had at least some contractual discussions before the incorporation of Citipost Jersey; the CSAs were signed after that agreement had been reached; only some of the CI companies actually signed a CSA; of those that did sign, at least some were never sent the T&C; the remainder only saw the T&C, not only after the agreement had been concluded but also after the CSA had been signed.

250. Under English law, terms are only binding on a party if they have been communicated and agreed before the conclusion of the contract. The legal position may be different here, because the agreements were made in Jersey or Guernsey. We note that in a speech given to the Jersey Contract Law Conference 2010, Lord Hope said that "more work must be done to find out what the law of contract actually is in these islands."

251. However, as we had no submissions on Jersey or Guernsey law, we decided this point on the basis that it is the same as English law. We find that the contracts with the CI companies were made by Mr Francis and/or Mr Jones on behalf of Citipost during the meetings they held with representatives of those companies, and that the T&C were not incorporated into those contracts.

252. Those findings are consistent with other facts which we have already found, namely that Citipost Jersey had a single part-time employee, while Citipost had around 50-60 employees including a CI customer services team of around 9 people; that the CI companies emailed their line manifest to Citipost's accounts team (and not to the single part-time employee in Jersey); and that if CI companies had questions about the service, they called Citipost (and not Citipost Jersey).

253. We have not gone on to explore the exact status of the CSAs because, as we have already said, the contract made by the CI companies is not relevant to Issue 3.

254. Finally, we observe that when Mr White sought to rely on generalised statements about standard DDP and DAP terms which he said were included in the contracts between the CI companies and the Buyers, he did so as part of his submissions; there was no evidence at all as to the terms of those contracts.

Is there joint liability?

255. We have therefore found that Ferryspeed/Condor were empowered to act as Citipost's representative, so that Citipost is liable for the customs debt. But if Ferryspeed/Condor were acting as Citipost's indirect representative, those companies would be jointly liable with Citipost.

256. This is, however, academic, as HMRC can then choose whether to pursue Citipost or Ferryspeed/Condor, and has already decided to assess Citipost.

257. Moreover, we find that Ferryspeed/Condor were acting as direct and not indirect representatives. They consistently completed Box 14 with the number "2" and not "3." No witness said that Ferryspeed/Condor had been instructed to act as an indirect representative. We agree with Mr Singh that it is not reasonable to suppose that Ferryspeed/Condor would have accepted the risk of an extra tax liability without an explicit agreement as to its terms.

What about Annex 37?

258. It only remains for us to consider the requirement in part C of Title II to Annex 37 of the Implementing Regulation that the word "consignee" should be entered in Box 14 when the declarant is the same as the consignee. As Mr White says, this is

what should have happened if Citipost is both the consignee (which is admitted) and the declarant.

259. This requirement is in the Annex to the Code, but is not included in the Tariff. Although we have not had the benefit of evidence from Ferryspeed/Condor, they are both UK registered companies, and it is reasonable to assume that they relied on the Tariff. Ms Burch was surprised when she was taken to Annex 37, and said that in her experience, Box 14 "routinely" contains the agent's name; we accepted her evidence. We find that the failure to follow Annex 37 was caused by oversight, and does not mean Citipost was not the declarant.

Conclusion on Issue 3

260. Citipost was the declarant, and Ferryspeed/Condor was acting as its direct representative. If there was a customs debt, Citipost would be liable.

ISSUE 4: DOES THE TRIBUNAL HAVE JURISDICTION TO CONSIDER THE WAIVER PROVISIONS?

261. If Citipost has a customs debt, Issue 4 is whether the Tribunal has the jurisdiction to consider whether that debt should be waived under Article 220(2)(b) of the Code. We first set out some further findings of fact and legal provisions relevant to this Issue.

Further findings of fact

262. Thrings wrote to HMRC on 19 December 2012 setting out a number of arguments on the issue in dispute, and then saying:

> "Citipost's primary position is as fully particularised above. Further, or in the alternative, it is Citipost's position that HMRC's representations in May 2009 and later correspondence have given rise to a legitimate expectation and a claim to waiver under Code Article 220(2)(b)."

263. Ms Burch's reply of 22 January 2013 informed Thrings that she was now issuing the assessments, and added:

> "regarding your assertion that Citipost relied on advice provided during initial discussions in May 2009, when this point was raised at our initial meeting in June 2011. I requested Citipost to provide further details or copies of correspondence and again in an email dated 28 June 2011, but no further information or evidence has ever been provided by your client to substantiate this claim."

264. On 19 February 2013 Thrings replied, asking for a statutory review. The letter included the following passage:

> "we note HMRC's letter of 22 January 2013 has not responded to our submission that, in all the circumstances, our client has the benefit of a defence to any C18 Post Clearance Demand Note by way of a reference to a right to waiver under Community Customs Code Article 20(2)(b) [sic]. We welcome your comments."

265. On 29 April, HMRC's Review Officer issued his review decision, upholding Ms Burch's assessments and adding:

> "in respect of your submission that your client is eligible for a waiver of the debt under Article 220(2)(b), it is not within my remit or that of the issuing officer to consider such a claim. It must be considered by another team altogether and would be a reviewable decision in its own right…"

Further legal provisions

EU law

266. Part VII to the Code is entitled "Customs Debt" and Chapter 3 of that Part is headed "recovery of the amount of customs debt." It opens with Article 217, which provides:

> "(1) Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called 'amount of duty', shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts)."

267. Articles 219 and 220 provide for "subsequent entry in the accounts" where the national customs authorities later become aware that an amount of duty is owed. Article 220(2) then says, so far as relevant to this decision:

> "…subsequent entry in the accounts shall not occur where–
>
> (a) …
>
> (b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration."

268. Article 241 of the Code begins:

> "1. Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid–
>
> – where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,
>
> – where national provisions so stipulate…"

UK law

269. VATA s 1 and s 16 are both relevant to Issue 4 and are set out at §136.

270. Regulation 120 of the Value Added Tax Regulations 1995 ("VATR") is headed "Community Legislation excepted." Subsection (2) of that Regulation begins:

"The following Articles shall be excepted from the Community legislation which is to apply as mentioned in section 16(1) of the Act–

(a) in Council Regulation (EEC) No 2913/92 establishing the Community Customs Code–

(i) Articles 126 to 128 (drawback system of inward processing relief),

(ii) [deleted]

(iii) Article 137 so far as it relates to partial relief on temporary importation, and Article 142,

(iv) Articles 145 to 160 (outward processing),

(v) [deleted]

(vi) Article 229(b) (interest payable on a customs debt),

(vii) Articles 232(1)(b), (2) and (3) (interest on arrears of duty), and

(viii) Article 241, second and third sentences only (interest on certain repayments by the authorities)."

271. Finance Act 1994 ("FA94"), s 16 provides that a person may appeal to the Tribunal against "a relevant decision." FA94, s 13A(2) defines "relevant decision" and is set out at §285 below.

Outline of the points in dispute

272. Mr White's submissions were that:

(1) Article 220(2)(b) of the Code applies to import VAT;

(2) it requires HMRC to consider, before making an assessment, whether the debt should be waived;

(3) Citipost's appeal to HMRC encompassed a request that, if any debt was due, that it be waived on the basis set out in that Article;

(4) there was no legal requirement that a separate appeal be made in order to make a valid claim for waiver under that Article; and

(5) as a result, this Tribunal had the jurisdiction to consider Citipost's submissions on waiver along with its other submissions, because it was part and parcel of its appeal against the assessments.

273. Mr Singh disagreed with all these submissions, each of which we consider below.

Whether Article 220(2)(b) applies to import VAT

The parties' submissions

274. Mr White said that Article 220(2)(b) applies to import VAT by virtue of VATA s 1(4) and VATA s 16(1). The former provides that import VAT is to be "charged and payable as if it were a duty of customs" and the latter states that community customs law applies to import VAT, subject only "to such exceptions and adaptations

as the Commissioners may by regulations prescribe and except where the contrary intention appears." There was no such exception or adaptation here.

275. Mr Singh emphasised that VATA s 1(4) says that import VAT is to be charged and payable as if it were a duty of customs; it therefore does not extend to a waiver, where there is no charge or payment. Similarly, VATA s 16 provides that community customs law shall apply "in relation to any VAT chargeable" on imports, so again does not extend to waivers.

276. In response, Mr White relied on the wording of Article 220(2)(b). This states that, where a customs debt should be waived because of error by the authorities etc, then "entry in the accounts shall not occur." This obliges HMRC to consider, as part of the process of making an assessment, whether or not the conditions in that Article are met. In saying this, he relied on *Mecanarte - Metalúrgica da Lagoa Ld v Chefe do Serviço da Conferência Final da Alfândega do Porto* [1991] C-348/89 ("*Mecanarte*") where the CJEU considered the earlier version of Article 220(2)(b). At [14] of its judgment, the CJEU stated that the provision:

> "must be interpreted as meaning that it confers on the competent national authorities a non-discretionary power as regards the decision not to carry out post-clearance recovery of import duties when the conditions laid down in Article [220(2)(b)] have been fulfilled."

277. Mr White said that consideration of waiver was therefore part and parcel of making the assessment, and so clearly fell within the customs provisions applicable to import VAT.

Discussion

278. We agreed with Mr White that Article 220(2)(b) of the Code applies to import VAT, for the reasons he gave.

279. Furthermore, although neither party cited VATR Reg 120, this lists the Articles within the Code which "are to be excepted from the Community legislation which is to apply as mentioned in section 16(1) of the Act." Were it the case, as Mr Singh argued, that the provisions relating to repayment and remission of customs debt did not apply to VAT, because they did not concern "charge" or "payment," one would expect that all Articles about repayment and remission would be included in the list at VATR Reg 120.

280. Not only is Article 220(2) not listed, but the exceptions include Article 241, which provides that interest is not due on the remission or repayment of a customs debt. It must follow that the remission or repayment of a customs debt is itself not an exception from the general rule.

281. Mr White's arguments on this first point also encompass his second, namely that Article 220 requires HMRC to consider, before making an assessment, whether any debt should be waived. Again, we agree that this is correct, for the reasons he gave.

Whether Citipost's appeal encompassed its arguments on waiver

282. Things first raised the waiver argument on 19 December 2012, before the assessments were issued. It was repeated in the request for a statutory review on 19 February 2013.

283. It is clear on the facts that the request for waiver was part and parcel of Citipost's appeal against the assessments.

Whether a separate appeal was required in relation to waiver

Submissions

284. Mr White submitted that, as HMRC had to consider whether or not to waive the debt before deciding to make an assessment, it followed that an appeal against a subsequent assessment encompassed an appeal against HMRC's failure properly to exercise its "non-discretionary power" not to assess the debt.

285. Mr Singh said that this was not correct; rather, an appellant had to make a specific claim for waiver which, if refused, would give rise to a separate HMRC decision carrying its own appeal rights. He relied on FA94 s 13A(2)(a), which provides:

> "A reference to a relevant decision is a reference to any of the following decisions–
>
> (a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the European Union, as to–
>
> (i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
>
> (ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
>
> (iii) the person liable in any case to pay any amount charged, or the amount of his liability; or
>
> (iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;…"

286. He submitted that the structure of the section made it clear that separate appeals were required, because s 13A(2)(a) (i) referred to an appeal against an assessment, and (iv) referred to an appeal against a refusal to waive the amount charged. He placed reliance on the "or" at the end of subsection (iii) and on the use of the singular "any decision" in the opening words.

Discussion

287. Again, we agree with Mr White. We do not read FA94, s 13(2)(a) as meaning that there must be separate appeals requiring separate decisions on each of (i) to (iv) of that provision. If Mr Singh were correct, a person challenging both liability and quantum would need to make two separate appeals, as the first falls under s 13(2)(a)(i) and the second under s 13(2)(a)(ii).

288. Mr Singh also relies on the singular usage of "decision." HMRC has here made a decision to raise an assessment, and in making that decision, as we have already found, they had an obligation under EU law first to consider whether or not to waive the debt. We find that a single decision has been made, namely to issue the assessment.

289. Furthermore, the Interpretation Act 1978 s 6 provides that "in any Act, unless the contrary intention appears" then "words in the singular include the plural." No contrary intention is apparent here.

290. This does not mean that there can never be two HMRC decisions, one to raise an assessment and one to waive (or refuse to waive) the debt. HMRC may raise an assessment on the basis of the facts available, and an appellant may subsequently apply for the resulting debt to be waived, in reliance on Article 236(2) of the Code and FA94 s 13(2)(a)(iv). But that is not the position in this case .

Whether the Tribunal has the jurisdiction to consider the arguments on waiver

291. The parties' submissions on this point followed from their other arguments and with one exception, we do not need to articulate them separately.

292. That exception is Mr Singh's submission that if HMRC had failed to exercise its discretion to consider waiver before making the assessments, this could only be challenged by judicial review. He relied on *Noor v R&C Commrs* [2013] UKUT 71 (TCC).

293. We do not agree, because:

(1) it is clear from *Mecanarte* that HMRC has "a non-discretionary power" under Article 220(2)(b) to waive a customs debt as part and parcel of their decision to make an assessment;

(2) under FA94 s 16 Citipost has the right to appeal against any relevant decision made by HMRC, including a decision (our emphasis) as to "whether *or not*, and at what time, anything is charged in any case with any such duty…"; and

(3) the Tribunal has jurisdiction to decide any matter within that right of appeal, see *Noor* at [31].

294. Citipost raised the waiver arguments before the assessments and before the review decision. The Tribunal has the jurisdiction to consider those submissions; they form part of Citipost's grounds of appeal against HMRC's decision to raise the assessments.

295. The fact that HMRC has a separate procedure for dealing with applications for waiver is simply not relevant. The Tribunal has to give effect to Article 220(2)(b) and FA94 s 13A(2).

Decision on Issue 4

296. Citipost succeeds on Issue 4.

ISSUE 5: WHETHER THE DEBT SHOULD HAVE BEEN WAIVED

Submissions

297. It was common ground that the test to be applied here is that set out by the CJEU in *Hauptzollamt Gießen v Deutsche Fernsprecher GmbH* [1990] C-64/89 ("*Fernsprecher*") at [24]:

> "in order to determine whether there has been 'an error ... which could not reasonably have been detected by the person liable' regard must be had in particular to the nature of the error, the professional experience of the trader concerned and the degree of care which he exercised."

298. Mr White submitted that, if Citipost had a customs debt, it should have been waived as the test in *Fernsprecher* was satisfied. This was because:

(1) the interaction between the LVCR and the LVBI was complex and it was reasonable for Citipost not to have realised it had to aggregate deliveries to the same recipient listed on the same manifest;

(2) during the meeting with HMRC in Southend, senior HMRC officials advised Citipost that the LVBI would be comparable with the MOU, and provide a 'level playing field'; if Citipost had to separate out parcels to the same recipients, this would not be a level playing field. That advice underpinned Citipost's understanding of how the LVBI would operate;

(3) Citipost was encouraged by HMRC to take up the LVBI because it would give HMRC more information about the recipients of the parcels in the UK than the information they obtained under the MOU;

(4) the LVBI approval letter states that it cannot be used where "more than one consignment is destined for the same importer where the combined value of the consignments for that importer exceeds £105." This is the customs duty LVCR threshold, not that for VAT. The approval letter makes no reference to the LVCR VAT threshold;

(5) Citipost's understanding of the LVBI was clear from the manifests; these showed that more than one package was routinely sent to the same recipient on a single manifest. HMRC regularly saw these manifests but did not raise any questions until Ms Burch's meeting with Mr Francis in June 2011, over a year after the business had begun. Mr White relied on *Hewlett Packard France v Directeur Général des Douanes* [1993] C-250/91 at [21], which concerned tariff classification. In *Hewlett Packard*, the CJEU had held that the earlier version of Article 220(2)(b) applied "where, despite the number and size of the imports made by the person liable, those authorities raised no objection concerning the tariff classification of the goods in question":

(6) HMRC had stopped one of the loads at the UK border but raised no issues as to the way the LVBI was being operated; and

(7) the LVBI was repeatedly reissued, so that it was in force up to the date Citipost ceased trading.

299. Mr Singh's case rested in part on certain challenges to the facts, which we have already resolved. In particular, we have found that (2) and (3) of Mr White's statements in the previous paragraph are correct, but we have also noted that there is very little information about the time Citipost's load was stopped at the border, so that it is difficult to come to any conclusions as to what was considered, apart from the fact that the manifests would have included more than 99 items (see §74).

300. Mr Singh's other submissions were that:

(1) The LVBI approval letter directed Citipost to read the parts of the Tariff which explained the relevant CPCs, and Citipost had failed to do that. Had it done so, it would have realised from para 9.5 of Appendix E2 to Volume 3 that "for each recipient the total intrinsic value must not exceed £18."

(2) Even if, which Mr Singh did not accept, Citipost had grounds for waiver up to the date they were informed by Ms Burch of the LVBI conditions, those grounds then disappeared. The assessments were for the period from 19 September 2011 through to 30 March 2012. This was after Ms Burch's letter of 24 August 2011, and also after Mr Francis had responded, on 26 September 2011, saying he fully understood the point and would ensure full compliance. Despite that promise, Citipost had continued to apply the LVBI in precisely the same way

Discussion

301. We have some sympathy for Citipost's position up to the date when Ms Burch informed Mr Francis that the company was not complying with the LVBI. We agree with Mr White that the rules are complex, and we have found as facts that HMRC's senior staff encouraged Citipost to apply for the procedure and said it would both provide a level playing field with Jersey Post and assist HMRC.

302. In assessing whether waiver is due, however, *Fernsprecher* requires us to take into account "the professional experience of the trader concerned and the degree of care which he exercised." Citipost was "the UK's leading privately owned fulfilment and delivery organisation for paper based products and packets." It had around 50-60 UK employees. Given its size and experience, there is no good reason why it did not check the Tariff as directed by the LVBI approval letter. This would immediately have alerted Citipost to the conditions attaching to the LVBI.

303. We therefore find that the waiver conditions would not have been met even were we considering only the period up to June 2011.

304. But, as Mr Singh says, the assessments were not made for that earlier period, but run from 19 September 2011. Even had we found that Citipost met the Article 220(2)(b) requirements in the earlier period, it clearly did not do so during the period of the assessments. By then it was well aware of the LVBI conditions and there is no basis on which the waiver provisions can apply.

Decision on Issue 5

305. For the reasons set out above, HMRC succeeds on Issue 5.

ISSUE 6: WHETHER THE PENALTY SHOULD BE UPHELD, SET ASIDE OR REDUCED

The basis of the penalty

306. The Penalty Notice begins: "You have failed to comply with your legal requirements as detailed below." A box headed "Description of contravention" contains the following text:

> "As detailed on page 2 overleaf, you have contravened Articles 62 and 77 [of the Code] and Article 199 [of the Implementing Regulation] and section 167(3) of the Customs and Excise Management Act 1979 ["CEMA"] which provide that declarations shall contain all the particulars necessary for implementation of the customs procedure."

307. The Penalty Notice continues by saying that the penalty was imposed under the Customs (Contravention of a Relevant Rule) Regulations 2003 ("the Penalty Regs").

308. The second page states that on 14 September 2011 Ms Burch issued Citipost with a Civil Penalty Warning Letter for misuse of the LVBI. It then repeats the text cited above, and continues:

> "Ms Burch…has found that, despite this warning, you have continued to abuse the low value bulking CPC on a regular basis. This has resulted in significant underpayments of import VAT."

309. We inferred from this paragraph that the penalty has been charged because of Citipost's misuse of the LVBI after receipt of Ms Burch's letter of 14 September 2011, and therefore relates to the same period as the assessments, namely 19 September 2011 through to 30 March 2012.

The statutory provisions

310. The Penalty Regs were made under the powers given by Finance Act 2003 ("FA03"), s 26. Regulation 3 provides that the Schedule to those regulations should set out, in columns, the "relevant rule", the contravention of which gives rise to a penalty; the person liable, and the maximum sum.

311. FA03, s 26(8) defines "relevant rule" as follows:

> "In this Part 'relevant rule', in relation to any relevant tax or duty, means any duty, obligation, requirement or condition imposed by or under any of the following–
>
> (a) the Customs and Excise Management Act 1979 (c 2), as it applies in relation to the relevant tax or duty;
>
> (b) any other Act, or any statutory instrument, as it applies in relation to the relevant tax or duty;
>
> (c) in the case of customs duty, Community export duty or Community import duty, Community customs rules;
>
> (d) in the case of import VAT, Community customs rules as they apply in relation to import VAT;

(e) any directly applicable EU legislation relating to the relevant tax or duty…"

312. The Schedule to the Penalty Regs lists the "relevant rules" and includes the following text:

> **"Articles 62 and 77 of the Code and Article 199 of the Implementing Regulation. Section 167(3) of the Act**
>
> Declarations shall be:
>
> a) made on a form corresponding to the official specimen prescribed for the purpose;
>
> (b) signed and contain all the particulars necessary for implementation of the provisions of the customs procedure; and
>
> (c) accompanied by all the documents required for implementation of the provisions of the customs procedure."

313. These are the four statutory provisions relied on in the Penalty Notice. Of these, Article 62 is set out at §196. Article 77 deals with electronic forms and adds nothing of relevance to this decision. Article 199 of the Implementing Regulation provides:

> "Without prejudice to the possible application of penal provisions, the lodging of a declaration signed by the declarant or his representative with a customs office or a transit declaration lodged using electronic data-processing techniques shall render the declarant or his representative responsible under the provisions in force for:
>
> – the accuracy of the information given in the declaration,
>
> – the authenticity of the documents presented, and
>
> – compliance with all the obligations relating to the entry of the goods in question under the procedure concerned."

314. The final provision is CEMA s 167(3), which reads:

> "If any person–
>
> (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or
>
> (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,
>
> being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, then…he shall be liable on summary conviction to a penalty of level 4 on the standard scale."

315. The third column of the Schedule to the Penalty Regs says that £2,500 is the maximum penalty for contravention of those four listed provisions. Citipost has therefore been charged that maximum penalty.

The issues the Tribunal has to decide

316. The Tribunal has to decide the following issues in relation to the penalty:

(1) whether Citipost breached a relevant rule;

(2) if the answer to that question is yes, whether Citipost has a reasonable excuse for the breach;

(3) if there was a breach but no reasonable excuse, whether to confirm, vary or remove the penalty.

Whether Citipost breached a relevant rule

317. Mr Singh submitted that there had been breaches of relevant rules, for the following reasons:

(1) Article 62 had been breached, because CPCs 49 00 003 or 49 00 005 had been entered on the C88s. These CPCs could only be used if Citipost had been complying with the terms of the LVBI. But it had included more than one item to the same recipient, despite the condition to the contrary in the LVBI, and had also ignored the 99 item rule;

(2) there had been a breach of Article 199 of the Implementing Regulation, as the information on the C88s was not accurate, for the reasons set out in the previous paragraph; and

(3) CEMA s 167(3) had also been breached, because the C88s stated that the CPCs applied when they did not. The C88s were therefore untrue in relation to a "material particular."

318. Mr White submitted that failure to follow the LVBI was not the contravention of a relevant rule, because:

(1) FA03, s 26(8) defines a "relevant rule" as "any duty, obligation, requirement or condition imposed by or under…[CEMA]…[or] Community customs rules as they apply in relation to import VAT":

(2) CEMA s 167(3) was a penalty provision, so was not itself a "relevant rule." Rather, it provided for penalties to be levied if a person delivered a document etc which is untrue in any material particular;

(3) he accepted that Article 62 of the Code was a "community customs rule" so a breach of an obligation imposed by that Article would be a breach of a relevant rule. However, Citipost had not breached Article 62. The C88s contained all the necessary particulars and attached all the documents required for "implementation of the provisions governing the customs procedure for which the goods are declared" namely the release of the goods into free circulation. Completing Box 37 on the C88 with a CPC number when the precise requirements for using that number had not been complied with, was not a breach of Article 62; and

(4) Article 199 of the Implementing Regulation was also a community customs rule, but again there had been no breach.

319. We agree, of course, that there must be a breach of a "relevant rule" before there can be any liability to a penalty under the Penalty Regs. We also agree with Mr White that CEMA s 167(3) is a penalty provision, so not itself a "relevant rule."

320. However, we find that Citipost breached two relevant rules, because:

(1) Article 62(1) requires that C88s shall "contain all the particulars necessary for implementation of the provisions governing the customs procedure." Annex 37 to the Implementing Regulation says that, when completing Box 37 "using the relevant Community code from Annex 38, enter the procedure for which the goods are declared." The CPCs in issue here are contained in Annex 38. We read Article 62(1) as not only requiring that a CPC be entered on the C88, but that where a CPC has been issued subject to certain conditions set by the national customs authorities, using a CPC without complying with those conditions is a failure to include "all the particulars necessary for implementation of the provisions governing the customs procedure."

(2) Article 199 of the Implementing Regulation requires the information given in the C88 be "accurate" and the declarant or his representative must comply with "all the obligations relating to the entry of the goods in question under the procedure concerned." Completing Box 37 with CPC Codes despite having failed to comply with the obligations set by HMRC in relation to those Codes is a breach of that Article.

Whether Citipost has a reasonable excuse

321. The parties' submissions in relation to reasonable excuse were the same as those they had made on waiver, and our conclusions are also the same. We find that there is no reasonable excuse.

Further evidence relevant to the penalty

322. The Tribunal asked Ms Burch a number of questions about the levying of the penalty and the Navistar system. In response, she said:

(1) the Civil Penalty Warning Letter had threatened a penalty for "poor compliance", but this been changed to "serious error" in the actual Penalty Notice. This was because HMRC had not established the size of the errors at the time of the warning letter, but the sum had been quantified by the time of the Penalty Notice;

(2) HMRC often charge £250 penalties for a failure to produce records; this is the minimum penalty which it levied under the Penalty Regs;

(3) if the breach of the 99 item rule had not occurred, the penalty would have been lower; and

(4) although she had been unaware of the detail of the Navistar system until the hearing, her preliminary view was that this was "an artificial attempt to split" the parcels so as to ensure only technical compliance and she would have "had concerns" about it.

The quantum of the penalty: submissions

323. Mr Singh submitted that the penalty was not disproportionate, given that "its errors had led to £1m of VAT not being paid." Although the penalty was the maximum set out in the Schedule to the Penalty Regs for breach of the relevant rules set out in the Penalty Notice, HMRC could have charged penalties on a per

contravention basis, whereas only a single penalty had been levied. It was also relevant to take into account the fact that Citipost had not changed its behaviour despite having received the Penalty Warning letter.

324. He said that it was "difficult to say" how HMRC would have reacted to the Navistar system, but that if it amounted to abuse of the LVCR, Citipost could potentially have been challenged under the abuse of rights provisions.

325. He also told the Tribunal that Citipost's failure to keep to the 99 items limit was not relied on by HMRC in relation to the penalty.

326. Mr White said that a penalty should only be charged if, contrary to his submissions, Citipost had a customs debt. He also made submissions on proportionality, but as these were based on the facts before the relevant period, we have not recited them here.

The quantum of the penalty: discussion and decision

327. FA03, s 29(1) gives the Tribunal a broad discretion to uphold the penalty, cancel the penalty, or "reduce [it] to such an amount as [we] think proper."

328. We do not agree with Mr White that there has been no behaviour deserving of a penalty, as for around six months Citipost continued to operate the LVBI on the previous basis, despite knowing this was in breach of the conditions.

329. However, we also take into account in particular the following factors:

(1) it is clear from page 2 of Ms Burch's evidence and Mr Singh's submissions that the size of the penalty was strongly correlated with the £1m of VAT which HMRC understood had not been paid as a result of Citipost's failure to comply. We have however found that there is no underpaid VAT, see Issue 2;

(2) despite Mr Singh's statement that HMRC was not relying on the 99 item rule in relation to the penalty, Ms Burch told us that it would have been lower had it not been for that failure;

(3) during the period when Citipost was aware it was in breach of the LVBI, Citipost investigated the Navistar system. Mrs Burch had not taken this attempt to comply with her requirements into account when setting the penalty, because she had not known about it;

(4) the Navistar system would have used a computer programme to divide up the parcels so that the manifests on which they were recorded met HMRC's requirements. Given our finding on Issue 2, it is clear that this system would not have been an abuse of rights, as there was no breach of the LVCR thresholds; and

(5) although we were not provided with the date on which the company designing the Navistar system went into liquidation, it is reasonable to assume that it was after the announcement that the law was to change, so that LVCR would no longer be available for imports from the CI. Although this does not

justify Citipost continuing to use the LVBI on the previous basis, it does explain why there was no further investment in a new system.

330. We find that Citipost's breaches were entirely technical, that it made efforts to comply with the requirements once it understood them, and that in consequence the penalty should be reduced.

Decision on Issue 6

331. Taking into account all the facts of this case, we have decided that it is proper to reduce the penalty to £500.

CONCLUDING REMARKS AND APPEAL RIGHTS

332. Finally, we are grateful to Mr White and Mr Singh for their thorough and careful submissions, which have been of great assistance to the Tribunal.

333. 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 Rules.

334. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2016