[2017] UKFTT 740 (TC)

TC06151

Appeal number: TC/2016/03015

VALUE ADDED TAX – import VAT – Customs Duty & VAT overpaid on import by mistake – HMRC refunding Customs Duty to appellant, but not VAT – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEMISPHERE FREIGHT SERVICES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
IAN ABRAMS

Sitting in public at Taylor House, Rosebery Ave, London EC1 on 11 August 2017

Mark Billany, Manager, for the Appellant

Amelia Walker, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Hemisphere Freight Services Ltd ("the appellant") against a refusal by HMRC to repay to them import VAT which they had paid in error in relation to an import of goods which they were handling. HMRC had repaid them the much smaller amount of customs duty which had been overpaid in relation to the same import, but insisted that the overpaid VAT could only be repaid by being credited as input tax to the importer, not the appellant.

Evidence & findings of fact

2. We had a slim bundle of papers prepared by HMRC. Mr Billany in presenting the appellant's case gave evidence and was cross-examined by Ms Walker.

3. From this evidence in §§4 to 35 we make the following findings of fact. We make some further findings in §§37 to 46 on matters on which there was some doubt or disagreement.

4. A Customs Entry was made at 17.08 on 24 November 2014 by the appellants acting as agent for A-Sure Technology Co Ltd ("A-Sure"). The relevant details shown on the printout of the entry are:

(1) Page 2 of printout

Type of entry:	SAD [Single Administrative Document]
Entry method:	D
Goods Arrived:	24/11/14 17.08
Goods Cleared on:	28/11/14 10.23
Paying agent:	529440540000
Customs Route:	1
ICS Code:	03 [Previous ICS shown as 00, 30, 22]

(2) Page 3 of Printout

Declaration:	IMA
Total packages:	26
Total items:	4
Declarant reference:	59848
Consignee country code	GB
Consignee reference:	14313345100
Declarant country code:	GB
Declarant No	52944054000
Country of Dispatch:	HK
Currency/Total Amt Inv:	GBP 8,607.50
Location of goods:	LHR ERT
Total customs value:	GBP 48,100.93
Total Customs Duty	GBP 1,457.16
Total VAT Value	GBP 49,658.07
Total VAT:	GBP 9,931.60

(3) Page 5

Consignor:	Henweit (Hong Kong)
Consignee:	A Sure Room 15J Qinghai Building Shenzhen M27 8SE GB
Declarant:	Hemisphere Freight Services, Unit 4 Colnbrook SL3 0AX GB

5. On 3 December 2014 an application for repayment was made on Form C285. The relevant details on that form are:

(1) Box 1:

Importer name, address and postcode: A Sure Room 15J Qinghai Building Shenzhen M27 8SE GB

Phone number [blank]

VAT registration number: GB143133451000

(2) Box 2:

Representative name, address and postcode: Hemisphere Freight Services

Phone number [mobile number given]

VAT registration number: GB529440540000

(3) Box 9: Basis of claim, with supporting evidence and technical literature:

Incorrect currency

The documents listed against the name of which a box contained a cross were:

C88/E2

Substitute entry

VAT Disclaimers*

Invoice

Airway bill

Direct representation.

* the cross in the box here was handwritten, whereas all the others were typed or computer generated.

Repayment and remission details:

	Amount paid	Amount due to HMRC	Total Repayment
Duty	1457.16	173.84	1283.32

VAT	9931.60	1180.34	8751.26
Total	11388.76	1354.18	10034.58

(4) Box 11: Person to be repaid: Importer ☐ Representative ☒

(5) Box 12: Application is made for repayment … of import duty under the following Article of the Code:

☐ 236 ☐ 237 ☒ 239

(6) Signed by: Perry Hocking, reference IMA/59848, Status: representative.

6. On 5 March 2015 HMRC's National Duty Repayment Centre ("NDRC") in Dover responded to this claim, made more than three months earlier on 3 December 2014. The letter ("the response letter") asked for the following information or documentation to be supplied:

(1) Direct representation letter attached

(2) Other (please see below)

7. It went on to inform the appellant that it had used an incorrect exchange rate in the amended entry and asked the appellant to see "Direct Representation letter attached".

8. It then said that:

> "if you are applying for a refund of import VAT please note that as per CIP (11) 14 Import Vat will not be repaid to VAT Registered traders. The equivalent amount can be re-claimed as input tax via the VAT return subject to normal VAT Rules."

9. The response letter set a time limit of 21 days for a reply failing which the application would be considered withdrawn and a fresh application would be needed. This was said to be in accordance with Art. 881 of EEC/2454/93 (the "Implementing Regulation").

10. The "Direct Representation" letter referred to in the response letter said, in bold letters:

> "Before we can repay your application [*sic*] please provide a letter on Company headed paper from the Importer, authorising repayment to be made to the named agent."

11. It went on to say that:

> "[t]he entry as completed bears a declaration by the agent (in box 14) that the principal. i.e. the importer is being directly represented. As per the Public Notice 199 Section 7 Para 7.4.1 it follows that it is the importer who is entitled to any repayment. In order for any other

> party to be repaid it is necessary for the importer to give specific authority to that effect."

12. A letter dated 12 March 2015 ("the A-Sure letter") addressed "to whom it may concern" and headed "Re: Stock Entry on 24/11/2014, No. 120408X" reads (verbatim):

> "I am writing to confirmed, I have noticed that the VAT amount of the entry on 24/11/2014 (120408X) is incorrect; I am here to declare that I am not going to claim the VAT for that invoice.
>
> Please could you also accept this letter as authority to repay Hemisphere Freight Services directly the difference in the VAT/Duty amounts"

13. It was signed "Stewen (Director), A-sure [*sic*] Technology Co Ltd" showing the address in China that is on the SAD (see §4(3)) and the C285 (see §5(1)).

14. On 16 April 2015 NDRC Dover said that the case was closed in the absence of a reply to the response letter of 5 March.

15. On 16 June 2015 the appellant submitted a further application seeking a refund of £10,034.58.

16. On 15 September 2015 NDRC (now in Salford) wrote to the appellant saying that the application on form C285 for refund or remission of Import Duties under Article 236 of the Community Code had been approved. The remittance advice would be for £1,283.32.

17. The letter added that:

> "As per Customs Information Paper (11) 14 overpayment of import VAT can no longer be claimed via the C285 by fully taxable VAT registered traders. The equivalent amount can be included as input tax on the importers next VAT return, supported by the VAT certificate C79 subject to normal tax rules. Consequently the claim has been rejected as invalid request.
>
> If the importer is not fully taxable or uses a VAT scheme such as Flat Rate the claim maybe [*sic*] re-submitted with evidence to support their VAT status."

18. The printout supplied from the NDRC computer for this event shows "Disposal Code: D1-DSU"; "Registered trader: Yes"; "VAT Refused: Yes"; "Refund Reduced/Rejected/Refused: No [*sic*]; "Tax Type: A00" and "Amount: 1283.32".

19. An email chain is exhibited which started on 4 March 2016. The chain at first involves emails between Mr Billany ("MB") and NCH Technical (another part of HMRC). The first from MB started by thanking Mr Paul Moorhouse for his time earlier.

20. MB then said that:

> "The above was originally entered incorrectly meaning an overpayment of Duty/VAT. The duty had been reimbursed via our reclaim but the VAT wasn't repaid (even though we were asked to submit a cnee [*consignee*] waiver stating they wouldn't claim a reimbursement which we did)
>
> UK Importer listed in BOX8 is based in China and unwilling to help in any way despite every effort on our part.
>
> …
>
> I'd appreciate your help and guidance on how we can resolve."

21. On 22 March 2016 the email was resent. Later on 22 March 2016 Mr Brian Nutter of NCH ("BN") told MB that:

> "The correct way in which VAT registered traders must claim back import VAT (including overpaid import VAT) is though their input tax records and returns. This is explained in HMRC public notice 702"

22. MB replied to BN:

> "OK understood but what action can I take if the importer refuses to claim the VAT back and reimburse us?"

and a minute later:

> "What I also don't understand is why NDRC asked for a VAT disclaimer with a view to reimbursing us if it couldn't be done?"

23. The response from BN was to give extracts from Notice 702 including section 2.5.

24. MB replied that he had "read that extract and fully understood" but he was "stuck with nearly 10,000 and needed to appeal this". He asked "can you accept this email as my formal appeal?"

25. BN replied saying that appeal rights were in the covering letters he would have received. He asked MB if he wished him to refer the case to NDRC to explain the issue "about the "disclaimer"", which MB agreed.

26. MB's question about the "disclaimer" was then referred to NDRC, this being the final email sent on 22 March 2016.

27. On 23 March 2016 Ms Sam Nuttall ("SN") of NDRC emailed MB referring to his enquiry and saying that she had called for the original paperwork and would respond when it had been received, but in the meantime she drew MB's attention to section 2.6 of VAT Notice 702 (which had not been sent to him previously by BN).

28. In his reply 19 minutes later MB said that:

> "on our original claim we were asked to produce a disclaimer letter though so there must have been an intention to reimburse us. It can't be correct that we are out of pocket by nearly 10,000.00 and HMRC are holding the revenue they aren't actually entitled to.
>
> The root cause of the issue was an entry error this end but I cannot accept under the circumstances there isn't an appeal route if the cnee won't co-operate"

29. On 23 May a reply was sent by Alison Ryan ("AR") of NDRC who explained that Dover's work had been sent to Salford "and we have inherited a lot of working practices". She said she had been seeking to find when the "disclaimer" declaration MB was referring to was implemented but could not find out.

30. AR went on to say (verbatim):

> "NDRC do not repay VAT to VAT registered traders or agent, even if the payment was made from an agents deferment of FAS account, as an import VAT certificate (C79) is issued enabling the registered trader to reclaim the VAT.
>
> Any money owing to you as a result of your paying customs charges on behalf of a client cannot be reclaimed from HMRC, your client should settle any debt they have with you as this is a commercial transaction and as such is outside HMRC's remit.
>
> In summary the correct refund was issued to you and this was not affected by the inclusion of the declaration you refer to. If you submit future claims without the declaration it will not affect the processing of the claim."

31. MB replied saying the reply didn't cover his position. He repeated that, by asking for a disclaimer letter, HMRC were in principle agreeing to reimburse the VAT, and that the consignee in China would not help.

32. AR then gave MB details of how he might seek a review or appeal to the Tribunal, and then a few minutes later sent him details of where to find Customs Information Paper "CIP 14/11".

33. MB replied to AR stating he noted what she had sent, "but please look at the attached. Why ask for a disclaimer if there was no intention to pay?". We cannot see from the bundle what the "attached" was.

34. This was the last email on that day.

35. On 26 May 2016 the appellant notified its appeal to the Tribunal.

36. We need to make some further findings of fact in relation to matters raised by HMRC in cross-examination and to draw some inferences from the facts we have set out.

37. It was common ground that the reference to the claim on Form C285 being made under art. 239 was a mistake and that it was art. 236 under which the claim was made, and so far as Customs Duty concerned, satisfied by a repayment.

38. Ms Walker repeatedly asked Mr Billany where the evidence was that HMRC had asked for a VAT disclaimer. Mr Billany said that he had had many discussions on the phone with HMRC and it would have been on one or more of those occasions on which he had been told to provide one.

39. We have noted that the copy of the C285 we have shows a box for crossing with an 'x' if a VAT disclaimer is to be sent in with the form, and that it is crossed but in freehand, not by using a computer (or even a typewriter) as was obviously used to indicate on the other boxes that particular documents are attached. From later email correspondence in the bundle we can see that the copy of Form C285 in the bundle came from Mr Billany in 2016 (HMRC admitting that they did not keep or at least could not find a copy) and not from HMRC's records, but it is impossible to tell when the handwritten 'x' was added to Mr Billany's copy, and Mr Billany was not asked.

40. We also note that the A-Sure letter which includes a VAT disclaimer is dated 15 March, shortly after HMRC's reply to the original C285 on 5 March. That reply did not ask for a VAT disclaimer – it had said that VAT would not be repaid. It did ask for a "Direct Representation" letter and that was also included in the A-Sure letter.

41. We consider that it is more likely than not that Mr Billany asked A-Sure for a VAT disclaimer after 5 March 2015 and did so because he saw that the C285 referred to one, and that he sent the A-sure letter to HMRC with his renewed application, as without it the appellant would not have been refunded the Customs Duty, since the letter also contained A-Sure's authority to HMRC to pay the refund to the appellant.

42. We do not accept that anyone in HMRC told Mr Billany he needed to provide a VAT disclaimer. We do not fully understand what Ms Ryan meant in her first email of 23 May 2016 (§29) that she could not find out when a disclaimer declaration had been implemented. But we think it is unlikely that, four years after CIP (11) 14 was published, HMRC staff in the Dover office of NDRC would have asked for a VAT disclaimer from a registered trader as a condition of making a refund.

43. We do not know what the "attached" was that Mr Billany was referring to in the last email on 23 May 2016 (§33). We think it is more likely than not that it was the A-sure letter. If it had been a letter or email from HMRC referring to a VAT disclaimer we are sure it would have been produced.

44. We should also add that by an application of 26 August 2016 HMRC sought to have the appellant's appeal struck out on the grounds that it had no reasonable prospect of success.

45. That application was heard by Judge Rupert Jones on 16 January 2017, with Mr Billany appearing for the appellant and Ms Walker for HMRC. Judge Jones in a decision

dated 8 February refused the application, despite having informed the parties at the end of the hearing that it had succeeded.

46. We mention it here because we have considered whether any factual matters were raised (and, if raised, decided) that we have not already dealt with. The decision at [19] refers to emails of 15 August and 16 September 2016 which are not in the bundle. According to the decision of the Tribunal, A-Sure Technology Ltd, the importer, had ceased trading in the UK at the time of these emails. We find as a fact that it had so ceased.

Law

47. The domestic law referring specifically or by implication to import VAT is in the Value Added Tax Act 1994 ("VATA") and the Value Added Tax Regulations 1995 (SI 1995/2518) "VAT Regulations", and the parts of that Act and those regulations that we consider relevant to our discussion of this case are set out below.

48. Starting at the beginning of VATA:

> "**1 Value added tax**
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
>
> …
>
> (c) on the importation of goods from places outside the member States,
>
> and references in this Act to VAT are references to value added tax.
>
> …
>
> (4) VAT on the importation of goods from places outside the member States shall be charged and payable as if it were a duty of customs."

49. Thus the charge to input VAT is imposed by s 1(1)(c) VATA and so is charged separately from the ordinary charge on supplies of goods and services (import VAT is *only* charged on goods). The separateness is then reinforced by providing that import VAT is both charged and payable as if it were a duty of customs. There are specific provisions for imported goods:

> "**15 General provisions relating to imported goods**
>
> (1) For the purposes of this Act goods are imported from a place outside the member States where—
>
> (a) having been removed from a place outside the member States, they enter the territory of the Community;

(b) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory; and

(c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred.

(2) Accordingly—

(a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the Community would be incurred, and

(b) the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt.

(3) Subsections (1) and (2) above shall not apply, except in so far as the context otherwise requires or provision to the contrary is contained in regulations under section 16(1), for construing any references to importation or to an importer in any enactment or subordinate legislation applied for the purposes of this Act by section 16(1).

16 Application of customs enactments

(1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—

(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and

(b) the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community,

shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, Community customs duties.

…

50. These two sections of VATA elaborate on s 1(1)(c) and (4) VATA. In particular the person importing goods for the purposes of import VAT is the person liable to

discharge any customs debt - s 15(2)(b). Section 16 is extremely important for the purposes of this case as it imports, for the purpose of applying import VAT, all of eg the Customs and Excise Management Act 1979 ("CEMA") and more importantly the Community Customs Code (EEC) No 2913/92 ("CCC") and its associated implementing legislation, Commission Regulation (EEC) No 2454/93 ("the implementing Regulation").

51. Not all of that legislation is applicable and some is excluded by the VAT Regulations. Regulation 120 contains the (relevant) statutory exceptions:

> "**120 Community legislation excepted**
>
> (1) Council Regulation (EEC) No 918/83 on conditional reliefs from duty on the final importation of goods, and any implementing Regulations made thereunder shall be excepted from the Community legislation which is to apply as mentioned in section 16(1) of the Act.
>
> (2) The following Articles shall be excepted from the Community legislation which is to apply as mentioned in section 16(1) of the Act—
>
> (a) in Council Regulation (EEC) No 2913/92 establishing the Community Customs Code—
>
> (i) Articles 126 to 128 (drawback system of inward processing relief),
>
> (iii) Article 137 so far as it relates to partial relief on temporary importation, and Article 142,
>
> (iv) Articles 145 to 160 (outward processing),
>
> (vi) Article 229(b) (interest payable on a customs debt),
>
> (vii) Articles 232(1)(b), (2) and (3) (interest on arrears of duty), and
>
> (viii) Article 241, second and third sentences only (interest on certain repayments by the authorities),
>
> (b) in Commission Regulation (EEC) No 2454/93 which contains provisions implementing the Community Customs Code—
>
> (i) Articles 496 to 523, Articles 536 to 544 and Article 550 (but only to the extent that these Articles apply to the drawback system of inward processing relief),
>
> (ii) Article 519 (compensatory interest),
>
> (iii) Articles 585 to 592 (outward processing) (and Articles 496 to 523 to the extent that they are relevant to outward processing)"

52. From this it seems to us clear that VAT legislation applying only to s 1(1)(a) VATA supplies and more generally expressed VAT legislation ("ordinary VAT law")

which is repugnant to, or conflicts with, "customs law" (ie anything in CEMA, the CCC or the implementing Regulation) must yield to customs law, unless that customs law is expressly disapplied by regulation 120.

53. There are some provisions of ordinary VAT law which do refer to import VAT and to which HMRC refer in their dealings with the appellant and in their Statement of Case and skeleton:

> "**24 Input tax and output tax**
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> …
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> **25 Payment by reference to accounting periods and credit for input tax against output tax**
>
> (1) A taxable person shall—
>
> (a) in respect of supplies made by him, and
>
> (b) in respect of the acquisition by him from other member States of any goods,
>
> account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit"."

54. And in the VAT Regulations:

"**100** Nothing in this Part shall be construed as allowing a taxable person to deduct the whole or any part of VAT on the importation or acquisition by him of goods or the supply to him of goods or services where those goods or services are not used or to be used by him in making supplies in the course or furtherance of a business carried on by him."

55. And there are further provisions of VAT law which relate only to import VAT:

"**37 Relief from VAT on importation of goods**

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

(2) In any case where—

(a) it is proposed that goods which have been imported from a place outside the member States by any person ("the original importer") with the benefit of relief under subsection (1) above shall be transferred to another person ("the transferee"), and

(b) on an application made by the transferee, the Commissioners direct that this subsection shall apply,

this Act shall have effect as if, on the date of the transfer of the goods (and in place of the transfer), the goods were exported by the original importer and imported by the transferee and, accordingly, where appropriate, provision made under subsection (1) above shall have effect in relation to the VAT chargeable on the importation of the goods by the transferee.

(3) The Commissioners may by regulations make provision for remitting or repaying, if they think fit, the whole or part of the VAT chargeable on the importation of any goods from places outside the member States which are shown to their satisfaction to have been previously exported from the United Kingdom or removed from any member State.

(4) The Commissioners may by regulations make provision for remitting or repaying the whole or part of the VAT chargeable on the importation of any goods from places outside the member States if they are satisfied that the goods have been or are to be re-exported or otherwise removed from the United Kingdom and they think fit to do so in all the circumstances and having regard—

(a) to the VAT chargeable on the supply of like goods in the United Kingdom;

(b) to any VAT which may have become chargeable in another member State in respect of the goods

38 Importation of goods by taxable persons

The Commissioners may by regulations make provision for enabling goods imported from a place outside the member States by a taxable person in the course or furtherance of any business carried on by him to be delivered or removed, subject to such conditions or restrictions as the Commissioners may impose for the protection of the revenue, without payment of the VAT chargeable on the importation, and for that VAT to be accounted for together with the VAT chargeable on the supply of goods or services by him or on the acquisition of goods by him from other member States."

56. We mention these two sections not because they apply to the appellant in this case but for the provisions in s 37(3) and (4) VATA for repaying VAT and for showing in s 38 VATA that the accounting and payment rules on import VAT are normally wholly separate from the charge and accounting rules for ordinary VAT.

57. Because of s 16 VATA we need to recite those provisions of the CCC and the implementing Regulation which seem to us to be relevant here, and in the CCC they are:

"TITLE I

GENERAL PROVISIONS

CHAPTER 1

SCOPE AND BASIC DEFINITIONS

Interpretation

Article 4

…

(18) 'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

Right of representation

Article 5

1. Under the conditions set out in Article 64(2) and subject to the provisions adopted within the framework of Article 243(2)(b), 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.

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

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

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

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

…

TITLE IV

CUSTOMS-APPROVED TREATMENT OR USE

…

CHAPTER 2

CUSTOMS PROCEDURES

Section 1

Placing of goods under a customs procedure

…

A. **Declarations in writing**

I. Normal procedure

…

Article 64

1. Subject to Article 5, a customs declaration may be made by any person who is able to present the goods in question or to have them

presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.

2. However,

(a) where acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on his behalf;

(b) the declarant must be established in the Community.

However, the condition regarding establishment in the Community shall not apply to persons who:

— make a declaration for transit or temporary importation;

— declare goods on an occasional basis, provided that the customs authorities consider this to be justified.

3. Paragraph 2(b) shall not preclude the application by the Member States of bilateral agreements concluded with third countries, or customary practices having similar effect, under which nationals of such countries may make customs declarations in the territory of the Member States in question, subject to reciprocity.

TITLE VII

CUSTOMS DEBT

…

CHAPTER 2

INCURRENCE OF A CUSTOMS DEBT

Article 201

1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties, or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

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

Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to

draw up the declaration and who knew, or who ought reasonably to have known that such information was false, may also be considered debtors in accordance with the national provisions in force.

…

CHAPTER 3

RECOVERY OF THE AMOUNT OF THE CUSTOMS DEBT

Section 1

Entry in the accounts and communication of the amount of duty to the debtor

…

Article 221

1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.

Without prejudice to the application of the second subparagraph of Article 218 (1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.

Section 2

Time limit and procedures for payment of the amount of duty

…

Article 231

An amount of duty owed may be paid by a third person instead of the debtor.

…

CHAPTER 5

REPAYMENT AND REMISSION OF DUTY

Article 235

The following definitions shall apply:

(a) 'repayment' means the total or partial refund of import duties or export duties which have been paid;

…

Article 236

1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment … shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid … upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.

Article 237

Import duties or export duties shall be repaid where a customs declaration is invalidated and the duties have been paid. Repayment shall he granted upon submission of an application by the person concerned within the periods laid down for submission of the application for invalidation of the customs declaration.

Article 239

1. Import duties or export duties may be repaid in situations other than those referred to in Articles 236, 237 and 238:

— 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 … may be made subject to special conditions.

2. Duties shall be repaid … 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.

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

TITLE VIII

APPEALS

Article 243

1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the Member States.

Article 245

The provisions for the implementation of the appeals procedure shall be determined by the Member States."

58. The appeal provisions referred to in art. 245 are implemented in domestic law by Part 1 Finance Act 1994 (and no point was taken by HMRC to the effect that it should be the VAT appeals law in sections 83ff VATA that applies in this case). As to the Implementing Regulation the relevant parts are:

"TITLE IV

REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES

…

CHAPTER 2

Implementing provisions relating to Articles 236 to 239 of the Code

Section 1

Application

Article 878

1. Application for repayment or remission of import or export duties, hereinafter referred to as 'application for repayment or remission', shall be made by the person who paid or is liable to pay those duties, or the persons who have taken over his rights and obligations.

Application for repayment or remission may also be made by the representative of the person or persons referred in the first subparagraph.

2. Without prejudice to Article 882, application for repayment or remission shall be made, in one original and one copy, on a form conforming to the specimen and provisions in Annex 111.

However, application for repayment or remission may also be made, at the request of the person or persons referred to in paragraph 1, on plain paper, provided it contains the information appearing in the said Annex.

Article 879

1. Applications for repayment or remission, accompanied by the documents referred to in Article 6(1) of the Code, must be lodged with the customs office of entry in the accounts, unless the customs authorities designate another office for this purpose; the said office shall transmit it immediately after acceptance to the decision-making customs authority if it is not itself designated as such.

2. The customs office referred to in paragraph 1 shall enter the date of receipt on the original and the copy of the application. It shall return the copy to the applicant.

Where the second subparagraph of Article 878(2) is applied, the said customs office shall acknowledge receipt in writing to the applicant.

Article 881

1. The customs office referred to in Article 879 may accept an application not containing all the information provided for on the

form referred to in Article 878(2). However, the application must contain at least the information to be entered in boxes 1 to 3 and 7.

2. Where paragraph 1 is applied, the said customs office shall set a time limit for the supply of any missing particulars and/or documents.

3. Where the time limit set by the customs office pursuant to paragraph 2 is not observed, the application shall be considered to have been withdrawn.

The applicant shall be informed of this immediately."

HMRC Guidance and publications

59. In their correspondence and Statement of Case HMRC have produced certain parts of their guidance to the public. We reproduce below the relevant parts:

60. **Notice 199 Section 7.4.1** - see §11:

"**7.4.1 Direct representation**

When you make a customs declaration acting as a direct representative on behalf of a principal i.e. the declarant, the principal will be liable for the customs debt. You and any sub-agent will have no liability for the customs debt.

The agreement between you and the principal must provide, either implicitly or explicitly, for the delegation of tasks to a sub-agent in order for the sub-agent to be empowered to represent the principal. If such a provision is absent, then the sub- agent will not be empowered to represent the principal in making a customs declaration. If he does nevertheless, the sub-agent may also become liable for customs debt."

61. **VAT Notice 702 Imports** - see §§21, 23 and 27:

"…

2.2 How import VAT is charged and collected

Goods are declared to Customs using form C88 Single administrative document (SAD) that in most cases is presented in an electronic format. Import VAT is dealt with in the same way as a Customs duty. You can pay it outright at importation, or under the duty deferment arrangements explained in Notice 101 Deferring duty, VAT and other charges which also covers Simplified Import VAT Accounting (SIVA). This is a scheme that reduces the level of financial security required to guarantee the payment of import VAT through the duty deferment system. Traders must be authorised to operate SIVA. See Notice SIVA 1 Simplified Import VAT Accounting for application details.

… The Cash accounting scheme shouldn't be confused with the Flexible Accounting Scheme (FAS). FAS may be used (by Director Trader (DTI) agents) to pay charges due on imported goods using an immediate payment method.

Details about the FAS scheme can be found in Notice 100 Customs Flexible Accounting System.

2.3 Who can reclaim import VAT as input tax

Subject to the normal rules, you can claim as input tax any import VAT you pay on goods, provided those goods are imported for the purpose of your business. Your claim must normally be made on the VAT return for the accounting period during which the importation took place.

The normal evidence of payment of import VAT is the import VAT certificate (form C79), which is issued monthly. Section 8 gives more information about the C79, as well as the acceptable evidence for those types of importation that at present don't appear on a C79. It also explains what to do if you lose a certificate or have any queries about items missing from certificates.

…

2.4 Can a shipping or forwarding agent reclaim input tax

If you act as a shipping or forwarding agent for an importer and pay or defer VAT on their behalf, it is a commercial arrangement between you and your principal. You can't claim the VAT as input tax because the goods aren't imported for the purpose of your business. Although HMRC usually deal with agents in relation to the importation and clearance of goods, it is the importer's responsibility to ensure that goods are properly entered, and that any Import VAT and other charges due are paid. Only the importer has the legal right to reclaim the VAT paid on imported goods as input tax, subject to the normal conditions being met.

2.5 What can I do as a shipping or forwarding agent if an importer doesn't pay me the import VAT

If an importer fails to pay you import VAT you paid on their behalf, your only recourse is to the importer, except where one of the following applies:

- the importer has gone into liquidation
- an administrator or administrative receiver has been appointed, who certifies that in their opinion, ordinary unsecured creditors will receive nothing in the liquidation

In such cases you may be able to recover amounts paid as tax from HMRC. All of the following conditions must be met:

- the interval between the date of the import entry for the goods and the date the importer became insolvent is no more than 6 months
- you entered the goods in accordance with instructions from the importer
- during their stay in the UK the goods were under your control and weren't used
- the goods have been re-exported in the same state as they were imported

To claim repayment you should write to the NDRC at Salford, enclosing:

- evidence that the import VAT has been paid to HMRC
- a certificate from the person in charge, for example, the liquidator, that the VAT hasn't been, and won't be, reclaimed as input tax
- within six months of Confirmation from the person in charge that the importer became formally insolvent the date the entry was lodged with HMRC
- a declaration that you won't recover the relevant VAT in whole or in part from the insolvency
- evidence to satisfy HMRC that you have acted in accordance with the importer's instructions

…

2.6 Claiming repayment of overpaid import VAT

Method of claiming repayment of overpaid import VAT - VAT registered, non VAT registered and non-fully taxable traders

Non VAT registered and non-fully taxable traders can claim overpaid customs duties and import VAT using form C285 Application for repayment/remission.

VAT registered traders can use form C285 to claim repayment of overpaid customs duties but must claim the equivalent of any overpaid import VAT as input tax on their VAT return subject to the normal VAT rules.

Current Month Adjustments (CMA)

Where the overpayment of customs duty or import VAT is made via your deferment account, you may (regardless of your VAT status) apply to have your deferment account adjusted to reflect the correct amount of duty or import VAT. Your request for CMA must be

made on form C285 and sent to the National Duty Repayment Centre (NDRC) at the address quoted under paragraph 2.5.

Current month adjustments can only be made in the month that the error occurs and therefore you must make your application for adjustment before the last day of the month in which the overpayment was made. Please ensure that you submit all supporting documents with your claim as there will be no time for further enquires to be made. If your application is received after the month end or without all supporting documentation it will be dealt with as a standard repayment. This means that if you are a VAT registered trader requesting the adjustment of overpaid import VAT your claim will be refused and you will have to claim the equivalent amount as input tax on your VAT return as explained above.

Repayments to agents

If an importer fails to pay you the import VAT that you paid on their behalf, your only recourse is to the importer, except in the circumstances set out in paragraph 2.5. If you need any further advice please contact the NDRC."

62. **Customs Information paper (11) 14** ("the CIP") - see §§8, 32 and 42 - reads:

"**Change to the process of claiming import VAT repayments**

Customs Information Paper (11) 14	
Who should read:	VAT registered traders involved in claiming overpaid import VAT via the National Duty Repayment Centre (NDRC) in Dover.
What is it about:	Change to process of claiming overpaid import VAT.
When effective:	1 March 2011.
Extant until/expires:	N/A

1. Introduction

Section 1 of the VAT Act 1994 provides for import VAT to be charged and payable as if it were a duty of customs. The application of this section does not extend to any other aspect of the Customs regime such as repayment or recovery of customs duties. In view of this, the repayment of Import VAT is governed by the usual VAT regime rules.

2. Change to the method of claiming Import VAT repayments

As claims for repayment of import VAT do not relate to the charge or payment of a customs duty, such claims should no longer be made using the customs repayment application forms C285 or C&E 1179.

All public notices and forms will be amended in due course to take this change into account.

With effect from 1 March 2011 all overpayments of import VAT should be re-claimed via the VAT return under the normal VAT rules. Any repayment claims for import VAT on a C285 or C&E 1179 received after this date will be refused.

This change in process is only for fully taxable VAT registered importers. It will not apply to non-VAT registered or partially exempt importers. Repayments for these groups can still be requested via the current system."

63. Because of the importance of the CIP we asked in post-hearing directions for submissions on the content of VAT Notice 702 as it stood before 2011 so that we could see the then equivalent parts to those quoted in §61. In the event this was not forthcoming (see §76 for the reason). From our own examination of the text of the VAT Notice as it stood then (obtained through the National Archives) we can see that in all the sections apart from section 2.6 the text of the Notice as in force in April 2010 was either identical or insubstantially different but to the same effect. But what 2.6 said then was:

"**2.6 Repayment of monies overpaid as import VAT**

General

Import VAT can only be reclaimed as input tax by a VAT registered importer. However, amounts overpaid as import VAT (for example, because of misclassification of the goods) are generally repayable to the person who paid the amount to HMRC, subject to certain conditions.

Repayments to VAT registered traders

If you have overpaid import VAT you can apply for the payment to be adjusted (see section 8). You or your agent must complete form C285 Application for repayment/remission and you must support the request with the written declaration:

"I am expecting direct repayment/partial repayment to be made, and no claim to input tax deduction has been, or will be made by me on the basis of the document as originally issued."

The written declaration must be signed by the sole proprietor, a partner or a responsible officer of the company. If the request is accepted, Customs will make the repayment.

> Customs do not normally make direct repayments of import VAT. However, if you do make a request for direct repayment, it will be processed through the duty adjustment system. VAT repayments are not given special priority, and you should carefully consider whether the money could be recovered more quickly through the normal input tax deduction system. If you use deferred payment arrangements a direct repayment cannot be made until the VAT has been paid by direct debit. However, you can apply for an incorrect deferred VAT transaction to be adjusted before payment is made by direct debit, if there is sufficient time within the deferment accounting period to allow for this. You should contact the EPU where the transaction was entered, who can advise you further on the timescales and processes for adjustments to be made to your deferment account.
>
> You may also make a claim for immediate repayment if you have been wrongly charged VAT because an incorrect Deferment Approval Number (DAN) has been quoted or keyed. You should submit your claim to the National Repayment Centre (see paragraph 2.5 for address).
>
> **Repayments to agents**
>
> If an importer fails to pay you the import VAT that you paid on their behalf, your only recourse is to the importer, except in the circumstances set out in paragraph 2.5. However, if you have overpaid import VAT (for example, because goods have been misclassified), you may be able to reclaim the amount overpaid if you can provide evidence that you have not been, and will not be reimbursed by the importer.
>
> If you need any further advice you should contact the National Repayment Centre."

We refer from here onwards to this April 2010 version as "the pre-CIP 2.6" and the version in §61 as the "new 2.6".

The grounds of appeal and the issues

64. In the Notice of Appeal the appellant maintained that:

> (1) HMRC requested a VAT disclaimer from the appellant and when it was supplied HMRC refused to pay the VAT to them, even though they informed HMRC that it was impossible for that to be done, and
>
> (2) they also made numerous attempts to chase progress of the claim, were told to be patient because of backlogs and were then told the claim was closed.

65. Ms Walker's skeleton argument for the application for strike out suggested that the grounds of appeal also included that:

> (1) HMRC has been unjustly enriched, and

(2) HMRC have provided misinformation to the appellant which led to an inability to reclaim the VAT.

66. HMRC's Statement of Case says that:

(1) as the importer, A-Sure Technology Ltd is VAT registered, import VAT is not repaid by NDRC but reclaimed on the importer's VAT return in the normal way. This is the position as set out in VAT Notice 702 paragraph 2.5 [*It is in fact in paragraph 2.6*] and had been the position since 2011 when CIP (11) 14 was released,

(2) VAT may be paid to freight forwarders and other agents only where importers go into liquidation etc and other formalities are met. This is set out in the Extra-Statutory Concession at paragraph 3.3 [*sic*] in VAT Notice 48, [*It is in fact paragraph 3.13*]

(3) as the appellant had entered into a commercial contract with A-Sure their recourse is to A-Sure, and

(4) the "disclaimer" referred to by the appellant was not one that allowed the agent to reclaim VAT: what the appellant was referring to was a letter from the importer saying that the appellant had the import's authority in respect of the customs declaration. [*The letter clearly disclaimed any deduction for VAT*]

67. Ms Walker's skeleton for the strikeout hearing before Judge Jones responded to the grounds of appeal she had teased out of the appellant's Notice of Appeal (§65) primarily by saying that neither ground was within the jurisdiction of this Tribunal.

68. We could also see that the ground in §65(2) might arguably be characterised as asserting that the appellant had a legitimate expectation that it would be paid the VAT paid in error.

69. We agree with HMRC that neither the provision of misinformation nor legitimate expectation are grounds of appeal that are within the jurisdiction of this Tribunal.

70. The ground in §64(1) gave us more pause for thought. The reason Mr Billany says HMRC has enriched itself is that HMRC accept that VAT was overpaid and should be refunded, but were not prepared to give proper effect to their obligation to refund. It offered to allow A-Sure to treat the overpaid VAT as input tax, but A-Sure had disclaimed it and by mid-2016 seemed to have disappeared from sight in the UK and was extremely unlikely to wish to go through the hoops, even if it was still able to, of reclaiming the amount overpaid. HMRC refused to repay the appellant even though A-Sure has asked it to.

71. It seems to us from this that there is an argument that HMRC's conduct infringes the principle of effectiveness in remedies as established by the Court of Justice of the European Union ("CJEU"). But, we asked ourselves, is what has happened really the correct outcome in law? There is little point in our examining the CJEU effectiveness principle if it is not engaged, ie if there is in fact an effective remedy in law. HMRC

would no doubt say that the appellant has not pleaded that HMRC is wrong in law and so they should succeed anyway.

72. But to leave matters there would not in our view serve the overriding objective of this Tribunal. Mr Billany is in effect a litigant in person. The appellant has made a claim for repayment of both the customs duty and the VAT that were charged on the same import on the grounds of an accepted mistake as to valuation of the goods in sterling which affected the amount of both the duty and the VAT. The appellant was repaid the duty after completing all formalities to HMRC's satisfaction. It was not repaid the VAT, and it has been given reasons for the non-repayment which rely entirely on statements and practices which do not have the force of law. There was no reference to the legal basis for the refusal in the letters from HMRC or in its Statements of Case or in Ms Walker's skeleton.

73. With a view to our finding out what that legal basis was (and so whether we needed to consider the principle of effectiveness) we directed after the hearing that HMRC should answer 15 questions which we put to them on HMRC's change of practice and the legal foundation for their actions. In doing so we were conscious that none of them was put forward by Mr Billany, but we are also conscious of what is said in [24] of Lord Neuberger's speech on 19 August 2016 on "[t]he role of the judge: umpire in a contest, seeker of the truth or something in between?" at the Singapore Panel on Judicial Ethics and Dilemmas on the Bench:

> "When it comes to points of law, it appears to me that, if a judge thinks that an argument which has not been raised could be raised, the right thing to do is normally to raise it, shortly and neutrally, as soon as possible with the parties. It should not be raised on the basis that it is the obvious answer to the whole case and the parties are idiots for not having seen it. That attitude smacks strongly of the judicial mind having been made up – and it carries the risk of judicial humiliation if the point turns out to be bad. Sometimes, however, it may be better to keep quiet – eg if it is pretty plain that, in order to enable the advocates to deal with the point, the hearing would have to be unacceptably adjourned. Again, a judge must be very careful of being prejudiced in favour of a point just because he raised it and the parties missed it."

74. Our questions set out in directions were as follows:

> 1 In periods before the issue of Customs Information Paper 14 of 2011 ("the CIP") what was HMRC's practice with respect to claims made for repayments of Customs Duty and Import VAT by a VAT registered importer?
>
> "Import VAT" here means VAT chargeable under s 1(4) Value Added Tax Act 1994 ("VATA").
>
> 2 If Notice 199 was available to the public immediately before the issue of the CIP, provide a copy of the version then available.

3 If VAT Notice 702 was available to the public immediately before the issue of the CIP, provide a copy of the version then available.

4 What does HMRC submit was the law in force immediately before the issue of the CIP that applied to claims to repayment of overpaid import VAT in general and by agents or representatives in particular.

5 What change in the law or other event or circumstances brought about the need to issue the CIP?

6 What consultation, if any, took place before the issue of the CIP, and who with?

7 What publicity was given to the change made by the CIP in addition to any announcement on HMRC's website, and who to?

8 Were any notes issued by HMRC before the issue of the CIP giving guidance about the completion of Form C285? If so provide a copy.

9 Were any notes, or revised notes, issued by HMRC after the issue of the CIP giving guidance about the completion of Form C285? If so provide a copy.

10 In HMRC's view does s 16 VATA have the effect that the Combined Customs Code in Regulation EEC/2513/92 ("the CCC") and the Implementing Regulation EEC/2454/93 apply to claims for repayment of overpaid import VAT as they apply to claims for repayment of customs duty under article 236 of the CCC?

We note in relation to this question that in oral submissions HMRC referred to the decision of this Tribunal in *Dnata Ltd v HMRC* [2016] UKFTT 682 (TC) (Judge Jonathan Richards and Mr John Robinson) ("*Dnata*"). In that decision the Tribunal declined to consider the argument whether art. 239 CCC was attracted by s 16 VATA 1994. But this Tribunal has in *Citipost Mail Ltd v HMRC* [2016] UKFTT 283 (TC) (Judge Ann Redston and Mr Julian Stafford) considered whether art. 220 CCC was attracted by s 16 VATA and concluded that it was, and what is more held that the whole of the provisions in the CCC relating to repayments and remissions were so attracted, as they were not excluded in the VAT Regulations. We find it somewhat surprising that in a case where the appellant was effectively a litigant in person that *Dnata* was referred to but this case was not.

11a If the answer to 10 is yes, explain why the appellant was repaid customs duty but not import VAT.

11b If the answer is no, explain why not, having regard to the express words of s 16(1) VATA.

12 Does HMRC say that s 80 VATA applies to any repayment of overpaid import VAT?

13 If a VAT registered importer pays an amount of import VAT and includes a credit for input tax under s 24(1)(a) in its VAT return for a period that includes the date of the customs entry, and after that period makes a valid claim for repayment of overpaid import VAT what entries do HMRC say the importer should make in its VAT account and return to reflect its entitlement to repayment of the overpaid tax?

14 What discretion, if any, do HMRC have to make a repayment of overpaid amounts of import VAT to an agent or representative who has been authorised by the importer to receive the payment, if not required by law to do so.

75. The directions asked for submissions on these questions by 1 September 2017, and gave the appellant a further week to make any representations if it wished to. HMRC sought an extension of three weeks which was granted by the Tribunal.

76. On 18 September HMRC's Solicitor's Office informed the Tribunal that HMRC "no longer intend to defend the above appeal. In light of this the Respondents respectfully inform the Tribunal that they do not propose to file any further submissions."

77. As a result the appeal falls to be allowed. But as no answer is given to the questions or reasons given to explain the volte face and in view of the fact that HMRC's arguments in this case were based on its published position in VAT Notice 702, we are issuing this decision for publication so that others in the same position as the appellant may now see the position in law as this Tribunal holds it to be.

Discussion

Our doubts as to the position in law

78. The main document that led us to asking for the post-hearing submissions was the CIP, and in particular section 1 which we repeat here:

> "Section 1 of the VAT Act 1994 provides for import VAT to be charged and payable as if it were a duty of customs. The application of this section does not extend to any other aspect of the Customs regime such as repayment or recovery of customs duties. In view of this, the repayment of Import VAT is governed by the usual VAT regime rules."

79. This raised the following questions in our mind:

(1) if "the application of this section does not extend to any other aspect of the Customs regime", what function do sections 1(4), 15 and 16 VATA (read with regulation 120 of the VAT Regulations) have?

(2) if "the repayment of import VAT is governed by the usual VAT regime rules" and "all overpayments of import VAT should be re-claimed via the VAT return under the normal VAT rules" (section 2, last paragraph, of the CIP), how is that to

be done? Is the amount of the repayment to be treated as if it were input tax (which it clearly isn't)?

(3) what is supposed to happen if the person who HMRC say can claim a refund is no longer able to do so?

(4) is it not rather more than a "change of process" when the effect is to deny the payer of the overpaid VAT any form of refund? and

(5) what event (court case, change in statute law or other matter) gave rise to the change?

80. It also seemed to us from the statements emanating from HMRC in this case that there were other relevant legal questions:

(1) is what is said in Notice 199 at 7.4.1 (see §11) a correct reflection of the law? If it is, why does it also not apply for import VAT given s 16 VATA?

(2) what is the authority for the statement in NDRC's letter of 15 September 2015 (§§16 & 17):

> "… overpayment of import VAT can no longer be claimed via the C285 by fully taxable VAT registered traders. *The equivalent amount can be included as input tax on the importers next VAT return*, supported by the VAT certificate C79 subject to normal tax rules." [our emphasis]

(3) what happens if, as in this case, the overpayment is not agreed until well after the "next" VAT return?

(4) if non-registered traders and partially exempt traders can reclaim overpaid import VAT directly and with the customs duty using Form 285 (New 2.6, first bold heading, paragraph 1), what is the legal authority for that and where in UK or EU law is it disapplied for fully taxable registered traders?

(5) if a fully taxable registered person can be refunded through their deferment account in a current month adjustment, what is the legal authority for that, if the law is as HMRC seem to say it is? and

(6) what authority is there for VAT law overriding the law of agency in a case where an agent has paid an amount on behalf of the principal but is denied a refund when most of that amount turns out to have been paid in error?

81. Those questions raised by HMRC's arguments led to us issue the post-hearing directions.

Our conclusions

82. Obviously we were expecting to set these out having considered HMRC's post-hearing submissions. But now we set out our conclusions after having attempted to answer our own questions.

83. The first and all-important question we have to decide is whether a claim for repayment of overpaid import VAT is one to which customs law applies. The authorities

listed for the hearing included one case relevant to this issue, *Dnata Ltd v HMRC* [2016] UKFTT 682 (TC) (Judge Jonathan Richards and John Robinson) ("*Dnata*") (which we referred to in our questions).

84. We do not think that *Dnata* assists. What the Tribunal said on the issue is:

> "47.
>
> …
>
> (2) Mr White [for the appellant] submitted that, although not expressly written into either the Excise Duty Directive or the Regulations, both Article 239 and Article 220(2)(b) could apply to excise duty, import VAT and customs duty.
>
> …
>
> 48.
>
> …
>
> (2) HMRC did not accept that Article 220(2)(b) or Article 239 apply for the purposes of excise duty. They accept that Article 220(2)(b) applies for the purposes of import VAT but submit that, despite the alignment of import VAT and customs duty for a number of purposes, Article 239 may not apply for the purposes of import VAT.
>
> …
>
> **Issue 8 – Whether Article 239 of the Code applies**
>
> 92. As we have noted, HMRC did not consider that Article 239 could apply for the purposes of excise duty. Mr Pritchard [*counsel for HMRC*] was more equivocal about the applicability of Article 239 to import VAT (noting that s 16 of VATA 1994 could be read as supporting the conclusion that Article 239 did apply) but his overall submission was that Article 239 did not apply to import VAT.
>
> 93. We will not make a decision on whether Article 239 was capable of applying to import VAT or excise duty since it is clear to us that, even if it could apply, the conditions necessary for any debt to be waived under Article 239 are not satisfied."

85. Thus the point was not decided by the Tribunal. At the hearing and in our post-hearing directions (Question 10) we drew attention to another recent case in this Tribunal, *Citipost Mail Ltd v HMRC* [2016] UKFTT 283 (TC) (Judge Anne Redston and Julian Stafford). This was a case where a waiver under art. 220 was in issue. The Tribunal said:

> "**Whether Article 220(2)(b) applies to import VAT**
>
> *The parties' submissions*

274. Mr White said that Article 220(2)(b) applies to import VAT by virtue of VATA s 1(4) and VATA s 16(1). The former provides that import VAT is to be "charged and payable as if it were a duty of customs" and the latter states that community customs law applies to import VAT, subject only "to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears." There was no such exception or adaptation here.

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

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

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

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

Discussion

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

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

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

86. This holding was not necessary for the decision but was fully argued. As a decision of this Tribunal it is not binding on us, but we find the analysis compelling and agree with it. It is the analysis we would and did come to unaided, and we apply it to a claim for repayment under art. 236 as the Tribunal in *Citipost* did to art. 220.

87. We are of the view that, given the terms of regulation 120 of the VAT Regulations (which was not cited to us, just as it was not to the *Citipost* Tribunal), we cannot see that it can realistically be argued that customs law does not apply to the claim under art. 236. The only question is whether there is something relevant in the customs law which is disapplied by VAT law.

88. The customs law on debts, their payment and repayment is in Title VII, Arts. 201 to 242 of the CCC and Part IV (Arts. 857 to 912) of the Implementing Regulation.

89. The only articles of Title VII of the CCC referred to in regulation 120 are 229(b) (interest payable on a customs debt), 232(1)(b), (2) and (3) (interest on arrears of duty) and 241, second and third sentences only (interest on certain repayments by the authorities), none of which are relevant. None of the articles of Part IV of the Implementing Regulation are disapplied.

90. HMRC repaid the appellant the overpaid customs duty on a claim under art. 236. It follows that it should also have repaid the appellant the VAT.

91. It seems to us that HMRC's approach to repayments of import VAT as set out in the pre-CIP 2.6 is also in accord with this holding of ours. But even this contains a statement which we do not understand, being:

> "However, if you do make a request for direct repayment, it will be processed through the duty adjustment system. VAT repayments are not given special priority, and *you should carefully consider whether the money could be recovered more quickly through the normal input tax deduction system.*" [Our emphasis]

92. This we assume is an alternative to providing a VAT disclaimer as set out in the pre-CIP 2.6. It seems to be saying that a VAT registered importer who would be using the goods in their business could recover the VAT overpaid by treating it as input tax. To us this raises a number of conceptual difficulties, particularly where the claim for repayment is made after the end of the prescribed accounting period in which the incorrect entry was made.

93. The pre-CIP 2.6 also permits a repayment of import VAT to be made to an agent where the agent has made the payment and the principal states that they will not be claiming (ie where the VAT disclaimer is made).

94. The C285 in this case coupled with the A-Sure letter fulfils all the requirements in pre-CIP 2.6 to enable a repayment to be made to the appellant. Under the pre-CIP version of paragraph 2.6 of VAT Notice 702 the appellant was in theory entitled to obtain recompense by claiming it as input tax, but such a claim would not have been possible for it because it did not use the goods in its business. There is ample authority (as well as the non-authoritative VAT 702 paragraph 2.4) for the proposition that an agent, be they a freight forwarder or another type of agent, cannot claim import VAT as input tax (and see regulation 100 VAT Regulations).

95. The new 2.6 changes the pre-CIP 2.6 by closing off the direct repayment method entirely for registered fully taxable traders and making what was the input tax option in pre-CIP 2.6 the only way in which a registered fully taxable trader can claim recompense. In so doing it omits any mention of the need for a VAT disclaimer. And by making input tax the only method of recompense for a fully taxable registered trader it makes it impossible for an agent to claim repayment even if they paid and have the authority to receive the repayment.

96. And yet even new 2.6 seems to allow a VAT registered trader, where even a small part of whose business is exempt, to claim a direct repayment even if the goods in question are acquired for, and the input tax wholly attributable to, the taxable part of its business.

On what basis is the input tax solution permitted?

97. HMRC's throwing in of the towel has left us with no explanation for the change made by the CIP, to make the input tax route compulsory for VAT registered wholly taxable traders, and therefore impossible for agents such as the appellant in this case.

98. But we cannot leave this case without explaining what our conceptual problems are with claiming input tax as a substitute for a direct repayment, as they exist to some degree even if, as we hope, HMRC revert to the position set out in pre-CIP 2.6. We take it as a given that an amount purporting to be VAT which is overpaid because it is not in fact payable is not VAT (see eg *Genius Holding BV v Staatssecretaris van Financiën* (Case C-342/87) [1991] STC 239). That this applies even in a case where the payer and the person seeking to deduct input tax is the same person can be seen from a reverse charge case in the CJEU, *Tibor Farkas v Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága* [2017] EUECJ C-564/15.

99. Take a simple example.

100. Suppose (ignoring agency issues)

(1) a fully taxable VAT registered trader imported goods on which import VAT of, say, £10,000 was paid by them on 15 November 2016 in their prescribed accounting period of the three months to 31 December 2016,

(2) on 30 November they realise that because of a mistake the VAT should have been £1,000,

(3) in accordance with VAT 702 paragraph 2.6 (current version) they understand that the £9,000 overpayment cannot be repaid directly and is to be claimed only as input tax,

(4) the VAT return is prepared on 31 January. The certificate (C79) required as evidence of the input tax (regulation 29(2)(c) VAT Regulations) shows VAT of £10,000 so that amount is included in the return, and

(5) the correct tax that should have been shown on the C79 is £1,000, so if they show £10,000 as input tax that is it seems to us incorrect.

101. Is new 2.6 (and pre-CIP 2.6 for that matter) saying that the £9,000 should be included as input tax as part of the £10,000 even though that is incorrect in law? This gives the "right" result in financial terms which is that the trader had a liability to pay £1,000 and to claim £1,000 as input tax but has paid £9,000 too much and reclaimed that £9,000 through its returns as if it were input tax.

102. Or is HMRC saying that the trader is entitled to deduct £10,000 on the basis of the C79 *and* another £9,000? The absurdity of that result shows that HMRC must have intended the treatment set out in §101. But that still leaves us with an uncomfortable feeling that what HMRC is suggesting be done is not in accordance with the law.

103. Our concerns mount when we consider a slightly more complex scenario.

104. Suppose (again ignoring agency issues):

(1) a fully taxable VAT registered trader imported goods on which import VAT of, say, £10,000 was paid by them on 15 November 2016 in their prescribed accounting period of the three months to 31 December 2016,

(2) on 7 February 2017 they file their VAT return for 12/16 in which the input tax includes the £10,000,

(3) on 20 February they realise that because of a mistake the VAT should have been £1,000,

(4) in accordance with VAT 702 paragraph 2.6 (current version) they understand that the £9,000 overpayment is to be claimed only as input tax, and

(5) they have already claimed input tax of £10,000.

105. The position in law is that their 12/16 input tax claim is now shown to be overstated. They are required by regulation 34 VAT Regulations to make a correction in their VAT account and next return which will have the effect of increasing their VAT liability for 03/17 by £9,000. If they do that and pay the £9,000 the overall result will be that they have paid £19,000 (£10,000 on 15 November 2016 and £9,000 in the 03/17 return) and they have had relief for £10,000 as input tax in the 12/16 return. The obvious way of ensuring neutrality here is to repay £9,000 overpaid, but that is not possible under new 2.6. Instead new 2.6 says they must make an input tax claim under normal rules. But how is such a claim lawful? Would not HMRC be justified in seeking penalties under Schedule 24 Finance Act 2007 for an incorrect return?

106. If the wrongly paid VAT was more than £50,000 then the adjustment to the return mechanism would not be available, and a voluntary disclosure followed by assessment of the overpaid tax (and possibly penalties) would follow. The economic result is the same as in §105, and the same issues regarding the £9,000 overpaid arise.

107. These conceptual difficulties reinforce us in our view that CIP (11) 14 was fundamentally misconceived.

108. There seem to us to be two major errors committed by HMRC in this case, and in promulgating CIP (11) 14.

109. They are wrong to say that the "normal VAT system", the system of making periodic returns of output tax ("O") and input tax ("I") and paying the balance, if O>I, or receiving repayment, if I>O, applies to the charge to VAT on imports from third countries. This is made clear beyond doubt by section 1(4) VATA and by numerous other parts of the "normal VAT system". One example is that there is nothing in the VAT return that relates to the accounting for and payment of import VAT. This is because "output tax" is defined in s 24(2) VATA to mean:

> "VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above)."

110. Section 24(1)(b) deals with acquisition for another Member State. By contrast s 24(1) defines "input tax" as including "VAT paid or payable by him on the importation of any goods from a place outside the member States".

111. The second major error HMRC make is to confuse a repayment of VAT paid in error with a credit for input tax. In the "normal VAT system" input tax is deal with in sections 25 and 26 VATA. Repayments of VAT paid in error are dealt with in s 80 VATA. The two things are wholly separate.

112. Input tax which arises under s 24(1)(c) VATA because it has been charged on an importation by a registered trader may be deductible on the same basis as any input tax on goods acquired domestically, the primary test being whether it was incurred for the purpose of making taxable supplies. But that input tax is tax which was correctly payable.

113. Because we hold that the appellant does have a remedy, a repayment of the VAT it wrongly paid, we do not need to consider whether the new 2.6 system contravenes the principle of effectiveness. Our provisional view is that it would, and it may be that this is behind HMRC's volte face.

Decision

114. The appeal succeeds and HMRC must repay the overpaid import VAT to the appellant.

115. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 06 OCTOBER 2017