[2017] UKFTT 562 (TC)

TC06004

Appeal number: TC/2014/5947

VAT & CUSTOMS DUTY – inward processing relief – EU Regs 2913/92 & 2454/93 – failure to file returns – refusal of remission

FIRST-TIER TRIBUNAL
TAX CHAMBER

NU-PRO LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE PETER KEMPSTER**

Sitting in public at Centre City Tower, Birmingham on 5-6 December 2016

Mr Tim Brown of counsel (instructed by The VAT People Ltd) for the Appellant

Mr Simon Pritchard of counsel (instructed by the General Counsel and Solicitor to HM Revenue & Customs) for the Respondents

DECISION

1. The Appellant ("Nu-Pro") appeals against:

(1) A C18 Post Clearance Demand Notice ("C18") issued by the Respondents ("HMRC") on 18 August 2014 in the amount of £1,178,325.88. The C18 was in respect of alleged non-compliance with an Inward Processing Authorisation and was upheld on formal review on 13 October 2014.

(2) A decision by HMRC dated 2 September 2015 to refuse remission of £136,224.88 customs import duties and £1,040,831.73 import VAT (as per the disputed C18). The decision was upheld on formal review on 1 December 2015.

Law

2. EU law provides for a system (Inward Processing Relief ("IPR")) whereby customs duties and VAT are relieved on imports of goods from outside the EU which are processed inside the EU and then re-exported. It is available only to traders specifically authorised for IPR by their national tax authority. It extends to certain acquisitions from and disposals to other authorised persons. There are two methods of relief: suspension and drawback. With suspension, no duty or VAT is due on import, and is charged only if the goods are released to the EU market. With drawback, duty and VAT are paid on import but are refunded on export (or certain other specified disposals).

3. At the time relevant to the current proceedings the position was governed by Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code ("the Customs Code").

4. Article 4 defines certain terms:

> "(13) "Supervision by the customs authorities" means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.
>
> …
>
> (16) "Customs procedure" means:
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> …
>
> (*d*) inward processing;
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> …
>
> (21) "Holder of the procedure" means the person on whose behalf the customs declaration was made or the person to whom the rights and

obligations of the above mentioned person in respect of a customs procedure have been transferred.

(22) "Holder of the authorisation" means the person to whom an authorisation has been granted.

…"

5. Article 5 (so far as relevant) provides:

"1. … 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 representative shall act in his own name but on behalf of another person.

A Member State may restrict the right to make customs declarations:

— by direct representation, or

— by indirect representation,

so that the representative must be a customs agent carrying on his business in that country's territory.

…

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."

6. Article 78(1) provides:

"The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods."

7. Article 204 provides:

> "1. A customs debt on importation shall be incurred through:
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> (*a*) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or
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> (*b*) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,
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> in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.
>
> 2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.
>
> 3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

8. Article 239 (so far as relevant) provides:

> "1 Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:
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> - to be determined in accordance with the procedure of the committee;
>
> - resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.
>
> 2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

3. However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases."

9. The detailed implementation of certain provisions of the Customs Code is performed by Commission Regulation (EEC) No. 2454/93 of 2 July 1993 ("the Implementing Regulation").

10. Article 199 of the Implementing Regulation provides:

"Without prejudice to the possible application of penal provisions, the lodging with a customs office of a declaration signed by the declarant or his representative shall render him responsible under the provisions in force for:

- the accuracy of the information given in the declaration,

- the authenticity of the documents attached,

and

- compliance with all the obligations relating to the entry of the goods in question under the procedure concerned."

11. Article 521 of the Implementing Regulation (so far as relevant) provides:

"1. At the latest upon expiry of the period for discharge, irrespective of whether aggregation in accordance with Article 118(2), second subparagraph, of the Code is used or not:

— in the case of inward processing (suspension system) or processing under customs control, the bill of discharge shall be supplied to the supervising office within 30 days;

— in the case of inward processing (drawback system), the claim for repayment or remission of import duties must be lodged with the supervising office within six months.

Where special circumstances so warrant, the customs authorities may extend the period even if it has expired.

2. The bill or the claim shall contain the following particulars, unless otherwise determined by the supervising office: …"

12. Article 859 of the Implementing Regulation (so far as relevant) provides:

"The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204 (1) of the Code, provided:

— they do not constitute an attempt to remove the goods unlawfully from customs supervision,

— they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularize the situation of the goods are subsequently carried out:

…

9. in the framework of inward processing and processing under customs control, exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time; …"

13. Article 860 of the Implementing Regulation provides:

"The customs authorities shall consider a customs debt to have been incurred under Article 204 (1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled."

14. Article 899 of the Implementing Regulation (so far as relevant) provides:

"1. Where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import or export duties concerned,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import or export duties concerned.

2. In other cases, except those in which the dossier must be submitted to the Commission pursuant to Article 905, the decision-making customs authority shall itself decide to grant repayment or remission of the import or export duties where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

Where Article 905(2), second indent, is applicable, the customs authorities may not decide to authorise repayment or remission of the duties in question until the end of a procedure initiated in accordance with Articles 906 to 909.

3. For the purposes of Article 239(1) of the Code and of this Article, 'the person concerned' shall mean the person or persons referred to in Article 878(1) or their representatives, and any other person who was involved with the completion of the customs formalities relating to the

goods concerned or gave the instructions necessary for the completion of these formalities. …"

15. Article 905 of the Implementing Regulation (so far as relevant) provides:

"1. Where the application for repayment or remission submitted under Article 239(2) of the Code is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which the decision-making customs authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909 where:

— the authority considers that a special situation is the result of the Commission failing in its obligations,

— the circumstances of the case are related to the findings of a Community investigation carried out under Regulation (EC) No 515/97, or under any other Community legislation or any agreement concluded by the Community with countries or groups of countries in which provision is made for carrying out such Community investigations, or

— the amount for which the person concerned may be liable in respect of one or more import or export operations but in consequence of a single special situation is EUR 500 000 or more.

The term 'the person concerned' shall be interpreted in the same way as in Article 899.

2. However, the cases referred to in paragraph 1 shall not be transmitted where:

— the Commission has already adopted a decision under the procedure provided for in Articles 906 to 909 on a case involving comparable issues of fact and of law,

— the Commission is already considering a case involving comparable issues of fact and of law. …"

The Hearing

16. In evidence were several files of documents, and I heard oral evidence from three witnesses:

(1) For Nu-Pro:

(a) Mr Tony Chester adopted and confirmed a witness statement dated 19 May 2016. Mr Chester is Nu-Pro's supply chain manager.

(b) Mr Peter Williment adopted and confirmed a witness statement dated 19 May 2016. Mr Williment is Nu-Pro's financial director.

(2) For HMRC, Mrs Patricia Francis adopted and confirmed a witness statement dated 15 June 2016. Mrs Francis is the case officer who made the disputed decisions.

17. At the outset of the hearing Mr Brown for Nu-Pro applied for permission to amend the grounds of appeal in stated particulars. I granted that application and, by Directions issued on 8 December 2016, I granted leave for amendment of grounds of appeal and required written submission sequentially from both parties before 15 February 2017, which was done. I determined that a continuation hearing was not necessary to address those matters.

Facts

18. I make the following findings of fact.

19. Nu-Pro is based in Stroud and operates in the aerospace and defence industries, providing a number of services including machining, sub-assembly and general processing.

20. On 29 September 2010 HMRC (Mrs Franks) visited Nu-Pro in connection with an IPR application submitted by an unconnected person; Nu-Pro was unaware that the application had been made, and it was subsequently withdrawn. Mrs Franks reviewed Nu-Pro's procedures in relation to imports and exports, and on 29 July 2011 she wrote to Nu-Pro setting out issues that must be addressed and points of assistance. She identified three breaches of IPR procedures and raised a C18 for a total of £607.81 duty and £4,003.69 VAT.

21. On 16 May 2011 Nu-Pro submitted an application for an IP authorisation, which was approved on 26 May 2011 ("the IPA") and was valid from 16 May 2011 until 16 May 2013.

22. On 30 January 2014 Nu-Pro applied to renew the IPA ("the Renewal Application") retrospectively, prompted by one of Nu-Pro's shipments being held up at Dover Customs because the IPA had expired over eight months previously. The Renewal Application omitted some information and was resubmitted on 14 February 2014.

23. On 23 April 2014 Mrs Francis and a colleague (Ms Evans) visited Nu-Pro, prompted by the Renewal Application, to review operation of its IPA. Mrs Francis considered there was a number of irregularities in Nu-Pro's operation of IPR; in particular, she identified that only one IPR return had been filed during the lifetime of the IPA (a nil return for the period May to June 2011). Nu-Pro undertook to complete and submit to HMRC by 30 May 2014 all outstanding IPR returns.

24. On 6 May 2014 Ms Evans sent to Nu-Pro a schedule of the IPR imports for the relevant period, with declarant/shipper references "that your agent may use to locate the customs documentation required", and a list of the disposals.

25. During May 2014 Mrs Francis provided information to Nu-Pro, at its request, concerning completion of the outstanding returns, including another visit on 21 May, and on 23 May she reminded Nu-Pro that the paperwork was still outstanding.

26. On 28 May 2014 Mr Chester emailed Mrs Francis stating that he was unable to complete the IPR returns by the agreed date of 30 May 2014. Mr Chester stated that he was "confident that all [the IPR returns] will be complete to submit on [4 June 2014]". On 20 June 2014 Mrs Francis emailed Mr Chester requesting an update with regards to the IPR returns which were still outstanding. On 30 June Mr Chester emailed Mrs Francis saying he had contacted Rolls Royce who informed him that Nu-Pro were actually "transferring" the goods to Rolls Royce.

27. On 4 July 2014 Mrs Francis wrote to Nu-Pro stating that, as it had failed to comply with the conditions of the IPA, a C18 would be issued for £1,178,325.88, and "if [Nu-Pro] have any further evidence or arguments that could change this decision then please send them to [HMRC] within 30 calendar days of the date of this letter i.e. 03/08/14." On 7 July 2014 Mr Williment replied stating that Nu-Pro "intends to respond with further evidence within the 30 calendar day period to allow you to change your decision". On 11 July 2014 Nu-Pro requested an extension of seven days because of a fire at Nu-Pro's premises, and on 14 July Mrs Francis agreed the extension to 10 August 2014.

28. On 11 August 2014 Mrs Francis emailed Nu-Pro stating that Nu-Pro's right-to-be-heard period "has now ended and [HMRC had] not received any IPR returns or heard from you …", and that she would be preparing a decision letter and a C18. On the same day, Mr Chester emailed Mrs Francis to confirm that Nu-Pro had still not completed the outstanding returns. On 13 August 2014 Mrs Francis wrote to Nu-Pro informing it that a C18 would be issued.

29. On 14 August 2014 Nu-Pro submitted a number of IPR returns to HMRC.

30. HMRC issued the C18 on 18 August 2014. Nu-Pro requested a formal departmental review, which on 13 October 2014 upheld the decision to issue the C18. Nu-Pro filed a notice of appeal to this Tribunal.

31. On 8 June 2015 Nu-Pro applied for remission of the sums stated on the C18. On 14 July 2015 HMRC stated that they did not consider there were grounds for remission and invited further representations. Nu-Pro supplied those on 12 August 2015. On 2 September 2015 HMRC wrote to Nu-Pro refusing the application for remission. On 14 October 2015 Nu-Pro requested a formal departmental review, which on 1 December 2015 upheld the decision to refuse remission. Nu-Pro filed a notice of appeal to this Tribunal.

Summary of relevant points of Witness evidence

Mr Williment's evidence

32. Mr Williment has been Financial Director of Nu-Pro since 2004.

33. Nu-Pro took seriously its HMRC commitments. In the twelve years since his appointment Nu-Pro had erred with HMRC only twice. Once in connection with Intrastat errors, which was a misunderstanding that was corrected and new procedures implemented. The second was the current dispute.

34. The first sign of any problem was when goods were held up at Dover Customs in January 2014, and it became apparent that the IPR authorisation needed to be renewed.

35. He recollected that previously Mr Chester had mentioned IPR in connection with a US customer (Ladish) approaching Nu-Pro and instructing PwC to obtain authorisation, but that costs would be recovered from Ladish. As he had never encountered IPR before he was unaware of its obligations and had he been informed of them during the application process then this matter would have been instantly transferred to the accounts team and Nu-Pro would have absolutely ensured that its commitments were met.

36. He did not consider Mrs Francis to be as knowledgeable or helpful as other HMRC officers he had dealt with. She constantly referred to Nu-Pro's authorisation letter.

37. Mr Chester was allocated the task of preparing the outstanding returns, with assistance from Ms Dickenson (a member of the accounts staff), and although extra resource was offered to him, the complexity of the task meant that Mr Chester handled it mostly himself.

38. The fire on 9 July 2014 had an enormous impact on operations and management availability. He had insisted that Mr Chester request an extension of the deadline for submission of the returns, which was granted.

39. He continued to check progress with Mr Chester and on the Thursday night before the Sunday deadline (of 10 August) they met, when Mr Chester assured him that there were only a few things to finish which he would do from home the following day.

40. Mr Williment was on vacation on 13 August when Mrs Francis's letter arrived, so he forwarded it to the managing director (Mr Bailey) to contact Mrs Francis and work with Mr Chester.

41. In response to questions in cross-examination:

(1) He would have passed Ms Frank's July 2011 letter straight to Mr Chester; as far as he was concerned, IPR was just an in-and-out procedure; he had not

apprehended any problems; he accepted that deficiencies were drawn to the company's attention.

(2) He corrected that he was not present at the first meeting with Mrs Francis.

(3) He had not contacted PwC for any advice. He obtained professional advice from The VAT People but that was not until after receipt of the C18.

(4) He had read the IPR authorisation letter but did not recall when.

(5) He accepted that it was not HMRC's role to advise taxpayers.

Mr Chester's evidence

42. Mr Chester had worked at Nu-Pro for 15 years and within the aerospace industry for 30 years.

43. A US customer (Ladish) contracted Nu-Pro to process aircraft parts for onward delivery to Rolls Royce. The parts were supplied by a Polish company (ZOPS). Nu-Pro informed Ladish when the goods were ready for collection and Ladish arranged for a freight forwarder (Kuehne & Nagel) to collect from Nu-Pro and deliver to Rolls Royce in Germany.

44. Ladish mentioned that import duty need not be paid on the delivery of the goods to Nu-Pro if Nu-Pro registered for IPR. Nu-Pro had no experience of operating IPR, so Ladish arranged (at its own cost) for PwC to assist Nu-Pro in obtaining IPR authorisation. PwC's only involvement was to obtain the authorisation and advise Nu-Pro that the first return should be a Nil return.

45. Standard and required practice in the aerospace industry is that all parts must be individually identified and traceable by records. Mr Chester believed that the detailed commercial documentation relating to the parts was sufficient record-keeping. He did not realise that further returns were required.

46. In January 2014 he became aware that the IPR authorisation had expired because a shipment was held up at Dover Customs. Nu-Pro asked for renewal of the authorisation. The goods were warehoused and subsequently returned to the supplier when Nu-Pro decided not to pursue a renewal of its IPR authorisation.

47. HMRC (Mrs Francis) visited Nu-Pro on 23 April 2014 in connection with the renewal and this was the first time Mr Chester became aware that there were outstanding returns. He was told that entries would need to be matched to disposals, and that he needed the entry and disposal documentation. He was not sure where this could be obtained; the freight forwarders were instructed by Ladish and Nu-Pro held no paperwork from them. Nu-Pro had to search its operating systems for every Ladish transaction, and link all goods receipts to despatches; Ladish might deliver items to Nu-Pro with instructions for them to be sent after processing to a number of different destinations. There were around 2,750 serial numbers.

48. Mrs Francis offered little help other than constantly referring him to the IPR authorisation letter. He felt she lacked knowledge of IPR procedures, and he felt a barrier existed between them.

49. He discussed the task, which he considered daunting, with the finance director, Mr Williment, and it was decided that Mr Chester would be assisted by one of the accounts staff, Ms Dickenson , and that would be sufficient resource.

50. Mrs Francis paid a second visit on 21 May 2014 when Mr Chester explained he was having difficulty obtaining documentation for the freight forwarders, and that timescales set for the end of May could not be met.

51. On 29 May 2014 he received a phone call from Mrs Francis who advised him to stop the collation process of the IPR returns until he heard from her; she stated this was because HMRC were not clear on what was happening in respect of Nu-Pro's IPR consignments and that she would ask her colleagues in the Large Business Unit to visit Rolls Royce to try to establish what was happening. He ceased work as instructed. He informed Mr Williment of this phone call due to the elation of stopping the process because of uncertainty.

52. On 30 May he sent to Mrs Francis examples of the entry paperwork he had started to collect and asked for advice but received no reply.

53. On 20 June 2014 Mrs Francis telephoned to ask about progress on linking IPR discharges to IPR imports. Mr Chester explained he had not carried out farther work since their last conversation on 29 May regarding clarification through her from Rolls Royce. He was surprised to be told that he should progress the returns without delay, but he resumed work collating the information after the three week break. He contacted Rolls Royce (Mr Sowerby) who told him that the process undertaken by Nu-Pro was one of transfer, not import/export, and that the information provided by Nu-Pro was sufficient for the goods transfer scheme that Nu-Pro were signed up to. On 30 June he informed Mrs Francis of this.

54. On receipt of the pre-decision letter on 4 July 2014 the work proceeded at a greater pace and the issue was escalated. The task was very time-consuming and performed by Mr Chester in addition to his normal workload. When he asked Rolls Royce (Mr Brook) for evidence of receipts they questioned why Nu-Pro was being asked to undertake the task given that Rolls Royce never paid import duty.

55. On the evening of 9 July 2014 there was a catastrophic fire at Nu-Pro's factory. On 11 July he asked for a seven day extension to the deadline for submission of the returns, which he believed would be sufficient and did not want to give the impression that nothing was being done, which was not the case. With hindsight, he had underestimated the impact of the aftermath of the fire on his role.

56. The new deadline was Sunday 10 August 2014. Each return was a ten page document and the returns were not ready for submission until Wednesday 13 August. On Monday 11 August he emailed Mrs Francis, without response:

"As a matter of explanation as to where we are with this task I can advise as follows;

Since we last spoke we have collated documentation relevant to incoming goods and outgoing goods under our IPR authorisation.

We have identified, to date 332 outgoing transactions of which we have 331 physical shipping documents traced and on record. Against this we have traced 308 Customs entries and have the documentation on record. All of these transactions can be verified by component serial number. This partially allows us to understand where each entry would need to be made against the required returns. Outstanding entries are still being traced.

We have identified 162 incoming transactions. Of which we have traced 142 incoming document packs and have them on record. Our difficulty is the method of tracing the Customs entry made against the incoming product. We currently have to assess Customs values made on the entries against the values on the shipping document. This is proving to be extremely difficult and complex.

The attached document shows the current position and the accuracy of the traceability. In its current form it is not linked to all the supporting documents.

I would be grateful if we could hold a conversation, as any indication on how to make the links would speed the process to conclusion.

Kind regards

Tony"

57. On 12 August 2014 he received from Rolls Royce confirmation that all the goods transferred to them in the period September 2011 to December 2013 (detailed in a spreadsheet) had been received into their IPR stock.

58. The returns were ready to be submitted on 13 August and on the same day the C18 was received. In the absence of Mr Williment, the managing director (Mr Bailey) telephoned Mrs Francis but without reply.

59. In response to questions in cross-examination:

(1) When the IPR application was made in 2011 he left matters to PwC, with whom he had a meeting; he did not read Notice 221 or look at HMRC's website. He accepted that the first section on the application form said "Before completing and submitting this form you must refer to Notice 221 – Inward Processing Relief (IPR)". Also, that the final section said "I agree to comply with the conditions of inward processing laid down in Council Regulation (EEC) No. 2913/92 establishing the Customs Code and with Commission Regulation No. 2454/93 that lays down provisions for its implementation." The form was completed by PwC;

he did not know why the form stated that discharge would be by full declaration, or why no reference was made to transfer of goods to another IPR trader.

(2) He first read Notice 221 in August 2014, when filling in the returns.

(3) He accepted that it was Nu-Pro's responsibility to file the returns, and that this was stated in the authorisation letter.

(4) He did not know why Nu-Pro did not apply for renewal of the authorisation before its expiry.

(5) He had believed that completion and retention of the normal commercial documentation for transfers to Rolls Royce would be sufficient.

(6) He accepted that Mrs Francis had shown him a blank IPR return and explained the difference between exports and transfers.

(7) From day one he had believed Nu-Pro was transferring the goods and he was confused later when HMRC asked for import and export details; he had contacted Rolls Royce for documentation because he was confused and going round in circles. He did not know why the authorisation application form stated Nu-Pro would be exporting.

(8) Nu-Pro had not sought professional advice in connection with completing the returns as it considered it understood the process. He did not agree that Nu-Pro had not taken reasonable care.

Mrs Francis's evidence

60. Mrs Francis's conclusions from the visit to Nu-Pro on 23 April 2014 were:

(1) Paperwork requested in writing in advance of the visit was not produced by Nu-Pro.

(2) There were no systems or records in place to identify IPR goods to specific customs declarations or to link IPR goods to disposal.

(3) No one at Nu-Pro had overall management of imports and exports. Personnel were not aware of the supply chain.

(4) Nu-Pro was still providing customs classifications to suppliers, despite this being a point raised by Mrs Franks following her 2010 visit.

(5) Because of the above shortcomings, she was unable to progress the visit.

61. At the visit she advised Mr Chester on IPR generally and specifically how to complete the returns. She was conscious that (i) an authorised person had a competitive advantage over other traders, and (ii) compliance failures could result in a customs debt. She specifically advised Mr Chester to read the terms of Nu-Pro's

authorisation and also HMRC Notice 221. She arranged a further visit for 21 May 2014, which was lenient because HMRC would usually expect matters to be resolved within 14 days, and gave a deadline of 30 May 2014 for delivery of the outstanding returns.

62. During May 2014 both Mrs Francis and her colleague Ms Evans provided further assistance to Mr Chester and his colleague Ms Dickenson, concerning information for completion of the returns. One matter raised by Ms Dickenson concerned "12 digit tracking numbers" requested by Nu-Pro's freight forwarders; Mrs Francis replied that Nu-Pro should hold all necessary information and she was not aware what the requested numbers were.

63. On 19 May 2014 Mr Chester asked for the 21 May meeting to be postponed as he had not got together all the paperwork; Mrs Francis refused. She asked him what further help he needed and emailed him some more information. When Mrs Francis visited on 21 May Mr Chester was unavailable due to a family emergency; she met with Mr Williment and Ms Dickenson. Ms Dickenson confirmed that the paperwork promised for the meeting was not available; she said she had not read Notice 221 or the IPR authorisation letter. Mrs Francis stated to Mr Williment:

(1) She considered Mr Chester had a complete lack of understanding of IPR and its procedures.

(2) Nu-Pro had failed to implement the recommendations by Mrs Franks in 2011.

(3) Only one IPR return had been filed for the entire authorisation period. She believed that eleven returns were required in relation to 55 items.

(4) Despite the help provided by HMRC, Mr Chester could not find any customs declarations from his records.

(5) HMRC might have to consider civil penalties due to non-provision of documentation.

(6) She would be recommending that Nu-Pro's authorisation should not be renewed.

(7) A C18 might be issued.

64. At the meeting Mrs Francis gave further guidance and education to Mr Williment and Ms Dickenson. Mr Williment confirmed that the 30 May deadline for the returns would be adhered to. Mrs Francis continued to correspond with Mr Chester and colleagues answering queries raised; apparently Rolls Royce were in the supply chains and Mrs Francis said she would contact the control officer for that trader to see if that would assist in the paperwork; she told Mr Chester not to complete the export section of the returns while she checked the Rolls Royce point, but to continue linking the import information to discharges of IPR. On 30 June Mr Chester emailed her stating "we are signed up to the Rolls Royce goods transfer scheme and what we are actually doing is 'transferring' goods".

65. Mrs Francis telephoned Mr Williment on 2 July 2014 and wrote on 4 July stating her intention to issue a C18; she gave the usual 30 days for submissions.

66. She was aware from local television news reports that on 9 July 2014 there was a serious fire at Nu-Pro's premises. On 11 July Mr Chester informed her that because of the fire Nu-Pro was going into seven days of crisis management; he confirmed the fire had not affected the offices and that most of the required paperwork was ready; he requested a seven day extension of time, to 10 August. She discussed the request with her superiors and it was agreed that, given the circumstances of the fire, it should be granted; that was communicated to Nu-Pro on 14 July and acknowledged on the same day.

67. On 11 August the returns had still not arrived so she checked with Mr Williment and Mr Chester whether they were in the post; she was told that the task was still in progress. Mr Chester sent her a spreadsheet which he said "shows the current position and the accuracy of the traceability. In its current form it is not linked to all the supporting documentation." Mrs Francis's view was that the spreadsheet gave details of Nu-Pro's exports rather than its transfer details, and the information provided did not display any links to items imported by Nu-Pro and entered into IPR.

68. She consulted with her superiors and was instructed to issue the C18, which she did on 13 August 2014. On the same date she was telephoned by Nu-Pro's managing director (Mr Bailey); he said that Nu-Pro had been pushed into IPR by Rolls Royce, had not understood what was required of it, and did not have adequate resource; he asked for the decision to be reconsidered by a higher officer. Mrs Francis referred Mr Bailey to the review and appeal rights stated in the covering letter; she did raise the protest with her superiors, who confirmed that the action taken was correct.

69. On 14 August 2014 Nu-Pro submitted ten IPR returns to Mrs Francis; she gave Mr Chester the correct address for submission. She examined the returns and noted that the disposal method was described as transfers to other IPR traders (method 2 disposals) but that Nu-Pro had added export declaration details to the IPR returns, rather than transfer details. She considered this was further evidence of Nu-Pro failing to follow the instructions set out in its authorisation letter.

70. At no time during her dealings with Nu-Pro had she received an audit trail from which she could verify its receipt of imported goods, the declaration of those goods to IPR, and its disposal of those goods from IP.

71. In response to questions in cross-examination:

(1) She accepted that the information requested on the IPR application form could be confusing.

(2) At the meeting on 23 April 2014 she had gone through a blank IPR return box-by-box with Mr Chester; he had not known what method of discharge was being used. It was unclear what was the supply chain.

(3) She would have expected Nu-Pro to have copies of Forms C88 (the single administrative document) for imports/exports. Mr Chester appeared unaware of what documentation arrived with the goods. HMRC hold records of the C88s and could have provided copies but did not do so; they can be purchased from HMRC.

(4) She did not regard her email to Mr Chester dated 29 May 2014 as giving agreement to a request to extend to 4 June the date for submission of the returns.

(5) She contacted her colleague who dealt with Rolls Royce because Nu-Pro seemed unaware of the method of discharge, to see if her colleague could offer any information; Mrs Francis was asking a favour of her colleague; her colleague agreed to raise it at her next visit to Rolls Royce; there was no discussion of particular goods.

(6) She was aware that documentation in the aerospace industry was detailed so as to ensure traceability, so she was surprised that Nu-Pro apparently experienced such difficulty in matching the discharges to the imports. She needed evidence of the exact supply chain.

(7) She told Mr Chester not to conduct further work on the export information because it seemed to her the discharges might be transfers, not exports – in which case different documentation would be required. She had told him to continue working on linking the imports to the discharges. She had not told him to "down tools".

(8) When she issued the pre-decision letter on 4 July she was still hoping to receive the returns plus supporting documentation that would be auditable. If that had arrived then she would have considered it all, even though past the deadline. She considered that was very lenient.

(9) She granted a seven day extension after consulting her colleagues and in view of the extraordinary circumstances of the serious fire; the extension related to the deadline for replying to the pre-decision letter, not the date for submission of the returns, which had already expired.

(10) She considered she had provided more help and assistance to Mr Chester and his colleagues than would normally be excepted.

(11) If the returns had been filed as originally agreed then she would have considered them.

Respondents' case

72. Mr Pritchard submitted as follows for the Respondents.

The last eight imports

73. It was acknowledged that the last eight imports listed on the schedule covered by the C18 post-dated the expiry of Nu-Pro's original IPR authorisation. These were

assessed by the C18. Nu-Pro correctly accepts that a customs debt has arisen in respect of those imports, and that the debtor is the "declarant". Nu-Pro is incorrect to claim that it is not the declarant. The position is governed by art 5, and is correctly summarised in Notice 221:

> "*2.19 Types of representation*
>
> There are 2 types of representation:
>
> direct representation - the third party submits a Customs declaration in your name and on your behalf - you are solely responsible for any Customs debt that may arise if information on the declaration is incorrect or the import or export process is not properly completed
>
> indirect representation - the third party submits a Customs declaration in their own name and they are jointly and severally liable with you for any Customs debt that may arise if a declaration is incorrectly made
>
> A third party must quote your IP authorisation number on all Customs import/export declarations."

74. Nu-Pro's claim that it did not authorise the freight forwarders to act on its behalf is fanciful. It argues that it did not import the eight items and that the freight forwarders did not have authority to do so. That is not consistent with Nu-Pro taking delivery of the goods, working on them, and then despatching them; if Nu-Pro genuinely did not intend to import the items then it would have protested when they were delivered - not accept and carry out work on the items. Everything in Nu-Pro's course of conduct since obtaining its IPR authorisation was the same as for the eight items; in relation to the other items on the C18 schedule Nu-Pro had accepted that it was the importer. Nu-Pro itself had submitted a retrospective application for authorisation; that could only be consistent with Nu-Pro intending to (and understanding itself to) import the goods; in fact, Nu-Pro had not even realised that its original authorisation had expired until that was brought to its attention. Even if Nu-Pro did not expressly authorise the freight forwarders, it clearly gave them implied authority through its conduct.

75. Nu-Pro's other argument (that HMRC had not assessed the freight forwarders) was equally flawed. Even if – which was incorrect – the freight forwarders were indirect representatives for art 5 purposes then the liability was joint and several. The fact that HMRC had (correctly) not raised a C18 on the freight forwarders did not extinguish Nu-Pro's debt. To the extent that Nu-Pro considered HMRC had not acted in accordance with its published practice then that dispute was proper to a judicial review challenge in public law, and was not a matter for the Tribunal.

Liability for the C18 assessment

76. Under art 204 Nu-Pro incurred the customs debt by failing to file the bills of discharge ("BODs") within the 30 day permitted periods. In *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (C-262/10) [2012] All ER (D) 155 (Sep) the CJEU stated (at [45]):

> "Therefore, it must be held that the non-fulfilment of an obligation, linked to the benefit of an inward processing procedure in the form of a system of suspension, which must be carried out after the discharge of that customs procedure – in the present case the obligation to submit the bill of discharge within the period of 30 days prescribed in the first indent of the first subparagraph of Article 521(1) of the Implementing Regulation – gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt pursuant to Article 204(1)(a) of the Customs Code, where the conditions set out in Article 859(9) of the Implementing Regulation are not met."

77. Article 204 provided relief where "it is established those failures have no significant effect on the correct operation of the … customs procedure in question". Article 859 stated that failures considered to have no significant effect included "exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time"; provided the failures "do not imply obvious negligence on the part of the person concerned, and all the formalities necessary to regularize the situation of the goods are subsequently carried out".

78. In relation to the condition that "all the formalities necessary to regularize the situation of the goods are subsequently carried out": HMRC accept that Nu-Pro has now submitted the outstanding returns, although even they appear to contain mistakes (for example Nu-Pro has identified the method of disposal as transfer to another IP trader but then entered details of export customs declarations). Of the customs declarations listed, HMRC have been unable to locate them all on CHIEF (the system recording the movement of goods by land, air and sea).

79. In relation to the condition that an extension of time would have been granted had it been applied for in time: Nu-Pro cannot demonstrate this. A customs duty liability was incurred as soon as Nu-Pro failed to file its IP returns on time. Under art 521(1) "where special circumstances so warrant, the customs authorities may extend the period even if it has expired". Here, there were no special circumstances justifying an extension of time to file returns that were due in the period from 2011 to August 2014. The fact of the fire cannot assist Nu-Pro here or amount to "special circumstances" because the IP returns were already well overdue at this time and Nu-Pro had missed self-imposed deadlines for submitting the returns. In any event, the fire did not impact Nu-Pro's offices and therefore, without underestimating the impact it might have had on Nu-Pro's business, it did not directly affect Nu-Pro's ability to prepare the long overdue IP returns. Mrs Francis's actions were trying to get returns submitted; no extension of time for submission was granted; the only extension given was in relation to the period allowed for a response to the right-to-be-heard letter – that was clear from her letter dated 14 July 2014. The decision to issue a C18, subject to any taxpayer representations, had been taken by the start of July. Even if an extension of time was granted by HMRC, the extended deadline was missed – a deadline was not extended simply by making a late submission.

80. In relation to the condition that the failures "do not imply obvious negligence on the part of the person concerned": The CJEU in *Firma Söhl & Söhlke v Hauptzollamt Bremen* (C-48/98) [2000] 1 CMLR 351 stated:

> (1) (at [51]) that the concept of "obvious negligence" should be interpreted consistently across the Customs Code and the Implementing Regulation.
>
> (2) (at [60]): "account must be taken in particular of the complexity of the provisions noncompliance with which has resulted in the customs debt being incurred and the professional experience of, and the care taken by, the trader."

81. The EU Commission has published guidance on the application of art 239: "Information paper on the application of Articles 220(2)(b) and Article 239 of the Community Customs Code". That guidance gives examples of "obvious negligence" at paragraph 2.2, including "an operator who did not comply with the clear provisions of the authorisation he held for a customs procedure with economic impact ...".

82. Nu-Pro's failure to make returns was obviously negligent. Nu-Pro imported goods on 55 occasions throughout the period of its authorisation (May 2011 to May 2014) yet only made one IP return. This was despite all of the public guidance, and Nu-Pro's own IP authorisation letter, explaining the significance of submitting IP returns and the consequences of a failure to make submissions on time.

83. Customs Notice 221 gives explicit guidance (at para 2.11) as to the need for authorisation; the correct procedures; the need for "meticulous records"; the need for regular BODs; and the possible liability to import duty, VAT and compensatory interest. Those requirements were amplified in detail in the Notice. For example, paragraph 4.15 stated: "Where you have failed to submit a return within the required time scale you may apply to your Supervising Office for an extension. However, approval is not automatic and you will need to show that there are special circumstances which warrant such an extension before it is granted." Paragraph 12.2 stated: "Periodic assurance checks or audits are undertaken on all Customs Procedures with Economic Impact. This is to make sure that IP traders are not obtaining an advantage over others without fully complying with the conditions of the procedure. The BoD should provide all the information required to trace the IP goods from the moment of entry to the moment of discharge from the procedure. It should include references to all the relevant documentation used to enter and dispose of the goods such as CHIEF import and export declaration reference numbers etc. If an assurance check is then undertaken we are able to trace the movement of the IP goods using the declaration reference numbers." The authorisation application form completed by Mr Chester specifically referred the applicant to Notice 221; Mrs Francis had repeatedly referred Nu-Pro to the Notice when she required the outstanding returns; Mr Chester appears not to have read the Notice until August 2014.

84. Nu-Pro appears to argue that it was not negligent because it (wrongly) believed that transferring the goods to Rolls-Royce, another authorised IP holder, meant there was no need to submit returns to HMRC. However, Nu-Pro has never sought to explain how it came about that (wrong) knowledge. In fact, had Nu-Pro given due

consideration to its authorisation letter, as all traders must, it would have noticed the need to make IP returns within 30 days of the throughput period (irrespective of who the goods are being transferred to or where the goods are being exported to). It is not enough to say that Nu-Pro was naive. As the CJEU explained in *Döhler*, the IP regime involves obvious risks to the correct application of the customs legislation of the EU and the resulting collection of duties and therefore the beneficiaries of that procedure (including Nu-Pro) must comply strictly with their obligations. The bill of discharge return is a "central document in the operation of the inward processing procedure" and the obligation to submit that return within 30 days is of "particular importance" for customs supervision. Failure to comply with that obligation means that traders have not complied with a condition of enjoying the economic advantage from participating in the IP procedure. Nu-Pro sought to somehow put the responsibility and blame on HMRC; the criticisms of Mrs Francis were unwarranted, it was not her job to hold the hand of Nu-Pro. Mr Chester appeared never to have read the authorisation letter; he stated he did not know why PwC had filed the first Nil return, so he clearly did not understand the reporting requirements; even by the time of the hearing he was unclear about Nu-Pro's throughput periods. The renewal application was made late, and only when goods were detained because the authorisation had already expired. Nu-Pro's executives had failed to engage with important requirements and procedures; they had not taken professional advice, except for filing the authorisation application and first return; they had not asked advice of HMRC until the problems were pointed out to them; despite being in an industry that demanded traceability of goods, they still could not produce complete documentation (the problem was not just with customs declarations).

Refusal of remission

85. Article 899 permits remission "where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned".

86. The CJEU considered the meaning of "special situation" in *Kaufring AG v European Commission* (T-186/97) [2001] 2 CMLR 1057 at [218]:

> "The case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business … and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties …"

87. The CJEU in *Firma Söhl & Söhlke* considered remission applications and stated (at [52]) that repayment or remission of import and export duties constitutes an exception to the normal import and export procedure; the provisions in that respect are to be interpreted strictly; and the term "obvious negligence" must be interpreted in such a way that the number of cases of repayment or remission remains limited.

88. This is not a case where a special situation has caused Nu-Pro to fail to submit the IP returns. During the three years when Nu-Pro failed to submit IP returns, Nu-Pro

was in the same position as all other traders using IP; Nu-Pro was under a duty to submit returns and should have dedicated sufficient resources to that task. Nu- Pro's decision not to dedicate appropriate resources meant that Nu-Pro was taking the risk of compliance issues arising. Now that those compliance risks have crystallised, Nu-Pro cannot argue that the company was in a "special situation". Furthermore, as already argued, the fire at Nu-Pro's factory was not a special situation.

89. As already argued, Nu-Pro was obviously negligent.

Appellant's case

90. Mr Brown submitted as follows for the Appellant.

The last eight imports

91. Of the 55 imports scheduled to the C18 by HMRC, the last eight post-date 16 May 2013 (the expiry of the IPR authorisation). As the IPR authorisation had expired, a customs debt arose under art 201 Customs Code as the goods were released for free circulation; alternatively, the debt was incurred under art 204. The debtor is the "declarant", which art 4 defines as "the person making the customs declaration in his own name or the person in whose name a customs declaration is made". Article 5(4) provides "A person 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". Nu-Pro accepts that the freight forwarders said on the forms they were direct representatives, but contend they were not "empowered" by Nu-Pro. Nu-Pro did not instruct the freight forwarders; that was done by the customer, Ladish, who also bore the shipping costs. Nu-Pro was kept out of the shipping process for both incoming and outgoing freight. The goods arrived without notice and were collected once Nu-Pro had received the shipping documents.

92. Further, where more than one person is liable for a customs debt then art 213 provides that they are jointly and severally liable. HMRC's published internal guidance (INCH06450) is that C18s must be issued to each debtor and that joint and several liability imposes on HMRC a duty to pursue all debtors without prioritising any particular one; when the debt is paid by one debtor then the other C18s can be withdrawn. HMRC had not also assessed the freight forwarders.

Liability for the C18 assessment

93. The returns were received by HMRC on 15 August.

94. In relation to the extending of the time limit permitted by art 859(9), the Tribunal in the recent case of ***Rikki Tann Limited*** [2016] UKFTT 538 (TC) had stated (at [46]):

> "The question then arises as to what time limit might be implied by the words "in time". Ms Lintner [HMRC counsel] suggested that this should mean before the end of the six month throughput period

> permitted, but since the process might or might not have been completed by then this would not assist us in determining what HMRC would have done. The only way we can interpret this provision meaningfully therefore is by reading the words "in time" as meaning "in time for an extension to be granted"."

95. HMRC did allow Nu-Pro several extensions to the time limit for it to submit the outstanding returns and information. It seems agreed that an extension to 30 May 2014 was granted; Nu-Pro say there were also further extensions granted to 4 June and then to 13 August 2014. That was supported by HMRC's letter dated 14 July 2015 from Ms Ford, and by Ms Bowden's formal review letter dated 2 September 2015. There is a disagreement about what was said on 29 May 2014; Mr Chester's clear recollection was that he had been told to stop work on collecting all information while Mrs Francis checked with her colleagues. If there were no further extensions then what was the point of all the work being performed by Nu-Pro in compiling the documentation? Mrs Francis had confirmed that she would have considered the documentation if it had been provided as agreed.

96. Nu-Pro had not been "obviously negligent".

(1) Although PwC were involved in setting up the IPR authority, Nu-Pro did not recollect being informed of having to submit returns other than the original "nil" first return. PwC's involvement was limited to setting up the authorisation and the initial "nil" return, this having been done at the behest and instruction of Nu-Pro's US customer.

(2) Nu-Pro believed that transferring the goods to Rolls-Royce, another authorised IPR holder, meant there was no need to submit returns to HMRC. Paragraph 12 of the authorisation letter described several methods of disposal of IPR goods; one category was "Re-export/export outside the EC" and another was "Transfer to another IPR authorisation holder".

(3) Nu-Pro did not have any previous experience in operating the IPR regime as an authorisation holder. The advice provided by Mrs Franks in 2011 related to *simplified* IPR, not full IPR authorisation.

(4) The failure to submit returns was drawn to Nu-Pro's attention for the first time in May 2014, three years after the second return should have been lodged. Until Nu-Pro was informed in 2014 that returns were required, the company had no doubts that it was complying with its authorisation.

(5) The instructions Nu-Pro received from Mrs Francis from May to August 2014 were incorrect or at least misleading. She continually referred to exports and imports, whereas Nu-Pro had received the goods from another IPR holder and had transferred the goods, not exported them, to Rolls-Royce in Germany. Nu-Pro's inexperience in this area led to the considerable delays. Mrs Francis's numerous references to educating the trader are misconceived; she may have instructed Nu-Pro to do certain things, but they were not the correct things. As early as the April 2014 visit Mrs Francis should have been aware that the disposals by Nu-Pro to

Rolls Royce were not exports, but she continued to refer to imports and exports; that had confused Nu-Pro.

(6) Mrs Francis caused a delay of three weeks when she instructed Mr. Chester to stop work on collating information.

(7) Nu-Pro's executives had had face-to-face meetings with an experienced HMRC officer, Mrs Francis, and so felt there was no need to go for external advice.

(8) The fire at Nu-Pro's premises was outside of its control.

Refusal of remission

97. HMRC had no discretion as to the remission of the duties; per the CJEU in *Kaufring* at [217]:

> "… the person liable to pay customs duties who demonstrates both the existence of a special situation and the absence of obvious negligence and deception on his part is entitled to the remission of those duties …"

98. The meaning of "special situation" in art 905 was considered by the Tribunal in *Beko PLC* [2014] UKFTT 060 (TC) and described (at [74]) as "a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made".

99. The situation must place one or more persons in a special position in relation to other traders carrying out the same activity (*Kaufring*) and the disadvantage to that person or persons must have been caused by that situation (*Beko* at [79]).

100. Given the equitable nature of art 239, Nu-Pro should be allowed remission of the customs duty because:

(1) The erroneous advice given by Mrs Francis between May and August 2014 as to what information was required for Nu-Pro to complete its returns;

(2) Mrs Francis also causing a delay of three weeks to Nu-Pro gathering information when she instructed Mr. Chester to stop;

(3) The fire at its premises; and

(4) The returns being submitted very shortly after the deadline.

101. Clearly, the fire was a special situation. It put Nu-Pro in a position no other company was in and caused it to miss the agreed deadline. HMRC acknowledge the severity of the fire, which was described by HMRC Policy Division as a possible force majeure. It was equitable that Nu-Pro should not pay the demand because the fire put the company in a position no other trader was put in.

102. In addition, an error by HMRC - i.e. Mrs Francis's incorrect and/or misleading advice to Nu-Pro - thereby causing delay, may also constitute a special situation in itself (*Kaufring; Beko* at [77]).

103. As already argued, Nu-Pro was not "obviously negligent".

Consideration and Conclusions

104. Nu-Pro appeals against both the C18 assessment and the refusal to remit the amounts charged by the C18. On both matters the burden of proof (to the standard of balance of probabilities) is on Nu-Pro: s 16(6) FA 1994. It is necessary to determine the following issues:

(1) In relation to the disputed C18:

(a) Should the last eight entries on the C18 be distinguished from the others?

(b) Is relief available because Nu-Pro's failures had "no significant effect" on the IPR procedure?

(2) In relation to the disputed refusal of remission:

(a) Was there a "special situation" within art 899?

(b) May "obvious negligence" be attributed to Nu-Pro?

The disputed C18

Should the last eight entries on the C18 be distinguished from the others?

105. This is the point that first arose at the hearing and on which I granted permission to amend the grounds of appeal and (for both parties) to make written submissions after the hearing.

106. It is agreed that of the 55 import entries on the schedule to the C18, eight post-date the expiry of Nu-Pro's IPR authorisation. Nu-Pro submits that it cannot be assessed on those items because (for those items) it is not the "declarant" as defined in art 4(18) Customs Code: "'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made". This is amplified by art 5(4) which provides: "A person 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". Nu-Pro contends that although the freight agents stated on the documents that they were acting on behalf of Nu-Pro, in fact they were not "empowered" by Nu-Pro. That was because, says Nu-Pro, the freight agents were appointed and paid not by Nu-Pro but instead by Nu-Pro's US customer, Ladish.

107. I do not accept that contention. The goods were imported into the UK and delivered to Nu-Pro's premises for processing and onward delivery. That was done in the same manner on 55 occasions over the three year period. It was clear to and accepted by all the parties to the commercial transactions that the freight agents were importing in Nu-Pro's name and with its authority. Nothing changed on 16 May 2013 when Nu-Pro's IPR authorisation expired; that is evident from the fact that further deliveries were made and accepted after that date in the same manner until one consignment was detained at Dover when the expiry was noticed by Customs.

108. I agree with HMRC that the freight agents were acting on behalf of Nu-Pro. At the very least, the fact that Nu-Pro had for over three years acquiesced to the freight agents holding themselves out as acting on behalf of and empowered by Nu-Pro means that the agents held authority to so represent.

109. I also do not accept Nu-Pro's subsidiary submission that if a liability is imposed as a joint and several one then HMRC cannot pursue only one of the debtors. On the contrary, that is exactly my understanding of the situation: the creditor is entitled to sue any or all of the jointly and severally liable debtors; payment of the debt by one debtor discharges the obligation of all of them, and that debtor can then sue the other(s) for a contribution. Any policy or practice on the matter expressed in HMRC's internal manuals is not a matter within this Tribunal's jurisdiction.

Is relief available because the failure had "no significant effect" on the IPR procedure?

110. Article 204(1) of the Customs Code provides (so far as relevant):

> "A customs debt on importation shall be incurred through … non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, … from the use of the customs procedure under which they are placed … unless it is established that those failures have no significant effect on the correct operation of the … customs procedure in question."

111. Article 859 of the Implementing Regulation provides (so far as relevant):

> "The following failures shall be considered to have no significant effect on the correct operation of the … customs procedure in question within the meaning of Article 204 (1) of the Code, provided:
>
> …
>
> — they do not imply obvious negligence on the part of the person concerned, and
>
> — all the formalities necessary to regularize the situation of the goods are subsequently carried out:
>
> …

> in the framework of inward processing and processing under customs control, exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time; …"

112. Thus there are three (cumulative) requirements:

(1) all the formalities necessary to regularise the situation are subsequently carried out;

(2) the time limit allowed for submission of the bill of discharge would have been extended had an extension been applied for in time; and

(3) the failures do not imply obvious negligence on the part of the person concerned.

First requirement – necessary formalities subsequently carried out

113. The central importance of the "formalities" attached to IPR authorisation was emphasised by the CJEU in *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (C-262/10) [2012] All ER (D) 155 (Sep). IP involves obvious risks to the application and collection of customs duties; authorised persons must comply strictly with the IPR obligations; the consequences of non-compliance must be interpreted strictly; the BOD is a central document in the operation of IPR; the deadline for submission of the BOD is of particular importance; and if the conditions required to obtain the advantage of IPR are not satisfied then the resulting customs debt does not have the nature of a penalty.

> "39. Furthermore, Article 204 of the Customs Code states, in its first paragraph, that a customs debt is incurred through 'non-fulfilment of one of the obligations arising … from the use of the customs procedure under which they are placed', therefore applying to all obligations arising from the relevant customs procedure. In addition, it must be pointed out that Article 859(9) of the Implementing Regulation expressly provides that exceeding the time-limit allowed for submission of the bill of discharge is not a failure which gives rise to a customs debt where certain conditions, set out in that article, are fulfilled.
>
> 40. It must be observed that the inward processing procedure in the form of a system of suspension constitutes an exceptional measure intended to facilitate the carrying out of certain economic activities. That procedure involves the presence, on the customs territory of the European Union, of non-Community goods, which carries the risk that those goods will end up forming part of the economic networks of the Member States without having been cleared through customs (see Case C-234/09 *DSV Road* [2009] ECR I-7333, paragraph 31).
>
> 41. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom. Similarly, the consequences of non-

compliance with their obligations must be strictly interpreted (see Joined Cases C-430/08 and 431/08 *Terex Equipment and Others [*2010] ECR I-321, paragraph 42).

42. Hence, as pointed out by the Advocate General in point 50 of his Opinion, it is through the discharge of the inward processing procedure based on the corresponding bill of discharge that the final fate of the imported goods is established, by way of derogation from the general arrangement. The bill of discharge is therefore a central document in the operation of the inward processing procedure in the form of a system of suspension, as shown also by the detailed wording which must appear on it in accordance with Article 521(2) of the Implementing Regulation, and the obligation to submit that bill of discharge within 30 days of the expiration of the period for discharge, as laid down in the first subparagraph of Article 521(1), first indent, of the Implementing Regulation, is of particular importance for customs supervision in the context of that customs procedure.

43. Consequently, the incurrence of a customs debt does not, in circumstances such as those in the main proceedings, have the nature of a penalty, but must rather be regarded as the consequence of the finding that the conditions required to obtain the advantage derived from the application of the inward processing procedure in the form of a system of suspension have not been fulfilled. The procedure implies the granting of a conditional advantage, which cannot be granted if the applicable conditions are not respected, thereby making the suspension inapplicable and consequently justifying the imposition of customs duties.

44. Moreover, the Court has held that Article 859 of the Implementing Regulation contains a validly constituted and exhaustive set of rules on failures, within the meaning of Article 204(1)(a) of the Customs Code, which 'have no significant effect on the correct operation of the temporary storage or customs procedure in question' (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 43). In the main proceedings, the referring court formulated the question referred on the assumption that the conditions set out in Article 859 were not fulfilled.

45. Therefore, it must be held that the non-fulfilment of an obligation, linked to the benefit of an inward processing procedure in the form of a system of suspension, which must be carried out after the discharge of that customs procedure – in the present case the obligation to submit the bill of discharge within the period of 30 days prescribed in the first indent of the first subparagraph of Article 521(1) of the Implementing Regulation – gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt pursuant to Article 204(1)(a) of the Customs Code, where the conditions set out in Article 859(9) of the Implementing Regulation are not met."

114. Nu-Pro accepts that returns should have been filed during the currency of the IP authorisation, and that apart from the first return this was not done by the relevant

statutory deadlines. The outstanding returns were eventually filed. The covering letter is dated 14 August 2014 and bears an HMRC date stamp of 15 August 2014.

115. HMRC, as I understand, accept that this satisfied the first requirement. I would note that, according to Mrs Francis's evidence, the returns as filed still contained some incorrect information; however, as HMRC do not claim that the returns do not regularise the situation, I accept that the first requirement is satisfied.

Second requirement – time limit would have been extended

116. At the meeting on 23 April 2014 Mrs Francis set a deadline of 30 May 2014 for the filing of the outstanding IPR returns. HMRC accept that the setting of the returns submission deadline at 30 May 2014 was an extension of time, but maintain there was no further extension of the filing deadline. HMRC maintain that any further time extensions related not to the returns but, instead, to the provision of information and submissions. Nu-Pro claims that there were further extensions of time granted in relation to the filing of the returns.

117. In *Rikki Tann Limited* [2016] UKFTT 538 (TC) the Tribunal addressed (at [46]) how this test should be approached – see the passage quoted at [94] above. The fact that in the current case at least one extension *was* granted means that the test is simply whether the new deadline was met. I have carefully reviewed the correspondence between the parties and, for the following reasons, I have concluded that HMRC did grant further extensions of time to file the outstanding IPR returns.

118. On 28 May 2014 Mr Chester emailed Mrs Francis stating that he was unable to complete the IPR returns by the agreed date of 30 May 2014, but that he was "confident that all [the IPR returns] will be complete to submit on [4 June 2014]". While he did not specifically request an extension of time, I believe that was the clear implication of Mr Chester's email. Mrs Francis did not insist on the returns being with HMRC by 30 May; instead on 20 June she emailed Mr Chester requesting an update with regards to the IPR returns which were still outstanding. At that point HMRC could have said to Nu-Pro, you have missed the final (extended) deadline for submission of the outstanding returns so we will be issuing a C18 (subject to the taxpayer's right to be heard prior to issue). Instead HMRC continued to assist Nu-Pro with information directed to the completion of the returns. The fact that the precursor letter (ie the right-to-be-heard letter) was not sent until 4 July 2014 suggests that at least until that date HMRC were minded to accept late submission of the returns. There was then the fire and HMRC granted a further extension, as requested by Nu-Pro. That is supported by the comments of the HMRC officers who were involved in the reconsideration or formal review of the decisions.

119. In a letter dated 14 July 2015 Ms Rachel Ford wrote to Nu-Pro's then advisers:

> "59. At no point during the validity of the authorisation did Nu-Pro request an extension to [its] throughput period. Neither could this period have said to have been extended by HMRC because it took no action to recover the returns until April 2014. As a result of her visit

> Officer Francis did give the company extra time to submit these returns, however it failed to do so.
>
> …
>
> 61. Officer Francis gave Nu-Pro 4 weeks to provide the outstanding returns before her original visit. She then gave the company another 4 weeks in the lead up to her visit of 21 May 2014. The outstanding returns were not submitted until 13 August 2014. This is a period of approximately 20 weeks from her original notification of 27 March 2014. A period of 15 weeks elapsed between Officer Francis' original letter on 27 March 2014 and the fire on 9 July 2014, during which time the outstanding returns were not submitted."

120. In the formal review decision letter dated 2 September 2015 Ms Libby Bowden wrote:

> "76. In spite of Officer Francis requesting these returns originally in her letter of 27 March 2014 prior to her visit and during the 15 weeks following the visit up to the date of the fire, Nu-Pro failed to submit these returns despite repeated advice and correspondence.
>
> 77. Following the fire Nu-Pro itself requested the extension of just one week to fulfil their obligations which it now considers naive. However, this one week extension gave the company approximately a 5 week period between 4 July 2014 and 10 August 2014 to submit the returns. There is no evidence and I am therefore unable to comment on whether a further extension request had it been made would have been granted.
>
> 78. Taking into account the company had been made aware of its obligation to provide this information on 27 March, approximately 20 weeks earlier I think that this was a realistic and adequate extension to the deadline.
>
> …
>
> 84. I accept that the fire had a profound effect on the business (even though it was the factory and not the offices which burned down). As part of its normal commercial risk, decisions made prior to the fire concerning the level of resource and priority given to the administration and record keeping of the authorisation, put Nu-Pro in the position of not having completed the returns when the fire occurred. Nu-Pro requested and were granted a reasonable extension to the deadline as a result of the fire."

121. I conclude that HMRC did grant an extension of time to file the outstanding returns until 10 August 2014. That deadline was not met by Nu-Pro and, accordingly, the following day Mrs Francis informed Nu-Pro that a C18 was being issued.

122. For the avoidance of doubt, it is also clear to me from the contents of Mrs Francis's email dated 11 August 2014 and surrounding correspondence that any

further extension request by Nu-Pro beyond 10 August 2014 would not have been granted by HMRC, had it been requested.

Third requirement – no obvious negligence

123. In *Firma Söhl & Söhlke v Hauptzollamt Bremen* (C-48/98) [2000] 1 CMLR 351the CJEU stated:

> "51 As regards the second part of the seventh question, it should be observed first of all that, as is evident from paragraphs 46 to 49 of this judgment, the second indent of Article 239(1) of the Customs Code and the other provisions of the Customs Code or the implementing Regulation which form the subject-matter of this judgment refer to the same concept of "obvious negligence".
>
> 52 Secondly, the repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly. Since a lack of "obvious negligence" is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited.
>
> 53 Thirdly, it appears that the Customs Code brought together the provisions of customs law which had previously been dispersed in a large number of Community regulations and directives. When that happened Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1) was essentially reproduced in Article 239 of the Customs Code. Therefore, the case-law of the Court concerning the former must also apply to the latter.
>
> 54 It follows from the judgment in Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 46, that Article 13 of Regulation No 1430/79 and Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. It follows that the conditions to which the application of those articles is made subject, that is to say that no negligence or deception may be attributed to the person concerned in the case of Article 13 of Regulation No 1430/79 and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 5(2) of Regulation No 1697/79, must be interpreted in the same manner.

> 55 Moreover, in its judgment concerning Article 5(2) of Regulation No 1697/79 in Case C-64/89 *Deutscher Fernsprecher* [1990] ECR I-2535, paragraph 19, the Court held that the question whether or not an error committed by the customs authorities was detectable by a trader had to be examined taking account in particular of the precise nature of the error, the professional experience of, and the care taken by, the trader.
>
> 56 By analogy with those criteria, in order to determine whether or not there is "obvious negligence" within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.
>
> 57 As regards the professional experience of the trader, it is necessary to examine whether or not he is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions.
>
> 58 As regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions.
>
> 59 It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader.
>
> 60 In those circumstances, the answer to the second part of the seventh question must be that in order to determine whether or not there is "obvious negligence" within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions noncompliance with which has resulted in the customs debt being incurred and the professional experience of, and the care taken by, the trader. It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader."

124. In relation to the complexity of the provisions, the starting point for any responsible trader would be to read the material provided to it by HMRC; principally, the terms of the IPR authorisation letter and the relevant sections of Customs Notice 221. If after perusing that explanatory material the trader had any unresolved questions then it could either ask HMRC for guidance, or seek independent professional assistance. I was referred at length to the contents of Notice 221 but I do not think it is necessary to quote extensively from the Notice here. In summary, I find that the contents of that Notice set out clearly and in terms comprehensible to the average businessperson the procedures to be followed in relation to IP, including the requirement to file returns and supply supporting documentation. Further, the authorisation letter included the following:

> "16. *Suspension Returns*
>
> Suspension returns on form C&E 812 must be received by the supervising office following the timescale below: First return 16/05/2011 to 30/09/2011 (initial 4½ month return to line up with calendar month) and every three months thereafter. Nil returns are required. You have 30 days from the end of the through-put period as above to lodge your return. The authorisation holder is responsible for ensuring form C&E 812 is received by the supervising office by the due dates. Failure to do so may result in relief being refused. No reminders will be issued by the supervising office."

125. In relation to the professional experience of the trader, Nu-Pro's business activities routinely involve import and export transactions of high value aerospace components. Nu-Pro's involvement with IP goes back at least to 2010 when Mrs Franks visited the factory – and I comment on that further below – thus it had already gained some experience in the conduct of such transactions (albeit in the simplified form of IPR) before the failures which gave rise to these proceedings.

126. In relation to the care taken by Nu-Pro, I would start with the results of the 2010 visit by Mrs Franks. The visit report prepared by Mrs Franks after her visit to Nu-Pro in September 2010 included the following:

> "Discussed Strategic Export requirements and the importance of supply chain security. The company are subject to tight regulatory control by the civil and military aviation industry. Explained [illegible] and directed the company to the HM R&C website for further information.
> …
>
> Tony Chester admitted they had little understanding of how IPR should work or the legal requirements relating to authorisations. He had discussed IPR with MIQ but was unaware that they had submitted an IPR application which when examined contained incorrect information. Agreed that this application could not be used, directed the company to the HMR&C website containing information of how to apply for IPR but stressed that further investigation would have to be undertaken before a way forward could be agreed.
>
> …
>
> Nu-Pro Ltd were found to be a company who had very little knowledge of Customs and International Trade requirements and placed a large amount of responsibility on their agents MIQ for the GKN contract or agents used by suppliers. Procedures and documented instructions focus on their involvement in the aerospace and defence sectors and not on import and export requirements. Lack of understanding over how IPR goods should be controlled was evidenced by their completion of C99s returned to NIRU and submission of an IPR application by agents MIQ.
>
> …

> The company were however found to be helpful, co-operative and willingly provided all information where available promptly. Advice and guidance given was readily accepted. Information within the management letter should improve the company's level of compliance. …"

127. In the management letter sent by Mrs Franks on 29 July 2011 she stated:

> "As a crucial part of the IPR supply chain involved in the disposal of the goods, you must ensure that a full audit trail is maintained from receipt, through processing, to despatch and export. Information required to support the disposal of the goods must be supplied to Thomson Aero Ltd as required under their approval and the audit trail spreadsheets must be kept updated at all times and returned to them. You must ensure that all IPR goods exported to GKN are declared under [reference number given] and the Thomson Aero Ltd authorisation number is shown on the C88 (SAD). Further information on the use of these CPC(s) can be found in volume 3 Appendix E1 of the Tariff.
>
> Any significant issues relating to the handling, process, despatch or export of the goods received from Thomson Aero Ltd under their IPR approval must be advised to them immediately."

128. It is significant that the other outcome of the 2010 visit was that HMRC issued a C18 on Nu-Pro for around £4,600. Thus Nu-Pro had already faced an unexpected liability as a result of its failure to properly engage with IPR procedures.

129. Moving forward to the events giving rise to the disputed C18 in these proceedings, I have no hesitation in concluding that the failures clearly show a lack of care on the part of Nu-Pro.

(1) As stated above, any responsible trader would have familiarised itself with the contents of its authorisation letter and Notice 221. Indeed, that is exactly what Mrs Francis told Nu-Pro to do on several occasions. This was not a case where the executives conscientiously consulted the documentation and either could not comprehend it or misunderstood the contents; rather, no one bothered to look at the documents, even after the failures were drawn to Nu-Pro's attention. Mr Chester stated that he first read Notice 221 in August 2014, when completing the outstanding returns. Nu-Pro was unaware that its authorisation had expired until goods were detained on entry.

(2) Had Nu-Pro read that documentation then the need for periodic returns would have been obvious, as would the appropriate record-keeping, and so the failure to file the returns is, I find, directly attributable to Nu-Pro's failure to take the appropriate care expected of an IPR authorisation holder. As per the CJEU in *Firma Söhl & Söhlke* (at [58]): "where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions."

(3) Nu-Pro seeks to blame HMRC, and specifically Mrs Francis, for Nu-Pro's continued failure to file the returns. Having carefully reviewed the chain of correspondence between the parties, I do not accept that. Nu-Pro's witnesses were obliged to withdraw several allegations that calls were not returned, or emails not answered, by HMRC; I accept that those mistakes were errors of recollection, but they are symptomatic of Nu-Pro's eagerness to cast itself in the role of victim. On the contrary, I find that Mrs Francis (and her colleagues) went out of their way to attempt to assist Nu-Pro in catching up on its obligations. On the few occasions where Mrs Francis did adopt a curt tone in correspondence, that was clearly as a result of understandable frustration at having to repeat advice already given but not heeded by Nu-Pro.

(4) Nu-Pro made no attempt to take professional advice on its situation, until the C18 arrived. The explanation given in evidence was that the company thought it could cope with the task facing it without consulting professional advisers. However, Mr Chester confirmed that he placed himself entirely in the hands of PwC in relation to the authorisation application and the first return; also, that later he was reliant on assistance from Mrs Francis to understand what was required of Nu-Pro; that is not consistent with a trader who is confident in its role as an IPR authorised person.

(5) There were several references to the magnitude of the task facing Nu-Pro and the short time period available for the work. First, that was, of course, work that should have been performed periodically over the duration of the authorisation but was not, and so being put in the position of having to catch up on unperformed compliance was the result of Nu-Pro's own inaction. Secondly, on 6 May 2014 (ie over three months before the eventual deadline for late submission of the returns) Ms Evans sent to Nu-Pro a schedule showing all the IPR imports for the period of the outstanding returns; that was a list of 55 entries. While auditing a list of 55 items is not a trivial task, I do not consider it is the massive workload that Mr Chester portrayed. In particular, the goods were aerospace components with (for reasons unconnected with customs procedures) strict traceability requirements; all the paperwork was available and identifiable. The problem was that Nu-Pro never took the trouble to understand exactly what it was required to do, and then execute that action.

(6) One conflict of evidence that I should address briefly concerns a telephone call between Mr Chester and Mrs Francis on 29 May 2014. Neither party made a written note of the call. Mr Chester's recollection is that he was instructed to cease all work on the returns while Mrs Francis checked with a colleague who dealt with Rolls Royce. Mrs Francis's recollection is that she instructed him to cease work on the disposal transactions (which she had been told were to Rolls Royce) but that he should continue collecting the necessary documentation on the import transactions. On 20 June there was a further conversation when the difference became apparent, and Mr Chester resumed work. I consider that even on Mr Chester's version of events, there was still adequate time between 20 June and 10 August (the eventual deadline for submission) for completion of the task; taking all the evidence together concerning how Nu-Pro approached and performed the task, I do not

consider that the possible loss of three weeks in the timetable made a significant difference to Nu-Pro's work on the returns.

130. Taking all the above together, I consider that Nu-Pro's failures demonstrate obvious negligence on its part.

131. Thus, Nu-Pro satisfies the first requirement in art 859 (all the formalities necessary to regularise the situation are subsequently carried out) but fails both the second requirement (the time limit allowed for submission of the bill of discharge would have been extended had an extension been applied for in time) and the third requirement (the failures do not imply obvious negligence on the part of the person concerned). Accordingly, no relief is available under art 859, and the appeal against the C18 must be dismissed.

The disputed refusal of remission

132. Article 899 of the Implementing Regulation sets out the circumstances in which remission can be granted. None of arts 900 to 904 are relevant to the current appeal. Further, the facts of the current appeal are not ones that require the dossier to be submitted to the EU Commission per art 905. Therefore, the test is "where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned".

133. As already quoted, the CJEU in *Firma Söhl & Söhlke* stated:

> "52 Secondly, the repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly. Since a lack of "obvious negligence" is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited."

134. The CJEU in *Kaufring AG v European Commission* (T-186/97) [2001] 2 CMLR 1057 stated:

> "216. It is settled case-law that Article 13(1) of Regulation No 1430/79 constitutes a general equitable provision (see in particular Case 283/82 *Schoeller & Söhne v Commission* [1983] ECR 4219, paragraph 7).
>
> 217. According to that provision the person liable to pay customs duties who demonstrates both the existence of a special situation and the absence of obvious negligence and deception on his part is entitled to the remission of those duties (see [Case T-42/96 *Eyckeler & Malt v Commission* [1998] ECR II-401], paragraph 134).
>
> 218. The case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the

> person liable is in an exceptional situation as compared with other operators engaged in the same business (see Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraphs 21 and 22, and Case C-61/98 *De Haan* [1999] ECR I-5003, paragraphs 52 and 53) and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties (Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* [1987] ECR 1525, paragraph 22).
>
> 219. As regards the condition concerning the absence of obvious negligence or deception on the part of the interested party, the Court held in [Case C-250/91 *Hewlett Packard France* [1993] ECR I-1839)], paragraph 46, that Article 13(1) of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. Seen in that light, the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79, and therefore the conditions laid down by the latter provision must be assessed in the light of those laid down in Article 5(2) of Regulation No 1697/79.
>
> 220. Finally, since, according to settled case-law, the conditions laid down by Article 13(1) of Regulation No 1430/79 are cumulative ([Case T-75/95 *Günzler Aluminium v Commission* [1996] ECR II-497], paragraph 54, and Case C-370/96 *Covita* [1998] ECR I-7711, paragraph 29), remission must be refused if one of those conditions is not met."

135. From the above I take the following:

(1) The conditions are cumulative, so Nu-Pro must demonstrate both a "special situation" and no "obvious negligence".

(2) If both conditions are met then HMRC have no discretion as to remission; Nu-Pro is then entitled to remission of the duties.

(3) A special situation exists if it is clear from the circumstances of the case that (a) Nu-Pro is in an exceptional situation as compared with other operators engaged in the same business; and (b) in the absence of such circumstances Nu-Pro would not have suffered the disadvantage caused by the customs duties charged by the C18.

Was there a special situation within art 899?

136. I do not accept Nu-Pro's submissions that there is anything about its circumstances prior to the factory fire that constitute a special situation as envisaged by *Kaufring.* Other operators complied with the IPR reporting requirements, while Nu-Pro failed. That failure was not due to any exceptional situation; it was simply

because Nu-Pro did not take care to understand and comply with the requirements of its IPR authorisation.

137. The fire was peculiar to Nu-Pro. However, the fire was not the situation that caused the failure to file the returns – that failure had been continuing for three years before the fire. Further, Nu-Pro requested an extra extension of time to accommodate the upheaval caused by the fire and (I have already found) HMRC granted that time extension. Given that the conditions for remission must be interpreted strictly (per *Firma Söhl & Söhlke* at [52]) I do not consider that the fire, serious and unfortunate as it was, can constitute a special situation for these purposes.

Obvious negligence?

138. The concept of "obvious negligence" must be interpreted in common across the provisions of the Customs Code and the Implementing Regulation: *Firma Söhl & Söhlke* at [51]. From my findings at [123-130] above and for the same reasons, I conclude that obvious negligence may be attributed to Nu-Pro.

139. Thus neither condition for remission is satisfied, and accordingly the appeal against the refusal of remission must be dismissed.

Final comments

140. For the reasons stated above, both appeals (against the C18 and the refusal of remission) must be dismissed. The result is that Nu-Pro is liable for a tax debt of almost £1.2 million. Around £1 million of that is import VAT which I anticipate will be recoverable by Nu-Pro as it is presumably input tax directly attributable to zero-rated exports of goods (s 30 VATA 1994). That leaves over £136,000 customs duties which are presumably to the account of Nu-Pro, arising from its failure to comply with the IP regime. Although that is a significant amount, I am satisfied that the Tribunal does not need to consider any question of proportionality (see, for example, *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), [2013] STC 681, and *HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC)); it is clear from *Döhler* (at [43] – see [113] above) that the customs debt does not have the nature of a penalty.

Decision

141. The appeals are DISMISSED.

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

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2017