TC06182

Appeal number: TC/2016/06324

CUSTOMS DUTY & VALUE ADDED TAX – goods entered for Inward Processing customs procedure – desk audit showing that (1) unauthorised customs codes used on some occasions (2) appellant did not put its name and EORI in box 2 of export declaration – whether post-clearance demand notes correct – held yes for (1), no for (2) – whether penalty properly imposed for alleged failure in (2) – held no – appeal partly allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CORPORATE MESSENGERS WORLDWIDE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DEREK SPELLER FCA

Sitting in public at Taylor House, London EC1 on 5 September 2017

Miss Rita Ajibulu-Moniya, director, for the Appellant

Jennifer Thelen, instructed by the Solicitor and General Counsel of HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Corporate Messengers Worldwide Ltd ("the appellant") against a post-clearance demand for customs duty of £7,782.70 and Import VAT of £143,047.49, and against a penalty charged under s 26 Finance Act 2003 of £1,000.

2. The demands for duty and tax arose from two types of error said to have been made by the appellant in operating a special procedure for goods imported from outside the EU and intended for export outside the EU after they had undergone processing in the EU, ie in the UK. The penalty was charged for contravention of the rules relating to this procedure in respect of one of the errors.

3. We have decided that the demand note is correct in relation to one of the errors but not the other and must be reduced. We have quashed the penalty.

How much is at stake?

4. We were somewhat disturbed by a footnote in Ms Thelen's skeleton argument. In connection with the total amount charged by the post clearance demand note (C18) of £150,930.19 she said:

> "Of this, £143,047.49 was import VAT which can be reclaimed by the appellant. Thus, the "out of pocket" cost to the appellant of the debt is £8,782.80 (£7,782.70 customs duty + £1,000 penalty".

5. This point is not referred to in HMRC's Statement of Case ("SoC"), but was mentioned indirectly in a letter from HMRC to the appellant giving the conclusions of the statutory review, where Michelle Dunn, an officer of HMRC, said:

> "The decision to issue the C18 … must be **upheld**.
>
> I appreciate that this is not the outcome that you were hoping for, but can find no grounds on which to overturn the decision.
>
> Please note that once the C18 has been paid, a C79 form will be issued, allowing you to **reclaim** the Import VAT, subject to the normal input VAT rules." [HMRC's emboldening]

6. The clear implication of the footnote in the skeleton is that this is not nearly as important a matter as it might have appeared, given that the net cost to the appellant is just over 5% of the total sought. It also seemed to us to carry the implication to the appellant that the case was hardly worth fighting and to the Tribunal that the case was a far less serious matter for the appellant than it might appear. We are not saying that those implications were intended.

7. What we infer from the passage we have quoted in the review conclusions letter, with its emphasising of the word "reclaim", is that once the C79 form was issued, the large VAT element would be reclaimable.

8. We noted that the appellant is stated to be a freight forwarder, and that in an email to HMRC Miss Ajibulu-Moniya, the director of the appellant, made it clear that

it does not buy and sell goods and does not import and export goods belonging to themselves. HMRC's VAT Notice 702 (Imports) carries at section 2.4 the clear statement that a freight forwarder or agent cannot claim import VAT they pay as input tax because the goods are not imported for the purpose of their business. This is a reference to the rules in s 26 Value Added Tax Act 1994 and in particular regulation 100 of the Value Added Tax Regulations 1995 (SI 1995/2518).

9. Because of this we asked HMRC if they would give the Tribunal an undertaking that if we upheld the C18 Demand Note they would repay the import VAT by allowing it as input tax to the appellant. They declined to give any undertaking at the hearing, but after it the Solicitor's Office of HMRC emailed Judge Thomas, through the Tribunal, to say:

> "You asked me whether I would be prepared to give an undertaking to the Tribunal or the Appellant, either as principal or on behalf of the Commissioners, to the effect that the Appellant would be repaid the import VAT component of the disputed C18 as input tax, if the Appellant files a VAT return claiming credit for it.
>
> I have considered your request and I must respectfully decline to give an undertaking.
>
> While the Appellant has paid the C18, the Appellant has not yet filed a VAT return claiming repayment of the input tax. As I am sure you can appreciate, HMRC cannot give a guarantee that a claim will be successful before it has been considered. If, when the Appellant's claim for input tax comes to be made, it transpires that there is some other, currently unknown, reason that the Appellant is not entitled to credit for the input tax, such an undertaking would prevent HMRC from having regard to it.
>
> At the hearing, HMRC gave the assurance that those with conduct of this case are not aware of any reason that the Appellant would not be entitled to reclaim the import VAT as input tax. That is the extent of the assurance HMRC considers it is able to offer the Appellant under the circumstances. However, given that the Appellant was previously able to reclaim input VAT in similar circumstances, and has not itself raised any concerns that it would be unable to do so here, I do hope that this assurance sufficiently addresses the concerns you raised at the hearing."

10. After the recess for lunch Ms Thelen supplied us and the appellants with *Nu-Pro Ltd v HMRC*, a recent decision of this Tribunal cited as [2017] UKFTT 562 (TC) (Judge Peter Kempster) in relation to the import VAT point we had raised at the start. At [140] that decision says:

> "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)."

11. We do not think this helps us, as we do not know what the VAT status of the appellant was vis-à-vis the goods in that case or what was said to Judge Kempster about VAT.

12. Because of the clear statement by HMRC in the email after the hearing, we do not expect them, in relation to the VAT that remains due after our decision, to seek to take any point based on VAT Notice 702 to deny input tax credit to the appellant.

13. We further note (see §58) that Mr Evans, HMRC's witness, when talking about the penalty charged on the appellant in this case, categorised the infractions as "a serious error" given the "the significant amounts of duty and VAT at stake". We would have taken the revised view of the net amount of tax and duty at stake into account when considering the question of the penalty, had we not decided to quash it.

The evidence

14. We had three large ring binders of documents with over 1,000 pages. These included the Notice of Appeal; HMRC's SoC; the Respondents' documents consisting of correspondence with attachments, reports of visits by HMRC and the statutory notices etc; the appellant's documents (correspondence from the appellant with attachments); and correspondence with the Tribunal.

15. The documents bundle also contained a witness statement from Mr Henry Obetoh, a manager with the appellant. Mr Obetoh gave his evidence in chief by reading out his statement. He was cross-examined by Ms Thelen, but it soon became obvious that Miss Ajibulu-Moniya was in a better position to answer many of the questions. Accordingly we allowed, with Ms Thelen's consent, either Miss Ajibulu-Moniya or Mr Obetoh, and sometimes both, to answer the questions. We accept the evidence of both of them as from witnesses doing their best to assist the Tribunal and telling the truth.

16. We also had two witness statements from Mr Christopher Evans, an officer of HMRC. Mr Evans' first statement was a factual account of his actions during the "holistic examination" he carried out. Mr Evans' second statement was put in to explain certain aspects of IP and to expand on the reasons he came to the conclusions he did. We find Mr Evans was also doing his best to assist the Tribunal and telling the truth. He was however somewhat evasive both to Miss Ajibulu-Moniya and to us about a particular statement he had made, which we consider later.

Inward processing – background & law

17. This case involves a special customs procedure known as inward processing ("IP") relief. It is convenient to set out information and the law about IP relief here, as it is the detailed law and procedures that the appellant is said to have contravened.

18. IP relief allows customs duties and VAT to be suspended or refunded on imports of goods from outside the EU which are processed inside the EU and then re-exported. It is available if used on more than a few sporadic occasions only to traders specifically authorised for it by their national tax authority. There are two methods of relief: suspension and drawback. In this case relief was given by

suspension, ie no duty or VAT is was charged on import, but it becomes due if the goods are released onto the EU market.

19. Until May 2016 the legal position for IP relief was governed by Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code ("the CCC").

20. Articles 84 and 85 provide:

> "*Article 84*
>
> 1. In Articles 85 to 90:
>
> (a) where the term 'procedure' is used, it is understood as applying, in the case of non-Community goods, to the following arrangements:
>
> — external transit;
>
> — customs warehousing;
>
> — inward processing in the form of a system of suspension;
>
> — processing under customs control;
>
> — temporary importation;
>
> (b) where the term 'customs procedure with economic impact' is used, it is understood as applying to the following arrangements:
>
> — customs warehousing;
>
> — inward processing;
>
> — processing under customs control;
>
> — temporary importation;
>
> — outward processing.
>
> …
>
> *Article 85*
>
> The use of any customs procedure with economic impact shall be conditional upon authorization being issued by the customs authorities."

21. Article 87 provides:

> "*Article 87*
>
> 1. The conditions under which the procedure in question is used shall be set out in the authorization.
>
> 2. The holder of the authorization shall notify the customs authorities of all factors arising after the authorization was granted which may influence its continuation or content."

22. Article 114 provides

"**D. Inward processing**

I . General

Article 114

1. Without prejudice to Article 115, the inward processing procedure shall allow the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products, without such goods being subject to import duties or commercial policy measures;

(b) goods released for free circulation with repayment or remission of the import duties chargeable on such goods if they are exported from the customs territory of the Community in the form of compensating products.

2. The following expressions shall have the following meanings:

(a) suspension system: the inward processing relief arrangements as provided for in paragraph 1 (a);

(b) drawback system: the inward processing relief arrangements as provided for in paragraph 1 (b);

(c) processing operations:

— the working of goods, including erecting or assembling them or fitting them to other goods,

— the processing of goods, and

— the repair of goods, including restoring them and putting them in order;

— the use of certain goods defined in accordance with the committee procedure which are not to be found in the compensating products, but which allow or facilitate the production of those products, even if they are entirely or partially used up in the process;

(d) compensating products: all products resulting from processing operations;

(e) equivalent goods: Community goods which are used instead of the import goods for the manufacture of compensating products;

(f) rate of yield: the quantity or percentage of compensating products obtained from the processing of a given quantity of import goods."

23. Article 118 provides:

"III. Operation of the procedure

Article 118

> 1. The customs authorities shall specify the period within which the compensating products must have been exported or re-exported or assigned another customs-approved treatment or use. That period shall take account of the time required to carry out the processing operations and dispose of the compensating products.
>
> 2. The period shall run from the date on which the non-Community goods are placed under the inward processing procedure. The customs authorities may grant an extension on submission of a duly substantiated request by the holder of the authorization.
>
> For reasons of simplification, it may be decided that a period which commences in the course of a calendar month or quarter shall end on the last day of a subsequent calendar month or quarter respectively.
>
> 3. Where Article 115(1)(b) applies, the customs authorities shall specify the period within which the non-Community goods must be declared for the procedure. That period shall run from the date of acceptance of the export declaration, relating to the compensating products obtained from the corresponding equivalent goods.
>
> 4. Specific time limits may be laid down in accordance with the committee procedure for certain processing operations or for certain import goods."

24. The detailed implementation rules for certain provisions of the Customs Code is set out in Commission Regulation (EEC) No. 2454/93 of 2 July 1993 ("the Implementing Regulation").

25. 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."

26. 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:

(a) reference particulars of the authorisation;

(b) the quantity of each type of import goods in respect of which discharge, repayment or remission is claimed or the import goods entered for the arrangements under the triangular traffic system;

(c) the CN code of the import goods;

(d) the rate of import duties to which the import goods are liable and, where applicable, their customs value;

(e) the particulars of the declarations entering the import goods under the arrangements;

(f) the type and quantity of the compensating or processed products or the goods in unaltered state and the customs-approved treatment or use to which they have been assigned, including particulars of the corresponding declarations, other customs documents or any other document relating to discharge and periods for discharge;

(g) the value of the compensating or processed products if the value scale method is used for the purpose of discharge;

(h) the rate of yield;

(i) the amount of import duties to be paid or to be repaid or remitted and where applicable any compensatory interest to be paid. Where this amount refers to the application of Article 546, it shall be specified;

(j) in the case of processing under customs control, the CN code of the processed products and elements necessary to determine the customs value.

3. The supervising office may make out the bill of discharge."

27. We set out the UK law in relation to customs debts and penalties in the Appendix.

Findings of fact

28. In this section we set out the findings of fact we make from the documents and the evidence of the three witnesses. Those set out in §§29 to 67 are not, so far as we can see, disputed. Later in §§68 to 86 we deal, among other things, with matters arising in cross-examination.

The authorisation

29. On 3 October 2014 HMRC informed the appellant (whose reference is given as "Greg Morley Smith") that its application for an IP authorisation had been approved, valid for the period 1 September 2014 to 30 April 2016.

30. The letter asked the appellant to read HMRC's Public Notice ("PN") 221. As a separate matter it seems, although it was contained in the same sentence which used a

comma splice, the appellant was told that the first use of the authorisation number would be deemed confirmation that they understood and would comply with the conditions of the approval.

31. The letter further informed the appellant that the appellant would be responsible for the duty and associated charges on all goods entered and processed and for ensuring records were kept detailing the processing operations carried out.

32. The letter stressed that the authorisation number must be quoted on all import transfer and export declarations, and that if they used an agent to complete declarations they must ensure that clear written instructions are given to them, which should include the IP authorisation number and the appropriate IP customs procedure code (CPC) to be used on the C88 (SAD) declarations.

33. It added that the HMRC Supervising Office must be informed of any changes which may influence the continuation or content of the authorisation, and that any request for an amendment must be made immediately.

34. The terms and conditions were then set out. We refer to these in detail where necessary later.

35. Under the heading further information it mentioned that:

(1) The appellant was responsible for ensuring an application to renew is made at least 30 days before expiry of the existing one.

(2) Use of the authorisation is subject to the conditions laid down in the CCC and the Implementing Regulation.

(3) It is subject to HMRC's right to vary it.

(4) Failure to comply with any of the conditions could lead to a civil penalty being imposed, and the appellant was directed to Notice 301.

(5) Public Notice 221 could be viewed and downloaded from HMRC's website.

36. For some reason that is not clear to us the notice indicated what the appellant's rights of appeal were against the decision to authorise them.

37. The authorisation letter referred to an attached "CE810" which gives precise details of the authorisation and is referred to extensively in setting out the terms and conditions.

38. Although it was not included in the bundle with the authorisation letter, we found from the appellant's documents a copy of the application for IP authorisation which is in fact the C&E810. In this:

(1) At box 1 the appellant name is shown as the applicant and it gives its EORI (Economic Operator Registration Identification) as 760 882704 000. The contact is given as Greg Morley-Smith whose email is greg@chordline.co.uk.

(2) At box 7 it sets out a list of 9 types of goods to be processed with their Commodity Codes ("CCs") and an estimate of the quantities and values. The four largest categories by value are computer equipment, computer terminals, watches and pharmaceutical products.

(3) Box 9 gave details of the processing to be carried out which was "repacking".

(4) The economic code to be used was Code 30(3). This code refers to "Goods subject to a usual form of handling" which includes packing and unpacking.

(5) The discharge procedures to be used were "Full declaration".

39. The C&E810 was dated 8 July 2014 and was accompanied by a letter from Miss Ajibulu-Moniya which was a letter of authority for Greg Morley-Smith of Chordline Ltd to act directly with HMRC for the application. It gives the appellant's EORI (as above).

40. On 11 November 2014 HMRC's National Import Reliefs Unit in Enniskillen wrote to the appellant about the appellant's use of IP with a Simplified Authorisation ("SIP"). The appellant was told that SIP was designed for occasional use only, with a maximum of 10 uses in a 12 month period, whereas in the period from 17 December 2012 to 17 December 2013 the appellant had made use of SIP on 44 occasions. The appellant was informed that it should apply for IP authorisation or, if it already holds one, to use that for future imports. They informed the appellant that it could continue to use SIP until 11 February 2015. [*The appellant had of course been authorised before the date of this letter*]

41. On 4 February 2016 HMRC's CITEX Operations in Nottingham wrote to the appellant to explain that from 1 May 2016 the Union Customs Code would replace the CCC in relation to Customs Procedures with Economic Impact of which IP was one. The letter explained that as a transitional measure its IP authorisation was extended to 31 August 2017 and the authorisation number changed.

The audit visit

42. On 19 October 2015 HMRC's Individuals and Small Business Compliance, International Trade & Excise unit in Nottingham informed the appellant that its request dated 30 April 2015 to amend the IP authorisation by the addition of 6 further CCs was agreed, with retrospective effect from the date of application. As before, the notice indicated what the appellant's rights of appeal were against the decision to authorise them to use further CCs.

43. On 26 November 2015 Kathy Lyall of CITEX Operations, Individuals and Small Business Compliance (ISBC), using a PO Box in Bootle, confirmed the date of a visit by her to the appellant's premises for 15 December 2015 and gave a list of the entries required to be available for her audit and other documents. The appellant was warned that "Penalty" [*her capitalisation*] action might be taken in cases of non-compliance with customs formalities.

44. In the same tab in the bundle there are what appear to be Ms Lyall's conclusions of her audit and her notes about her visit. These show Ms Lyall's view of the appellant included:

> (1) All paperwork relating to goods is maintained and documents requested were all provided for testing. Trader was able to establish an audit trail for the movement of IP goods, from their initial import through to disposal.
>
> (2) One entry was tested and it was identified that the CC declared was not on the authorisation list. A CPWL [Civil penalty warning letter] was to be issued for this irregularity.
>
> (3) The trader had a good knowledge of IP and their responsibilities. Every effort is made to ensure IP regulations are adhered to.
>
> (4) Trader demonstrates good knowledge of IP and Customs procedures overall.

45. On 2 February 2016 a Customs CPWL was issued for the CC infraction which it said was contrary to arts. 6, 7, 85 to 87 and 90 of the CCC and Arts. 505 to 508 of the Implementing Regulation. The appellant was it said liable to a penalty of up to £1,000 in accordance with the Customs (Contravention of a Relevant Rule) Regulations 2003 ("CCRRR"), but that on that occasion the Commissioners of [*sic*] Revenue & Customs had decided not to charge a penalty.

46. However, it went on, if similar errors were found within the next two years the Commissioners might charge a penalty without further warning. The appellant was directed to Notice 301. The CPWL indicated what the appellant's rights of appeal were against the decision not to charge a penalty.

47. On 3 February 2016 Ms Lyall wrote to the appellant in relation to her audit visit of 15 December 2015. She explained that "overall the systems and procedures in place appear to be satisfactory for Customs International Trade Audit purposes". She went on to explain how the error is using CCs might be avoided and what the appellant's responsibilities were.

The holistic examination by Mr Evans

48. On 23 June 2016 Mr Christopher Evans, an officer of Revenue and Customs in Individuals and Small Business Compliance, wrote to the appellant. This letter said that he had recently undertaken a review of the appellant's IP Suspension Bills of Discharge (C&E812) for the period 21.09.2011 to 31.03.2014. His review "holistically examines" imports to the IP regime and he had identified a number of issues that required the appellant's immediate attention.

49. Mr Evans gave no indication in this letter why he had carried out this review, though he said he was aware of Ms Lyall's visit and the error she had discovered.

50. His letter identified five areas of concern:

(1) On two occasions the C&E812 showed a CPC that was not proper to IP suspension, on 17 and 19 November 2014.

(2) Only one bill of discharge should be received [*by HMRC presumably*] each quarter. [*The letter does not indicate how often the appellant was sending them to HMRC or whether this was contrary to the rules governing IP*]

(3) CCs for which the appellant was not authorised had been used. The appellant was asked to request additional code authorisation if needed.

(4) On three occasions the appellant was shown as the consignee of goods which have not been shown on the C&E812s. The letter asked how the goods had been disposed of. Mr Evans indicated his intention to raise a post clearance demand note (C18) to recover the customs duty and VAT on these items.

(5) Mr Evans could not identify any evidence of any of the goods on the bills of discharge being exported from the EU. He could only identify movements of goods between the countries outside the EU, so he wanted evidence of how the goods moved from the UK to outside the EU for the import entries on a schedule he attached. Mr Evans indicated his intention to raise a post clearance demand note (C18) to recover the customs duty and VAT on these items.

51. He then summarised the charges due broken down between unauthorised commodity code, imports omitted from returns and insufficient evidence of export from the UK. He then asked for comments and said that in the absence of a response within 30 days he would instruct the National Payments Centre Salford to issue a C18 for £150,830.19.

The ensuing correspondence

52. Miss Ajibulu-Moniya responded by email on 6 July 2016. She admitted a mistake over incorrect CPCs (§50(1)) and periods of return (§50(2)). On unauthorised CCs (§50(3)) she said that this was due to items being entered for import before arriving at the appellant's warehouse. They had explained this to Ms Lyall who had told them to request further codes which they had now done (and which was agreed in a letter from Individuals and Small Business Compliance, CITEX Authorisations and Returns Team on 1 August 2016).

53. As to imports into IP not shown on bills of discharge (§50(4)), Miss Ajibulu-Moniya said that these were genuine inexplicable omissions due to human error. She attached evidence of export from the UK.

54. On the question of insufficient evidence of re-export (§50(5)) Miss Ajibulu-Moniya explained that the appellant is a freight forwarding company which does not buy and sell goods and does not import and export goods belonging to themselves. They do not themselves import goods - these are imported by Nigerian customers who use the UK for cost and security reasons and the appellant repacks the goods under the IP procedures. For the avoidance of doubt we add that we find as a

fact that what Miss Ajibulu-Moniya said about the way the appellant operates is a true statement of what they do do.

55. The appellant could not see any error in what they had done. As far as they were aware the NES [National Export System] entry was always regarded as sufficient proof of export.

56. In conclusion Miss Ajibulu-Moniya pointed out that the appellant was inexperienced in IP relief and under the circumstances a warning letter would be appropriate.

57. Mr Evans responded on 4 August 2016. His view had not been changed by any of the information the appellant had given him or her explanations and he intended to cause the C18 to be issued. However he took the view that the errors identified in §50(4) were also cases where one or other of the errors in §50(3) or (5) applied and so the customs debt now related to two types of error, not three, though with the same amount due. He notified the appellant of their appeal rights.

58. Under separate cover Mr Evans wrote to the appellant about penalties and said that:

> "following an intervention recently undertaken by myself, it was identified that the company has contravened the following conditions of its [IPR authorisation]:
>
> Unauthorised removal from Customs Supervision."

That he said was a breach of art. 203 CCC. Because of the significant amounts of duty and VAT at stake this was classed as a serious error and that HMRC "may go direct to penalty without having first issued a [CPWL]." The maximum penalty for incorrect declarations was £2,500 per contravention, but he had decided to charge £1,000.

59. In coming to that figure Mr Evans took into account that no evidence had been presented to him for the movement of goods to the airport of departure under cover of the export declaration. A legal entity not established in the UK had been declared as an exporter of the goods when it should have been the authorisation holder or an approved processor.

60. The error affected "100% of" the 36 imports "declared to the Inward Processing regime."

61. On 26 August 2016 HMRC National Clearance Hub, Belfast, issued the C18 post-clearance demand note in the sum of £150,830.19. The covering letter notified the appellant of their appeal rights.

62. On 30 August 2016 the appellant requested a review of the issuing of the C18.

63. On 20 October 2016 Michelle Dunn, the reviewing officer, upheld Mr Evans' decision.

64. On 27 October 2016 a notice of assessment of a penalty of £1,000 for a serious error (the category or type of contravention shown on the notice) was issued to the appellant. It said that:

> "You have failed to comply with your legal requirements as detailed below."

65. In a box with a heading "Description of Contravention" the notice said:

> "Christopher Evans undertook an International Trade Assurance audit of your records on 23/06/2016 covering the period 1st September 2014 – 31st December 2015 and identified that your company has failed to comply with the conditions of your Inward Processing Relief Authorisation IP/0904/485/17 in that you have failed to properly discharge your liability under the Inward Processing regime."

66. The notice notified the appellant of their appeal rights.

67. On 15 November 2016 the appellant gave a Notice of Appeal to the Tribunal against the C18 demand note and the penalty assessment.

Mr Evans' evidence

68. Miss Ajibulu-Moniya questioned Mr Evans on two paragraphs of his first witness statement:

> "5. I could not find any of the appellant's exports of their goods imported under the Inward Processing CHIEF system to demonstrate the discharge of duty liability for the import entries.
>
> 6. In addition, the documentation filed along with the bills of discharge showed only goods moving between two non-European Union countries. As a result I was not able to verify that the Appellant had exported their Inward Processing goods."

69. She asked him whether the information on the bills of discharge, import reference numbers and export reference numbers would not have allowed him to verify the export. Mr Evans merely repeated that because the appellant's EORI number was not shown in the right place on the export declarations, he could not see that the goods had been exported. He continued to repeat this mantra when we asked him further questions on this point, including why he did not run other types of search on the CHIEF system. He remained unmoved and continued to evade the questions.

70. In re-examination he said that the information he had found on the system did not give him sufficient customs supervision.

71. We find as fact from these exchanges that the only check Mr Evans made to verify the re-export out of the EU was by reference to box 2 on the export declaration where he did not find the appellant's EORI.

Mr Obetoh's evidence

72. Mr Obetoh was a senior freight administrator at the appellant and had been employed there since 2005.

73. His evidence was that one of his and his department's duties was to complete export declarations and in all the time he had been doing them he had never been told by HMRC of any inadequacy for the purposes of IP relief.

74. Nor had he or anyone in his department been told that the export declarations were insufficient proof of export from the EU.

75. He said that HMRC's claim that failure to provide an EORI number on export declarations was having "a serious detrimental impact to the operation of customs procedures" was misleading, because "as the declarant you have to use an EORI" and he always quoted the appellant's EORI.

76. Not every exporter, he said, has an EORI which was why goods can be declared as "GBUNREG" or "GBPUNREG" or "UNREG" with the country code eg "CHUNREG" for China.

77. He further said that CHIEF is designed in such a way that an export entry will not be validated if all the relevant boxes are not completed and/or if conflicting information is provided.

78. He responded to a point in HMRC's SoC where they said that "goods may easily disappear and enter free circulation without the necessary duties or taxes being paid on them". He said that may be the case if the goods are not at the port or airport at the time of declaration but in their case they clearly state on the export declarations where the goods are and so HMRC have every opportunity to inspect the goods should they so desire, so that the goods cannot possibly enter free circulation without HMRC's knowledge.

79. Finally he said for every export declaration they receive responses from HMRC which are either:

(1) Route 1 – meaning HMRC wish to inspect the paperwork

(2) Route 2 – meaning HMRC wish to inspect the goods.

(3) Route 6 –meaning goods which did not go Routes 1 or 2 so HMRC have given permission for the goods to be exported without inspecting the paperwork or any physical inspection

(4) Route 3 – meaning goods may be exported after a Route 1 or Route 2 inspection.

80. In the appellant's case Mr Obetoh said that he could categorically state that all the goods they have exported have been given Route 6 or Route 3 responses.

81. In cross-examination of Mr Obetoh (which, as we have noted, included Miss Ajibulu-Moniya's answers to the questions where more appropriate) Ms Thelen asked

about the use of unauthorised commodity codes and why it took the appellants until April 2016 to seek the issue of new ones when they had been told by Ms Lyall about unauthorised codes in December 2015.

82. Miss Ajibulu-Moniya replied that they often did not know about the CCs because goods were entered and left at their premises without their being able to check the CCs entered beforehand. In any case she said there was no deadline for getting new codes. She also said that customers told them they would pay the duty if there was any problem.

83. She agreed that the appellant was responsible for using only authorised codes.

84. As to the export evidence point she agreed that Route 6 was automated and that there was no review by HMRC.

85. Ms Thelen asked if the appellant referred to Notice 221 and the Integrated Tariff and Miss Ajibulu-Moniya said they did, and agreed it was said in the authorisation that they should.

86. We find as fact the answers given in §82, §84 and §85.

The law

87. We have set out above the relevant parts of the CCC and Implementing Regulation which deal with IP.

88. As far as a customs debt itself is concerned, the relevant parts of the CCC and regulation are set out in the Appendix, together with the law relating to penalties and to appeals against both.

The appellant's submissions

89. Miss Ajibulu-Moniya addressed each type of error reflected in the demand notes separately, but did not in terms address the penalty.

Unauthorised commodity codes

90. The appellant admitted that goods appropriate to such CCs had been entered for IP. But the main reason for this was the import declarations were done without the appellant's knowledge when goods were delivered to them by carriers such as DHL or TNT. The appellant was not aware that "this could be changed". The request for authorisation for these goods should have been granted retrospectively to cover them.

No evidence of export

91. The appellant says that HMRC were wrong to say that there was no proof of export for the following reasons (as attested to by Mr Obetoh and confirmed by Miss Ajibulu-Moniya):

(1) NES entries were done for every shipment that left the UK with the appellant as declarant (therefore the appellant's EORI was used).

(2) The appellant was not obliged to put their details in box 2 of the NES entry. This is supported by page 12 of HMRC's Export Entry Trade User Guide and Part 1 Volume 3 of the UK Tariff which states "unless they own or have a right of disposal over the goods forwarders agents and carriers … must not enter their details in this box".

(3) Not every exporter has an EORI (see Mr Obetoh's evidence).

(4) CHIEF would not accept an entry if all relevant boxes were not complete and the information accurate.

(5) It was not possible for goods to enter free circulation if they were at the airport where HMRC could inspect them.

(6) Every export was made following "permission to progress" by the respondent.

Case law

92. Ms Thelen also produced two CJEU cases which she said may be considered to support the appellant's position, and which she felt it her duty to bring to the tribunal's attention. These were Case C-480/12 *Minister van Financiën v X BV* [2014] ECLI:EU:C:2014:329 ("*X*") and C-319/14 *B & S Global Transit Centre BV* [2015] ECLI:EU:C:2015:734 ("*B & S*").

HMRC's submissions

93. Ms Thelen divided her submissions of law on the facts into three parts, the demand for duty on account of the use of unauthorised commodity codes, the demand for duty on account of no proof of export and the penalty.

Unauthorised commodity codes

94. It was a breach of the appellant's IP authorisation to use CCs for which authorisation had not been obtained, or if obtained subsequently, without retrospective effect to the date of breach. The appellant had admitted the breach and its subsequent application for the appropriate CCs was not retrospective to the date of breach. This then was a breach of Article 204 of the CCC.

95. It was not possible, as the appellant argues, to apply the 2016 application for more CCs retrospectively. PN 221 does permit retrospection, but says that a second application is unlikely to be granted because to commit a second breach would be evidence of obvious negligence.

96. Art. 859 of the Implementing Regulation does not help the appellant as none of the failures that may be regarded as not having significant effect on the correct operation of IP procedure in question is present here, and in any event there was obvious negligence.

No evidence of export

97. There was no evidence of re-export from the EU of the goods imported for IP because box 2 on the export declaration did not include the appellant's EORI number

as the consignor/exporter. It included details of a non-EU entity, ie the person whose goods were subject to IP.

98. This was not a simple clerical error. Without the EORI of the EU registered party HMRC cannot track the goods and ensure they are not released for free circulation within the EU duty free. The appellant's multiple failures to do this had a serious detrimental effect on the operation of customs procedures, as set out in Mr Evans' first witness statement.

99. Failure to list itself as the exporter of the goods it had taken into IP meant there was no link to prove the re-export. Accordingly there was a customs debt due under art. 203, as PN 221 explains.

100. The appellant's argument that the details in box 17a of the ED show the goods moved from the UK to Nigeria and that paragraph 8.7 of PN 221 permits this misses the point. The fact that other information showed the export does not detract from the error over box 2.

101. Nor is it relevant that they had never exported goods without HMRC permission. That is a reference to the automatically generated approvals issued by the CHIEF system. They are not approvals to export (as Mr Evans shows): they are generated automatically by reference to risk criteria.

102. There is nothing in the appellant's evidence and argument from it that it had never been told on previous inspections that it had exported goods without permission. It is an experienced logistics company and had used SIP since 2010, and it had of its own free will entered a heavily regulated business. It was its responsibility to pay due care and attention to its obligations, and it was not HMRC's job to monitor the compliance of every importing and exporting company.

Penalty

103. The penalty of £1,000 (the maximum being £2,500) was due because there was a breach of arts. 85 and 87 CCC so that the CCRRR applied. In this case the breach was a failure to provide evidence of export, ie to include the EORI number in box 2. Because of this failure goods were not being properly controlled at export and given this and the amount of tax and duty at stake, it was a "serious error".

104. The appellant is wrong to suggest that a warning letter would have been the appropriate course. The appellant relies on the Notice 301 about civil penalties for customs contraventions. The policy there applies only where there had been no previous warning letter, but there had been in this case.

105. A penalty may also be removed where there is a reasonable excuse, but here the compliance history and lack of explanation for the error shows there was none, nor any mitigating circumstances.

Case law

106. In relation to the demands Ms Thelen cited Joined Cases C-430/08 and C-431/08) *Terex Equipment & others v HMRC* [2010] ECR I-321 ("*Terex*") and Case C-262/10 *Döhler Neuenberg GmbH v Hauptzollamt Oldenburg* [2012] EU:C:2012:559 ("*Döhler*") for the proposition that IP is an exceptional measure to facilitate the carrying out of certain economic activities and involves obvious risks to the correct application of customs legislation and the conditions must be strictly complied with. She also cited *F. W. Parrett Ltd v HMRC* [2017] UKFTT 0493 (TC) (Judge Abigail McGregor) to show that "ignorance of the obligations is no defence".

> "removal from customs supervision must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation"

Discussion

107. A customs debt can arise post-clearance under two articles of the CCC, art. 203 and art. 204. The difference between them is that art. 203 is in absolute terms whereas art. 204 does not apply if it is established that those failures have no significant effect on the correct operation of the customs procedure in question, a phrase that is defined in art. 859 of the Implementing Regulation. Article 203 takes precedence, as art. 204 can only apply if art. 203 does not.

108. In this case HMRC accept that art. 204 applies to the use of unauthorised CCs, but say that art. 203 applies to the "no evidence of export" contravention. Of course it would not be necessary to decide which applies, if the "no significant effect" let out would not apply.

Unauthorised Commodity Codes

109. Art. 204 CCC says (irrelevant material omitted):

> "1. A customs debt on importation shall be incurred through:
>
> (a) 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, or
>
> (b) non-compliance with a condition governing the placing of the goods under that procedure …,
>
> … unless it is established that those failures have no significant effect on the correct operation of the … customs procedure in question."

110. The first question is what is meant by a "condition" in paragraph 1(b). Article 85 says:

> "The use of any customs procedure with economic impact shall be conditional upon authorization being issued by the customs authorities."

111. Thus we have to consider the appellant's authorisation to see if it is limited to certain CCs so that the placing of goods under IP where the CC of the goods in question is not one for which the appellant is authorised.

112. The appellant's authorisation set out in HMRC's letter of 3 October 2014 does not itself list any CCs. It says that when completing a Single Administrative Document, the SAD, the CCs shown in box 31 must correspond to those stated on the C&E 810. The C&E 810 is the application form and that does list certain CCs.

113. Further CCs were approved in the amended authorisation of 19 October 2015 and we are satisfied that the CCs questioned by Mr Evans in 2016 were not ones for which the appellant was authorised.

114. On the face of it therefore a customs debt had been incurred unless the failures to use an authorised CC have no significant effect on the correct operation of the IP. To see if this is the case we must consider art. 859 of the Implementing Regulation (irrelevant material omitted):

> "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:
>
> …
>
> 5. in the case of goods … placed under a customs procedure, unauthorized movement of the goods, provided the goods can be presented to the customs authorities at their request;
>
> 6. in the case of goods … placed under a customs procedure, removal of the goods from the customs territory of the Community … without completion of the necessary formalities;
>
> …
>
> 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; …"

115. That art. 859 is an exhaustive definition of what constitutes failures with no significant economic impact can be seen from art. 860.

116. We agree with Ms Thelen that the failures here do not fall within any of the relevant types of failure in paragraph 5, 6 or 9 of art. 859. We do not then need to consider whether there was obvious negligence.

117. No part of the appellant's argument is relevant here. Whether to allow retrospection when amending an authorisation, and how far, is a decision that is within the discretion of HMRC, and this tribunal has no jurisdiction to adjudicate on it. We add that even if we did have some sort of supervisory jurisdiction we cannot see that the decision not to allow retrospection for a second time was flawed in any judicial review sense.

118. We therefore consider that a customs debt was incurred in relation to these failures. It is not disputed that the appellant is the person liable to pay the debt when demanded, and that is clearly the effect of art. 204.3.

No evidence of export: wrong name and EORI in box 2 assumed

119. In this part of the discussion we assume that HMRC are correct to say that the appellant should have entered their own details and EORI number in box 2 of the export declaration.

120. For article 203 to apply, the goods in question must have been removed from "customs supervision". That concept was discussed in *Terex* and in the two subsequent cases which Ms Thelen drew to our attention.

121. In *Terex* the goods had been included in IP and when certain of the goods were re-exported outside the EU:

> "[16] … customs agents acting on behalf of Terex or purchasers inserted code 10 00 into the export declarations, indicating the export of Community goods, instead of code 31 51 used for the re-export of goods for which duties are suspended."

122. The discussion of the CJEU in the case is particularly important and is set out here in full:

> "33 By these questions, which it is appropriate to consider together, the national courts seek, in essence, to establish whether the use in the export declarations of code 10 00 indicating the export of Community goods, instead of code 31 51 used for the re-export of goods which are under the inward processing procedure, should be regarded as a removal of the goods from customs supervision and as incurring a customs debt pursuant to Article 203(1) of the Customs Code.
>
> 34 Under Article 203(1) of the Customs Code, a customs debt on importation is incurred through the unlawful removal from customs supervision of goods liable to import duties.
>
> 35 According to the case-law of the Court, removal from customs supervision must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation (see Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 47; Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55; Case C-337/01 *Hamann International* [2004]

ECR I-1791, paragraph 31; and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47).

36 Since that term is not defined by the Community legislation, Article 865 of the Implementing Regulation contains examples of acts which are to be regarded as constituting removal from customs supervision for the purposes of Article 203(1) of the Customs Code (see *D. Wandel*, paragraph 46).

37 Pursuant to the first paragraph of Article 865 of the Implementing Regulation, the presentation of a customs declaration for goods, or any other act having the same legal effects, are to be regarded as removal of those goods from customs supervision within the meaning of Article 203(1) of the Customs Code, where those acts have the effect of wrongly conferring the customs status of Community goods on the goods concerned.

38 In that regard, the national courts, Terex and also Wilson and Caterpillar consider that the use of customs code 10 00 indicating the export of Community goods, instead of code 31 51 used for the re-export of goods which are under the inward processing procedure does not alter the customs status of the goods concerned, which should still be regarded as non-Community goods. They had not been released for free circulation, which would have conferred on them, in accordance with Article 79 of the Customs Code, the status of Community goods. It is not sufficient, for the purpose of applying Article 865 of the Implementing Regulation, that the use of customs code 10 00 merely created the false impression that they were Community goods.

39 That interpretation cannot be accepted.

40 Article 865 of the Implementing Regulation covers a situation in which declarations confer on goods the status of Community goods which they cannot be deemed to have, so that non-Community goods are removed from the customs supervision which the Customs Code, and in particular Article 37 thereof, imposes on them

41 In that regard, emphasis must be placed on the particular characteristics of the inward processing procedure and the role played, in particular, in that context by the use of the correct customs code for the purposes of assessing whether or not the use of a code indicating the export of Community goods affects the monitoring abilities of the customs authorities.

42 It must be observed, first of all, as the Commission of the European Communities maintains, that the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying out of certain economic activities 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.

43 The obligation under Article 182(3) of the Customs Code to lodge a customs declaration bearing the correct customs code indicating that there is a re-export of goods that were under the inward processing procedure is of particular importance for customs supervision in the framework of that customs procedure.

44 The objective of the use of the customs code indicating the re-export of goods under the inward processing procedure is to ensure effective monitoring by the customs authorities and to give them the power to identify, solely on the basis of the customs declaration, the status of the goods concerned without the need for subsequent assessments and findings. That objective is particularly important since the goods which are introduced into the customs territory of the Community remain under customs supervision, pursuant to Article 37(2) of the Customs Code, only until such time as they are re-exported.

45 Therefore, the objective of the use of the customs code indicating the re-export of Community goods under the inward processing procedure is to permit the customs authorities to decide at the last minute to carry out a customs check pursuant to Article 37(1) of the Customs Code, namely to check whether the re-exported goods in fact correspond to the goods placed under the inward processing procedure.

46 Consequently, the use of customs code 10 00 in the export declarations at issue in the main proceedings erroneously conferred the status of Community goods on the goods concerned and therefore directly affected the ability of the customs authorities to carry out controls pursuant to Article 37(1) of the Customs Code.

47 In these circumstances, the use in the export declarations of customs code 10 00 indicating the export of Community goods instead of code 31 51 used for the re-export of goods under the inward processing procedure must be classified as 'removal' of those goods from customs supervision (see, by way of analogy, *British American Tobacco*, paragraph 53).

48 Furthermore, as regards the possible lack of customs supervision during the period concerned, such a situation is not a factor excluding the application of the concept of removal from customs supervision. According to the case-law, for there to be removal from customs supervision, it is sufficient that the goods in question have been objectively removed from possible controls, whether or not such controls have actually been carried out by the competent authority (see *British American Tobacco*, paragraph 55).

49 Finally, the view that that interpretation of Article 203(1) of the Customs Code wrongly attributes the character of a disproportionate penalty to that article cannot be accepted.

50 As pointed out in paragraph 42 of this judgment, the beneficiaries of the inward processing procedure are required to comply strictly with their obligations under that procedure. Moreover, since the goods at issue were exported as Community goods, they might potentially be re-imported into the Community as returned goods within the meaning of Article 185 of the Customs Code without import duties being due.

123. Article 865 of the Implementing Regulation, which was not cited to us by HMRC, says:

> "*Article 865*
>
> The presentation of a customs declaration for the goods in question, or any other act having the same legal effects, and the production of a document for endorsement by the competent authorities, shall be considered as removal of goods from customs supervision within the meaning of Article 203 (1) of the Code, where these acts have the effect of wrongly conferring on them the customs status of Community goods.
>
> However, in the case of airline companies authorised to use a simplified transit procedure with the use of an electronic manifest, the goods shall not be considered to have been removed from customs supervision if, at the initiative or on behalf of the person concerned, they are treated in accordance with their status as non-Community goods before the customs authorities find the existence of an irregular situation and if the behaviour of the person concerned does not suggest any fraudulent dealing."

124. There is no indication in the Implementing Regulation or in the judgment in *Terex* that art. 865 is illustrative rather than exhaustive. So the question here is whether the act in question, not putting the appellant's EORI in box 2 of the export declaration, had the effect of wrongly conferring on the goods the customs status of Community goods. Nothing in Mr Evans' witness statement or HMRC's Statement of Case and skeleton and oral submissions suggested that the error had that effect or why it had that effect.

125. We have considered whether there is anything in the two cases given to us by Ms Thelen that helps us. In *X* the CJEU said of the facts:

> "23 On 26 October 2005, X made an electronic application for a diesel engine to be placed under the external Community transit procedure. The deadline by which that engine should have been presented at the office of destination was set at 28 October 2005.
>
> 24 That engine was presented to that office only on 14 November 2005, that is to say, 17 days after expiry of the time-limit prescribed, and was placed under the inward processing customs procedure with the application of the drawback system. The customs office in question, after accepting that application, found that the previous customs procedure, namely, the external Community transit procedure, had not been properly terminated and invalidated that placement.
>
> 25 After apprising X of that situation, the inspector responsible ('the inspector') gave X the opportunity to provide proof that it had completed the customs procedure properly, proof which it could not provide. The inspector therefore concluded that the engine at issue in the main proceedings had been removed from customs supervision, within the meaning of Article 203(1) of the Customs Code. On that basis, it requested that X pay customs duties and turnover tax.

126. It then considered whether art. 203 applied:

> "As regards, more specifically, the concept of unlawful removal from customs supervision, referred to in Article 203(1) of the Customs Code, it should be borne in mind that, in accordance with the Court's case law, that concept must be interpreted as covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the Customs Code (Case C-66/99 *D. Wandel* EU:C:2001:69, paragraph 47; Case C-371/99 *Liberexim* EU:C:2002:433, paragraph 55; and *Hamann International* EU:C:2004:90, paragraph 31).
>
> 35 In the light of that interpretation, it is clear that, as the Advocate General observed at points 42 and 43 of his Opinion, even though the location of the goods at issue in the main proceedings remained unknown for more than two weeks, which may mean that the inability to give access to those goods is more than merely temporary, nonetheless, according to case-law, the application of Article 203 of the Customs Code is justified where the disappearance of the goods entailed a risk of entry into the economic networks of the European Union (see, to that effect, *Liberexim* EU:C:2002:433, paragraph 56, and Case C-300/03 *Honeywell Aerospace* EU:C:2005:43, paragraph 20).
>
> 36 The presence, on the customs territory of the European Union, of non-Community goods 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, a risk which Article 203 of the Customs Code contributes to preventing (see, by analogy, Case C-234/09 *DSV Road* EU:C:2010:435, paragraph 31).
>
> 37 As is clear from the order for reference, the goods in question were indeed presented to the office of destination 17 days late. Therefore, it is undisputed that those goods have not entered the economic networks without having been cleared through customs. It follows that, subject to verification by the referring court, it seems inconceivable that Article 203 of the Customs Code could apply to the facts at issue in the main proceedings."

127. We take from this that "forming part of the economic networks of the Member States" (at [36]) would necessarily involve that the status of Community goods was conferred on them.

128. In *B & S* the facts were:

> "On 3 July 2006, 13 August 2007 and 18 December 2007, B & S, a provider of logistical services, submitted, as principal, electronic declarations for foodstuffs to be placed under the transit procedure. Those declarations designated each time the customs office of Moerdijk (Netherlands) as the office of departure, and, respectively, those of Bremerhaven (Germany), Antwerp (Belgium) and, again, Bremerhaven as the offices of destination.

> 14 On 4 August 2006, 26 September 2007 and 24 January 2008, the customs office of departure notified B & S that it had received neither the necessary return copies nor the electronic confirmations of receipt. Following that office's request to furnish proof that those procedures had been correctly ended, B & S submitted a number of commercial transport documents, referred to as 'bills of lading'.
>
> 15 In response to an enquiry notice issued by the tax inspector of the Netherlands fiscal authorities (Inspecteur van de Belastingdienst) ('the Inspector'), the customs offices of destination stated that no goods or corresponding transit documents had been submitted to them. In those circumstances, and taking the view that the commercial documents produced by B & S did not comply with Article 365 or 366 of the implementing regulation, so that the transit procedures could not be regarded as having ended, the Inspector, relying on Article 203 of the Customs Code, issued, on 24 May 2007, 1 July 2008 and 4 November 2008 respectively, demands for payment of customs duties by B & S, on the ground that the latter had removed the goods concerned from customs supervision."

129. The judgment in relation to the application of art. 203 said:

> "With regard more particularly to the concept of removal from customs supervision, referred to in Article 203(1) of the Customs Code, it must be borne in mind that, in accordance with the Court's case-law, that concept is to be interpreted as covering any act or omission the result of which is to prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and from carrying out the monitoring required under Article 37(1) of the Customs Code (judgment in *DSV Road*, C-187/14, EU:C:2015:421, paragraph 25).
>
> 29 It is sufficient, for there to be 'removal from customs supervision', for the goods in question to have been objectively removed from possible controls, whether or not such controls have actually been carried out by the competent authority (judgment in *SEK Zollagentur*, C-75/13, EU:C:2014:1759, paragraph 32).
>
> 30 In the light of the case-law cited in paragraphs 25 to 29 of the present judgment, it must be stated that a situation such as that at issue in the main proceedings, described in paragraphs 23 and 24 of the present judgment, comes within the scope not of Article 204 of the Customs Code, but of Article 203 thereof.
>
> 31 As the Advocate General observed in points 25 and 26 of his Opinion, the obligation, laid down in Article 96(1)(a) of the Customs Code, for the holder under a transit procedure to present the goods at the customs office of destination plays a crucial role for the functioning of customs supervision in the context of such a procedure since, in accordance with Article 92(2) of that code, their presentation enables the customs authorities to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.

32 Therefore, in a situation such as that in the main proceedings, a failure to comply with the obligation to present the goods at the customs office of destination before they leave the customs territory of the European Union prevents the competent authorities from performing one of the customs controls referred to in Article 37(1) of the Customs Code, namely that provided for in Article 92(2) of that code, a control which is decisive for the functioning of the transit procedure in that it enables those authorities to establish whether the transit procedure has ended correctly. Such a failure amounts to removal from customs supervision, for the purposes of Article 203 of the Customs Code, where the requirements of Article 365(3) or 366(2) and (3) of the implementing regulation, allowing such a procedure to be regarded as having ended notwithstanding the failure to present the goods at the customs office of destination, are also not fulfilled.

33 In so far as the European Commission maintains that removal from customs supervision is precluded in the present case because the goods at issue in the main proceedings were under the supervision of the customs authorities until they left the customs territory of the European Union, it must be stated that, by failing to fulfil its obligation under Article 96(1)(a) of the Customs Code to present those goods at their respective customs offices of destination before they left the customs territory of the European Union, B & S removed those goods from customs supervision before they had even left that territory.

34 Moreover, the mere fact that the goods at issue in the main proceedings left the customs territory of the European Union does not preclude a failure to comply with the obligation to present those goods at their respective customs offices of destination from being classified as 'removal from customs supervision', resulting in a customs debt being incurred on the basis of Article 203 of the Customs Code. The Court has already found there to be such removal notwithstanding the fact that the goods concerned do not improperly enter the economic network of the European Union.

35 Thus, in the judgment in *Hamann International* (C-337/01, EU:C:2004:90), the Court held, as is apparent in particular from paragraphs 21 to 24, 32 and 36 thereof, that, having regard to the circumstances of the case giving rise to that judgment, the failure to comply with the obligation to place goods under the transit procedure amounted to removal from customs supervision for the purposes of Article 203 of the Customs Code, even though the goods concerned had left the territory of the European Union. In the judgment in *SEK Zollagentur* (C-75/13, EU:C:2014:1759), the Court considered, as follows in particular from paragraphs 18 and 33 of that judgment, that the temporary removal of the transit document from the goods listed therein had to be characterised as 'a removal of those goods from customs supervision', within the meaning of that article, even though the goods concerned had correctly entered the economic network of the European Union by being released for free circulation.

36 Moreover, it should be noted that, in a situation in which the goods have been taken out of the customs territory of the European Union, the financial nature of the import duties does not preclude a customs

> debt from being incurred on the basis of Article 203(1) of the Customs Code, since Article 239 of that code provides for the repayment or remission of duties legally owed, subject to certain conditions (see, to that effect, judgment in *Hamann International*, C-337/01, EU:C:2004:90, paragraph 34).
>
> 37 Finally, the finding in paragraph 30 of the present judgment can also not be called into question by the argument set out by the referring court and put forward by B & S that it follows from the judgment in *X* (C-480/12, EU:C:2014:329) that the failure to comply with the obligation to present the goods at issue in the main proceedings at their respective customs offices of destination does not lead to a customs debt being incurred on the basis of Article 203 of the Customs Code since the removal of those goods from the territory of the European Union eliminated the risk that they would improperly enter the economic network of the European Union.
>
> 38 It is apparent from paragraph 37 of that judgment and the facts set out relating to the case giving rise to the judgment that the latter concerned an instance in which the goods at issue were presented, although late, at the customs office of destination. The goods at issue in the main proceedings were, by contrast, not presented at their respective customs offices of destination enabling the authorities to establish that the transit procedure ended correctly.

130. The appellant in *B & S* fell within the ambit of art. 203 because of a failure to present the goods at the customs post of destination.

131. In this case we do not see how, unlike in *Terex* and *B&S*, there can have been an objective removal from customs controls of the goods. There was no physical removal nor any failure to present nor any use of a wrong CPC that could have led to the goods acquiring Community goods status. We agree with the appellants when they point out that nothing in what they did could have led to objective removal from Customs supervision or to the conferring of that status.

132. Accordingly we do not consider the appellant's failure to put their EORI in box 2 of the export declaration falls within art. 203.

133. The question then is whether that failure falls within art. 204. To do so it must amount to either non-fulfilment of one of the obligations arising from the use of IP or non-compliance with a condition governing the placing of the goods under IP.

134. We therefore consider again the authorisation. Under "disposal of goods" the authorisation letter says that the "main compensating products" (which means simply the goods after processing) must be put to an eligible disposal within the time laid down in the authorisation. Eligible disposals are listed and include relevantly "re-export/export outside the EC [*sic*]". If the authorised person had access to CHIEF they could do this by an electronic declaration. The letter also says that "Full NES export declaration" was required, with no simplifications.

135. Thus there is nothing in the authorisation that requires the entry in box 2 in the ED to show the appellant's EORI.

136. Is it then non-fulfilment of an obligation arising from use of IP? The main relevant obligation in IP is to produce a Bill of Discharge within the appropriate throughput time (art. 521 of the Implementing Regulation). There is no complaint by HMRC of a failure to do that.

137. In fact HMRC did not argue that art. 204 applies, having put all their eggs in the art. 203 basket.

138. Accordingly we find that art. 204 does not apply either. The closest HMRC seem to get to an art. 204 failure is that set out in art. 859.6 of the Implementing Regulation, a failure to complete necessary formalities before removing goods from the EU. Even if that were the case in relation to these goods (and we do not think it is) we would be inclined to say that there was no obvious negligence.

No evidence of export: was the wrong name and EORI in box 2?

139. Although in the circumstances we do not need to address the point, we have looked at the arguments put forward by the appellant that their completion of the export declaration was correct.

140. An example of the document in question was given in the bundle and referred to in her skeleton by Ms Thelen. The document identifies itself as "HMCE [*sic*] SAD Copy 3" with a heading in five languages, the English version of which is "Export Declaration".

141. The document starts by saying that it is a Single Administrative Document (SAD) Copy 3 equivalent containing information declared to and accepted by CHIEF on the date shown in section A. The reference number in section A is a customs allocated unique number for the declaration.

142. The entries include (the italicised words in [..] explain the codes etc in accordance with Annex 38 to the Implementing Regulation):

(1) Box A: Office of export: London (Heathrow) – AI.

(2) Box 1: Declaration – EXD. [*Export outside the EU and EFTA*]

(3) Box 2: Consignor/Exporter - CAUNREG, then "Citizen Watch Company of Canada" with an address in Canada.

(4) Immediately below box 2 is box 14: Declarant/rep - GB760882704000 [*this is the appellant's EORI*], then "Corporate Messenge" with its address in Greenford, Middlesex.

(5) Box 17a: Country of Destination – NG. [*Nigeria*]

(6) Box 30: Location of goods – GBLHR.

(7) Box 33: Comm Code – 91021100.

(8) Box 37: Procedure – 3151000. [*re-export of IP goods*]

(9) Box 40: Summary declaration/previous document - Z-380-INV:1512306. [invoice with number]

(10) Box 44 Additional information includes: IPS/Goods – LIC99 and Documents/Certificates/Authorisations 9DCR – 5GB76088270400 [*after '5' this is the appellant's EORI*] – 316026, 9MCR – A:57431711570 and C601 IP/0904/485/16. [*this is the appellant's IP authorisation number*].

143. Title I Part C of Annex 37 to the Implementing Regulation gives instructions for completion of the form. In relation to box 2 it says:

> "Box 2: Consignor/Exporter
>
> Enter the full name and address of the last seller of the goods prior to their importation into the Community.
>
> Where an identification number is required, the Member States may waive provision of the full name and address of the person concerned.
>
> Where an identification number is required, enter the EORI number referred to in Article 1(16). If an EORI number has not been assigned to the consignor/exporter, enter the number requested by the legislation of the Member State concerned.
>
> …"

144. In relation to box 14 it says:

> "Box 14: Declarant/Representative
>
> Enter the EORI number referred to in Article 1(16). Where the declarant/representative does not have an EORI number, the customs administration may assign him an ad hoc number for the declaration concerned.
>
> Enter the full name and address of the person concerned. If the declarant and the consignee are the same person, enter the word consignee.
>
> To designate the declarant or the status of the representative, use the relevant Community code from Annex 38."

145. The appellant's submissions referred in this context to Volume 3 of the UK Tariff. Part 1 sets out "[t]he Law". Ms Thelen had drawn our attention to paragraph 1.3.4 which says that :

> "All exporters and other parties involved in international trade need to quote their EORI number. There are some exceptions to this. Further information is available from the EORI Home Page on the HMRC website at [website]"

146. The paragraph Ms Ajibulu-Moniya was referring to in her submissions is paragraph 1.9.14 b), notes for completion of a SAD, and in relation to box 2 it says:

> "(i) Definition of exporter. The exporter is the person on whose behalf the export declaration is made and who owns the goods or has a similar right of disposal over them at the time when the declaration is accepted.

> (ii) Where ownership or right of disposal belongs to a person established outside of the EU, pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the EU (Commission Regulation 2454/93 Article 788(2)). For example, the UK seller would be entered as exporter/consignor in respect of ex-works sales and the name and address of the overseas buyer entered as additional information into box 44 of the declaration (see AI codes under general statements in appendix C9).
>
> Unless they own or have a right of disposal over the goods, forwarders, agents and carriers such as airlines and shipping lines must not enter their details in this box."

147. We have found as a fact (see §54) the appellant is a forwarder or agent and because of this we accept that they do not own or have a right of disposal to the goods which it subjects to IP. It follows that Miss Ajibulu-Moniya was quite correct to say, both in correspondence with HMRC and before us, that the appellant could not lawfully use box 2 in the SAD for their details and EORI.

148. The history and development of the box 2 issue is revealing and needs setting out in some detail.

149. On 23 June 2016 Mr Evans said that he could not trace the export of IP goods by the appellant – he did not at that stage refer to the export declaration or box 2.

150. On 6 July 2016 the appellant emailed Mr Evans to give him the information about the way it operated as agent or forwarder.

151. On 4 August 2016 Mr Evans replied saying that the appellant had not declared itself as the exporter of goods, and as a direct consequence they had not properly moved the goods to the airport of exit and they had unlawfully removed the goods from Customs supervision.

152. In their review application of 30 August 2016 the appellant said that they had followed the correct procedure, giving documents to support that. They were ignored in the singularly poorly constructed and argued review conclusions letter of 20 October 2016.

153. The SoC at paragraph 18.iv sent to the appellant on 2 February 2017 repeated the conclusions of Mr Evans about the EORI in the wrong box (thereby failing to show evidence of export).

154. On 23 February 2017, the author of the SoC, Mr Street of HMRC's Solicitor's Office, sought to find out the detail of the appellant's grounds of appeal as he could not possibly see what their case could be, as he was looking at a box 2 without their EORI number in it.

155. Miss Ajibulu-Moniya responded, on 27 March 2017, in a measured and polite way, to explain yet again that they had quoted their EORI *as declarant* and explained

why for example CANUNREG was shown as the EORI for the exporter. [Our emphasis]

156. In his second witness statement dated 23 August 2017 Mr Evans stressed again that box 2 "should have had the Appellant's EORI number, correctly identifying the Appellant as the exporter". He follows by explaining that, by not putting their EORI in box 2, the appellant could cause goods to easily disappear and enter free circulation. Exports and imports are filed, he says, on the system according to EORI numbers and officers run reports for traders based on their EORI number.

157. He goes on to say:

> "Since the appellant had not declared themselves as the consignor/exporter, none of their exports appeared on the report. Given this, you [ie the Tribunal] can see why the Appellant's multiple failures to provide an EORI number is considered by the Respondents as having a serious detrimental impact to [*sic*] the operation of customs procedures"

158. Amazingly in the next paragraph he sets out paragraph 1.19.4 of the UK Tariff (see §147).

159. The text of Mr Evans' second witness statement described and quoted in §§156 and 157 was repeated in Ms Thelen's skeleton arguments, but she did not refer to the passage from the UK Tariff. She repeated that the appellant was wrong not to use box 2 for its own details.

160. We would on the basis of what we say here have had absolutely no hesitation in throwing out HMRC's case on the box 2 point had we needed to. We do not understand why HMRC could not see at an early stage why Miss Ajibulu-Moniya was right about box 2, especially given what it clearly says in the Implementing Regulation and in the UK Tariff glossing it.

The penalty

161. HMRC argue that the penalty was incurred for the failure to provide evidence of re-export. Although we have held that no customs debt is due for the alleged failure, that does not mean that a failure to complete a form properly in the course of re-export of goods that were subject to IP cannot be penalised. It all depends on the terms of the legislation imposing the penalty. Again we assume first that box 2 was completed wrongly.

162. Section 26 FA 2003 is the legislation that imposes penalties for contravention of a "relevant rule". The relevant rules referred to are those listed in the Schedule to the CCRRR.

163. HMRC rely on the rule headed "Customs Procedure with Economic Impact" and referring to arts. 85 and 87 of the Code. The matters that are penalised are failures to comply with a condition (including special conditions governing the procedure in question) of an immediately enforceable binding decision of Customs, in

respect of an authorisation or transferred obligations for use of any customs procedure with economic impact referred to in Articles 85 to 87a.

164. HMRC say that the penalisable failure is a "breach of Articles 85 and 87" and in particular "the failure to provide evidence of export (ie to include an EORI in the 'consignor no' area of the export declaration)."

165. HMRC, on whom the burden of proof lies, do not say why the non-inclusion of the EORI on the ED is a failure to provide evidence of export. It is clearly not something that speaks for itself. It would need to be put in the context of all the other material in the ED for this non-intuitive suggestion to be shown to be correct.

166. Nor do they say why or how it is a breach of arts. 85 or 87. They do not say how the failure meets the specific wording in the rule listed in the Schedule to CCRRR (see Appendix at §185).

167. HMRC have not in our opinion met the burden of showing that this rule in CCRRR has been contravened. It follows that s 26 FA 2003 does not apply.

168. We add that had it applied we would have been strongly inclined to find that the appellant had a reasonable excuse for the failure.

169. Nor do we need to consider whether the appellant's rights under art. 6 European Convention on Human Rights were infringed, particularly the requirement in art. 6(3)(a) that:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"

170. But on the basis that the entries in box 2 were the correct ones as we have held, then there clearly is no penalisable conduct.

Decision

171. Under s 16(5) FA 1994 we vary the C18 demand note for customs duty of £7,782.70 to be a demand for £5,535.96.

172. Under s 16(5) FA 1994 we vary the C18 demand note for VAT of £143,047.49 to be a demand for £29,437.98.

173. Under s 33(6)(a) FA 2003 we quash the penalty of £1,000.

Costs

174. Had the question of unauthorised customs codes not been in issue, we would have seriously considered awarding the appellant their costs on account of HMRC's repeatedly failing to engage with or even understand the box 2 issue.

175. Finally we commend Miss Ajibulu-Moniya for her conduct, on behalf of her company, of the case. It was clearly an emotional and stressful ordeal for her to make the appellant's case, to cross-examine Mr Evans and to help Mr Obetoh to answer Ms Thelen's questions, not least as the hearing went on past the usual time in order to avoid running into the second day allowed for the hearing. She put her case to us, as she did in vain on many occasions to HMRC, in a measured but convincing way and it is only a pity that HMRC were unable to see at any level that she was obviously right on the box 2 issue.

176. We were also grateful to her for sparing our blushes and allowing us to call her "Rita" rather than having to try to say "Miss Ajibulu-Moniya" all the time.

177. 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: 24 OCTOBER 2017

APPENDIX

178. Article 203 of the CCC provides:

> "1. A customs debt on importation shall be incurred through:
>
> — the unlawful removal from customs supervision of goods liable to import duties.
>
> 2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.
>
> 3. The debtors shall be:
>
> — the person who removed the goods from customs supervision,
>
> — any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,
>
> — any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and
>
> — where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed."

179. Article 204 provides:

> "1. A customs debt on importation shall be incurred through:
>
> (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
>
> (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,
>
> 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."

180. Articles 243 and 245 provide:

"*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."

181. 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:

…

5. in the case of goods … placed under a customs procedure, unauthorized movement of the goods, provided the goods can be presented to the customs authorities at their request;

6. in the case of goods … placed under a customs procedure, removal of the goods from the customs territory of the Community or their

entry into a free zone or free warehouse without completion of the necessary formalities;

…

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; …"

182. 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."

183. Article 865 of the Implementing Regulation (not included by HMRC in the list of authorities) provides:

"*Article 865*

The presentation of a customs declaration for the goods in question, or any other act having the same legal effects, and the production of a document for endorsement by the competent authorities, shall be considered as removal of goods from customs supervision within the meaning of Article 203 (1) of the Code, where these acts have the effect of wrongly conferring on them the customs status of Community goods."

184. As most of the amounts demanded in the C18 are import VAT, we set out the relevant parts of the Value Added Tax Act 1994:

"**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.

…

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.

…"

185. Nothing in the regulations, that is regulation 120 of the Value Added Tax Regulations 1995, excludes any of the provisions of the CCC or the Implementing Regulation we have cited.

186. The appeal rights referred to in art. 243 CCC are given effect to in accordance with art. 245 CCC by provisions of Part 3 Finance Act 2003, which we set out below.

187. The penalty was charged under the provisions of the Customs (Contravention of a Relevant Rule) Regulations 2003 (SI 2003/3113), which relevantly provides:

> "**2 Interpretation**
>
> In these Regulations—
>
> "the Act" means the Customs and Excise Management Act 1979;
>
> "the 1994 Act" means the Finance Act 1994;
>
> "the Code" means Council Regulation 2913/92/EEC;
>
> "Customs" means Her Majesty's Revenue and Customs, the Secretary of State by whom customs functions are exercisable or the Director of Border Revenue;
>
> "customs territory" has the meaning given by Article 3 of the Code to "customs territory of the Community";
>
> "the Implementing Regulation" means Commission Regulation 2454/93/EEC as it implements the Code;
>
> "the Importation Regulations" means the Customs Controls on Importation of Goods Regulations 1991;
>
> **3 Relevant Rule and Amount of Penalty**
>
> (1) The Schedule to these regulations shall have effect.
>
> (2) An entry in Column 1 of the Schedule specifies the relevant rule or the description of a relevant rule in the case of any relevant tax or duty to which it applies for the purposes of section 26(1) of the Finance Act 2003 (Penalty for contravention of relevant rule).
>
> (3) An entry in Column 2 of the Schedule adjacent to an entry in Column 1 specifies a person, of the description there laid out, who shall be liable to a penalty under section 26 of the Finance Act 2003 (where his conduct contravenes the relevant rule or a relevant rule of the description specified for the purposes of that section).
>
> (4) An entry in Column 3 of the Schedule adjacent to an entry in Columns 1 and 2 specifies for the purposes of section 26(1) of the Finance Act 2003 the maximum amount of the penalty which may be imposed upon a person specified for the purposes of that section as liable for that contravention of that specified relevant rule.
>
> (5) Any description of a relevant rule specified in Column 1 and any description of a person prescribed in Column 2 of the Schedule is without prejudice to the effect of any directly applicable EU provision so described or description of a person responsible contained in that provision so described.
>
> (6) A specified relevant rule or description of a person shall be construed in accordance with the effect and scope of that directly applicable EU provision referred to in Column 1.

(7) Where as a consequence of these Regulations, a person is liable to a penalty under section 26 of the Finance Act 2003 and the conduct giving rise to the liability continues after the date specified in a notice in writing given to that person by the Commissioners, that continuation of the conduct—

(a) shall constitute a further contravention of the same rule; and

(b) shall make that person liable to a separate penalty accordingly.

SCHEDULE

…	…	…
Customs Procedure with Economic Impact **Articles 85 and 87 of the Code**		
To comply with a condition (including special conditions governing the procedure in question) of an immediately enforceable binding decision of Customs, in respect of an authorisation or transferred obligations for use of any customs procedure with economic impact referred to in Articles 85 to 87a	The person to whom the authorisation for use of any customs procedure with economic impact is issued. Any person to whom the conditions or obligations of a customs procedure with economic impact are transferred.	£2,500 £2,500
To notify Customs of all factors arising after the authorisation is granted and which may influence its continuation or content.	Any authorised person.	£2,500
…	…	…

188. Penalties arising under the CCRRR are charged on the person concerned by s 26 Finance Act 2003 which provides:

"**26 Penalty for contravention of relevant rule**

(1) If, in the case of any relevant tax or duty, a person of a prescribed description engages in any conduct by which he contravenes—

(a) a prescribed relevant rule, or

(b) a relevant rule of a prescribed description,

he is liable to a penalty under this section of a prescribed amount.

(2) Subsection (1) is subject to the following provisions of this Part.

(3) The power conferred by subsection (1) to prescribe a description of person includes power to prescribe any person (without further qualification) as such a description.

(4) Different penalties may be prescribed under subsection (1) for different cases or different circumstances.

(5) Any amount prescribed under subsection (1) as the amount of a penalty must not be more than £2,500.

(6) The Treasury may by order amend subsection (5) by substituting a different amount for the amount for the time being specified in that subsection.

(7) A statutory instrument containing an order under subsection (6) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the House of Commons.

(8) In this Part "relevant rule", in relation to any relevant tax or duty, means any duty, obligation, requirement or condition imposed by or under any of the following—

…

(c) in the case of customs duty, Community export duty or Community import duty, Community customs rules;

(d) in the case of import VAT, Community customs rules as they apply in relation to import VAT;

…

(9) In subsection (8)—

"Community customs rules" means customs rules, as defined in Article 1 of the Community Customs Code;

…"

189. Further provisions in Part 3 FA 2003 are relevant:

"**27 Exceptions from section 26**

(1) A person is not liable to a penalty under section 26 if he satisfies—

(a) the Commissioners, or

(b) on appeal, an appeal tribunal,

that there is a reasonable excuse for his conduct.

(2) For the purposes of subsection (1) none of the following is a reasonable excuse—

(a) an insufficiency of funds available to any person for paying any relevant tax or duty or any penalty due;

(b) that reliance was placed by any person on another to perform any task;

(c) that the contravention is attributable, in whole or in part, to the conduct of a person on whom reliance to perform any task was so placed.

…

29 Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section … 26—

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

…

Demand notices

30 Demands for penalties

(1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person or his representative a notice in writing (a "demand notice") demanding payment of the amount due by way of penalty.

(2) An amount demanded as due from a person or his representative in accordance with subsection (1) is recoverable as if it were an amount due from the person or, as the case may be, the representative as an amount of customs duty.

This subsection is subject to—

(a) any appeal under section 33 (appeals to tribunal); and

(b) subsection (3).

(3) An amount so demanded is not recoverable if or to the extent that—

(a) the demand has subsequently been withdrawn; or

(b) the amount has been reduced under section 29."

190. The law relating to appeals in relation to customs duty demands is found in Part 1 FA 1994.

"**Customs and excise reviews and appeals**

13A Meaning of "relevant decision"

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions—

(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the European Union, as to—

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;

(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;

…

15A Offer of review of relevant decision

(1) If HMRC notify a person (P) of a relevant decision by HMRC, HMRC must at the same time, by notice to P, offer P a review of the decision.

(2) This section does not apply to the notification of the conclusions of a review.

16 Appeals to a tribunal

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

(b) in a case where a person other than P is the appellant, the date the other person becomes aware of the decision, or

(c) if later, the end of the relevant period (within the meaning of section 15D).

(1F) An appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so.

(1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review.

..

(2A) An appeal under this section with respect to a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) shall not be entertained unless the appellant is—

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by the relevant decision,

(b) a person in relation to whom, or on whose application, the relevant decision has been made, or

(c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied.

…

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—

[*matters not relevant to this case*]

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter.

…"

191. As to the penalties the appeal provisions are in s 33 FA 2003:

"**33 Right to appeal against certain decisions**

(1) If, in the case of any relevant tax or duty, HMRC give a person or his representative a notice informing him—

(a) that they have decided that the person has engaged in conduct by which he contravenes a relevant rule, and

(b) that the person is, in consequence, liable to a penalty under section 26, but

(c) that they do not propose to give a demand notice in respect of the penalty,

the person or his representative may make an appeal to an appeal tribunal in respect of the decision mentioned in paragraph (a).

(2) Where HMRC give a demand notice to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of—

(a) their decision that the person is liable to a penalty under section 25 or 26, or

(b) their decision as to the amount of the liability.

(6) The powers of an appeal tribunal on an appeal under this section include—

(a) power to quash or vary a decision; and

(b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section—

(a) the burden of proof as to the matters mentioned in section 25(1) or 26(1) lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established.