[2018] UKFTT 0072 (TC)

TC06337

Appeal number: TC/2017/05198

CUSTOMS DUTY & IMPORT VAT – Inward processing procedure – failure to submit bills of discharge within 6 months time limit – 40 post-clearance demand notes issued – some notes returned undelivered and reissued – all notes later reissued – request for review turned down as out of time - application to make late appeals to Tribunal –* Denton *& Data Select applied – appeals against demand notes reissued for first time were not out of time for appeal to the Tribunal – appeals against demand notes reissued after being returned undelivered were out of time – application in relation to those notes upheld.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHARYA UK LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
NICHOLAS DEE

Sitting in public at Centre City Tower, Birmingham on 9 January 2018, with further submissions by HMRC on 23 January 2018

Ashok Desor of Ashok Desor & Co, Chartered Certified Accountants, for the Appellant

Ben Hayhurst, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This was an application by Sharya UK Ltd ("the appellant") to make appeals out of time in accordance with s 16(1D)(b) Finance Act ("FA") 1994 in relation to 40 post-clearance demand notes on Form C18 ("the demand notes").

2. When shortly before the hearing we received Mr Hayhurst's skeleton we noted for the first time that it appeared to include an application to strike out the appeals made by the appellant on the grounds that there was no reasonable prospect of success. This was of course an alternative argument for HMRC should the Tribunal give the appellant permission to make its appeals out of time.

3. We said to Mr Hayhurst that we were unaware that HMRC had made an application to strike out, and that the Tribunal administration had expressly listed this case for a half day to hear the appellant's application. Mr Hayhurst directed us to half a paragraph at the end of HMRC's statement of case which referred to striking out.

4. We said that we would see how the hearing went before deciding whether to entertain the strike out application. At 12.55 pm with the end of the hearing approaching, closing submissions not yet having begun and our having two more cases to hear in the afternoon, we decided that we would not hear the strikeout application.

Evidence

5. We had two bundles of documents totalling over 800 pages and a bundle of authorities with over 400 pages. Overkill is a polite expression for this profusion of paper, made even more unpalatable by the fact that, shortly after the delivery through the post of the bundles of documents, a further set, this one paginated, followed close on their heels.

6. We had witness statements from Mr Ashok Sharma, a director of the appellant, and Ms Carol Gilmore, an officer of HMRC. Subject to one or two clarificatory points their witness statements stood as their evidence in chief, and they were cross-examined by Mr Hayhurst and Mr Desor respectively. We accept their evidence as honestly given and that each was doing their best to assist the Tribunal.

Facts

7. The issue as presented in this application is the simple one of whether the appellant should be granted permission to make appeals out of time, and that requires us to conduct the familiar enquiry into the length and significance of the delay, the reasons for it and the prejudice to each party if we were to allow or not allow the application.

8. In order to be able to do that and explain our decision we do not need to examine every bit of the documentary evidence. The findings we make below give the necessary factual background to the issue and are taken from the papers in the bundle, elucidated where necessary by the evidence of Mr Sharma and Ms Gilmore.

9. The appellant was incorporated on 4 June 2014, with Mr Sharma as a director. The company's business was the import, export and sale of clothing imported from India. The business address and registered office of the company on registration was 124B Cavendish Rd, Leicester ("Cavendish").

10. Where clothing is imported from India with a view to its subsequent sale in the UK, it is held in a bonded warehouse by its shipping agents and the goods are released only after the appellant has paid the import duty and VAT.

11. On a large number of occasions the appellant imported clothing from India but with a view to their re-export to Dubai. This was to circumvent restrictions on imports from India into Dubai.

12. In these re-export cases the goods were entered for inward processing ("IP"), a customs procedure which had the effect that no duty or VAT was payable on importation. It was a requirement of this procedure that a bill of discharge (BoD) must be submitted to HMRC within 30 days of the end of the "throughput period" which in a case such as this was 6 months from the date of import.

13. A "welcome letter" explaining the IP procedures was issued on at least the first occasion when the procedure was initiated. In particular this letter stressed that the BoDs must be issued in time or duty may become charged on the appellant.

14. In at least 40 cases no BoD was filed within the relevant period. In each case HMRC through its National Import Reliefs Unit ("NIRU") issued a reminder letter and then a "right to be heard" letter, warning that the appellant had made itself liable for the customs duty and VAT that had been suspended.

15. In the absence of an explanation for the delay or an application for extension of time, HMRC issued 40 demand notes to the appellant between 4 March 2016 and 8 August 2016. Each of the demand notes was accompanied by a decision letter (NIRU 4) explaining the appellant's rights, which it said were either to request a review by an officer of HMRC or to appeal to the Tribunal, in either case within 30 days of the date of the demand note and letter.

16. The demand notes and decision letters were all sent to Cavendish. No requests for a review were received by HMRC following this issue.

17. Between 14 April 2016 and 17 July 2016, at least 16 demand notes were returned to HMRC using the Royal Mail's returned letter service ("RLS").

18. On 2 March 2015 (ie the year before any demand notes were issued) the appellant had notified Companies House that its registered office (which was its trading address) had been changed from Cavendish to Unit 8, Oak and Ash Business Park, Farringdon Rd, Leicester ("Farringdon").

19. By 19 April 2016 at the latest Ms Cheryl Robinson, an officer of HMRC in NIRU, had discovered that the company's address was now Farringdon.

20. 16 demand notes were then reissued to Farringdon between 21 April 2016 and 30 June 2016. A seventeenth was returned RLS on 18 July 2016 and seems to have been reissued but the date is not known.

21. On 4 May 2016 HMRC received a phone call from or on behalf of the appellant asking how the C18 had arisen.

22. Between 12 May 2016 and 29 June 2016 the appellant submitted BoDs for at least 8 and possibly 11 of the imports re-exported.

23. In three letters of 13 and 18 May and 29 June 2016 HMRC explained how the C18s had arisen. Further detail about these letters is set out later in this decision.

24. On 16 May 2016 the appellant explained in a letter to HMRC that its address was Farringdon. The unit of HMRC, NIRU, receiving this letter informed the appellant that a change of address had to be notified to the "variations" team in Grimsby. Ms Gilmore admitted in evidence that NIRU was able to amend addresses on the system they used.

25. 4 demand notes were issued to Cavendish after the date on which Ms Robinson had found the correct address and after the dates on which at least 7 demand notes had been reissued to Farringdon.

26. 25 demand notes were issued to Cavendish after the date on which the appellant had notified its correct address to NIRU and after the dates on which at least 15 demand notes had been reissued to Farringdon.

27. Between 27 October 2016 and 1 November 2016 Jerry Arora, Mr Sharma's business partner in the appellant asked HMRC for all C18s issued to be reissued.

28. 40 demand notes were reissued to Farringdon on 2 November 2016. The dates on these reissued letters were the dates of the original issue to Cavendish.

29. On 22 November 2016 Ashok Desor & Co ("the firm") requested a review of all 40 decision notices.

30. On 25 November 2016 HMRC replied saying that the request was out of time and would not be undertaken. The letter explained that the appellant could seek permission from the Tribunal to appeal and gave the firm the details of the Tribunal's website.

31. On 16 June 2017 the appellant appealed to the Tribunal.

Law – the statute and the EU Regulation

32. The law relating to appeals against decisions in respect of customs duty and import VAT is contained in Part 1 FA 1994, and so far as relevant to this case is as set out below.

> "**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.

15B Right to require review

(1) Any person (other than P) who has the right of appeal under section 16 against a relevant decision may require HMRC to review that decision.

(2) The other person may not notify HMRC requiring a review of the decision if either of the following conditions is met.

…

(4) Condition B is that P or the other person has brought an appeal under section 16 with respect to the relevant decision.

(5) A notification that such a person requires a review must be made within 30 days of that person becoming aware of the decision.

15C Review by HMRC

(1) HMRC must review a decision if—

(a) they have offered a review of the decision under section 15A, and

(b) P notifies HMRC of acceptance of the offer within 30 days beginning with the date of the document containing the notification of the offer of the review.

(2) P may not notify HMRC of acceptance of the offer of review if either of the following conditions is met.

…

(4) Condition B is that P has brought an appeal under section 16 with respect to the relevant decision.

(5) HMRC must review a decision if a person other than P notifies them under section 15B.

(6) HMRC shall not review a decision if P, or another person, has appealed to the appeal tribunal under section 16 in respect of the decision.

15D Extensions of time

(1) If under section 15A, HMRC have offered P a review of a decision, HMRC may within the relevant period notify P that the relevant period is extended.

(2) If under section 15B another person may require HMRC to review a matter, HMRC may within the relevant period notify the other person that the relevant period is extended.

(3) If notice is given the relevant period is extended to the end of 30 days from—

(a) the date of the notice, or

(b) any other date set out in the notice or a further notice.

(4) In this section "relevant period" means—

(a) the period of 30 days referred to in--

(i) section 15C(1)(b) (in a case falling within subsection (1)), or

(ii) section 15B(5) (in a case falling within subsection (2)), or

(b) if notice has been given under subsection (1) or (2), that period as extended (or as most recently extended) in accordance with subsection (3).

15E Review out of time

(1) This section applies if—

(a) HMRC have offered a review of a decision under section 15A and P does not accept the offer within the time allowed under section 15C(1) or 15D(1); or

(b) a person who requires a review under section 15B does not notify HMRC within the time allowed under that section or section 15D(3).

(2) HMRC must review the decision if—

(a) after the time allowed, P, or the other person, notifies HMRC in writing requesting a review out of time,

(b) HMRC are satisfied that P, or the other person, had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and

(c) HMRC are satisfied that P, or the other person, made the request without unreasonable delay after the excuse had ceased to apply.

(3) HMRC shall not be required to review a decision under this section if Condition A is met (see sections 15B(3) and 15C(3)).

(4) HMRC shall not review a decision if P, or another person, has appealed to the appeal tribunal under section 16 in respect of the decision.

15F Nature of review etc

(1) This section applies if HMRC are required to undertake a review under section 15C or 15E.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purposes of subsection (2) HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in making the decision, and

(b) by any person who is seeking to resolve disagreement about the decision.

(4) The review must take account of any representations made by P, or the other person, at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that the decision is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In subsection (6) "relevant date" means—

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 15A),

(b) the date HMRC received notification from another person requiring review (in a case falling within section 15B), or

(c) the date on which HMRC decided to undertake the review (in a case falling within section 15E).

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.

(9) If subsection (8) applies, HMRC must notify P or the other person of the conclusion which the review is treated as having reached.

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).

(1C) In a case where HMRC are required to undertake a review under section 15C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(1D) In a case where HMRC are requested to undertake a review in accordance with section 15E—

(a) an appeal may not be made to an appeal tribunal—

(i) unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and

(ii) if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;

(b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;

(c) if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the appeal tribunal gives permission to do so.

(1E) In a case where section 15F(8) applies, a notice of appeal may be made at any time from the end of the period specified in section 15F(6) to the date 30 days after the conclusion date.

(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.

…

(5) … 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.

17 Interpretation

(1) Subject to the following provisions of this section, expressions used in this Chapter and in the Management Act have the same meanings in this Chapter as in that Act.

(2) In this Chapter—

"appeal tribunal" shall be construed in accordance with section 7(3) above;

…

"HMRC" means Her Majesty's Revenue and Customs;

"the Management Act" means the Customs and Excise Management Act 1979;

…"

33. Other relevant law is referred to in the discussion section.

Law – the case law on late appeals and our approach to the issue

34. It did not come as a surprise to the Tribunal, nor will it, we suspect, to readers who have got this far, that among the cases cited by Mr Hayhurst in his skeleton were *BPP Holdings v HMRC* [2017] UKSC 55 ("*BPP*"), *Denton v TH White Ltd (and related*

appeals) [2014] EWCA Civ 906 ("*Denton*") and *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*").

35. From *BPP* we know that while the Civil Procedure Rules ("CPR") of the Courts in England and Wales do not apply to this or any other Tribunal applying the law in that jurisdiction (which we are in), we are expected to apply the same principles but having regard to the overriding objective of the Tribunal rather than any similar statement in the CPR.

36. That means that we should follow the three stage approach in *Denton* to applications from relief from sanctions, and we know from *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*") that an application to do something after the time permitted by either the Rules of the tribunal or any enactment is to be treated in the same way as an application for relief from sanctions.

37. *Data Select* is binding on this Tribunal. Although it, a decision of the Upper Tribunal, was applying a previous version of the CPR by analogy, nothing in *BPP* suggests that the five questions suggested as relevant in *Data Select* are not relevant any longer. Indeed those questions may be seen as reflected in the three stage *Denton* approach.

Discussion - the first *Denton* stage

38. At the first *Denton* stage we are required to establish whether the delay was serious and significant, and the first *Data Select* question is: how long was the delay? To answer both those questions it has to be established that there was a delay, an exceeding of the statutory time limit.

39. In a schedule attached to Ms Gilmore's witness statement she had exhibited a spreadsheet showing the dates of each of the actions taken in relation to each of the C18 demand notes, and in the last column she had stated the number of whole months by which the notice of appeal to the tribunal was out of time. The number of months was between 9 and 14. The end month was June 2017 when the appeal was made, and the start month was the month in which the C18 had been originally issued to Cavendish.

40. In the course of Ms Gilmore's evidence the tribunal questioned her about the reissued decision letters and demand notes. Her evidence was that the reissued demand notes would have had the address changed (ie from Cavendish to Farringdon) but the date of the reissued letters and the dates on the C18s would have been the same as on the original.

41. Ms Gilmore agreed with the Tribunal when we suggested that the statement of rights as to reviews and appeals in the reissued decision letters might be thought to be at least potentially misleading, as it was HMRC's view that the reference to the time limit in the letter for exercising the rights stated in it continued to run from the date of the original letter as sent to Cavendish, and HMRC agreed that some at least of the reissued letters would actually have been reissued after the time allowed for exercising those rights.

The original issue of demand notes

42. It must therefore be HMRC's view, and we did not understand Mr Hayhurst to disagree, that there was valid service of all the original notices. Ms Gilmore's schedule

confirms this in showing the number of months the appeals were out of date. Yet HMRC admit that 16 (or possibly) 17 decision letters and demand notes were returned to HMRC as RLS. HMRC are quick in other contexts, where appellants say that they did not receive a statutory notice or assessment, to say that they must have been served because HMRC did not received anything returned to them as RLS.

43. HMRC have not sought to pray in aid s 7 Interpretation Act 1978 or any provision in the enactments relating to customs duty about service, nor any provision of the Companies Act 2006 to suggest that service can be deemed to have happened. That is perhaps not surprising as the law on serving the notices of decisions is in the Regulation of the Council of the European Communities dated 12 October 1992 (EEC) No 2913/92 for establishing the Community Customs Code ("CCC"), at article 221:

> "Article 221
>
> 1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.
>
> …
>
> 3 . Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period."

44. "Appropriate procedures" is not defined in the CCC, nor is there anything in the Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (the "Implementing Regulation") on this subject. But "communication" is a ubiquitous term in that Regulation. It seems to us most unlikely that by using the term "communicate" the European Commission was intending to mean mere despatch, and not the equivalent of "notice". This seems to us to be especially true of a matter of the type in issue here where grave consequences can ensue if rights offered by the document in question do not become apparent to the intended recipient.

45. We note that in *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 Russell LJ said:

> "But the requirement of 'notice … to', in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, …"

and Lawton LJ added

> "A notice is a means of making something known. … If a notice is to be of any value it must be an intimation to someone. A notice which cannot impinge on anyone's mind is not functioning as such."

46. We therefore consider that the evidence that at least 16 demand notes and decision letters were returned RLS strongly supports the evidence of the appellant that it did not

receive any of the notes and letters issued before they were returned because they were posted to an address, Cavendish, which was not the registered office and trading address of the appellant at the time, which was Farringdon.

47. There does not appear to be in domestic customs duty legislation such as the Customs and Excise Management Act 1979 (except in relation only to notices of seizure of goods – paragraph 2(b) Schedule 3) a provision akin to that in s 98 Value Added Tax Act 1994 or section 115 Taxes Management Act 1970 permitting service to a last known address. And as we have said, s 7 of the Interpretation Act does not stretch to affect directly effective EU Directives or Regulations. Section 1139 Companies Act 2006 does permit service on a company at its registered office, but that must mean at the registered office as it is on record at Companies House at the time of attempted service, and that was not the case here.

48. As a result we find that none of the C18 demand notes and decision letters were served on the appellant at the correct address, whether or not they were returned RLS.

49. HMRC sought in their skeleton to explain that it was no excuse for the delay that the demand notes were sent to Cavendish. They say that the appellant "should have notified HMRC of their change of address and have their post redirected".

50. In support of the proposition they say that as the appellant was VAT registered it was under a requirement to notify HMRC of a change of address "as per Notice 700/1 (ie notify the variations team at Grimsby)".

51. It is said by HMRC that the change requirement for VAT affects the appellant because it is VAT registered, and even though the issue here is a customs duty matter (the IP procedure) the fact that it also involves import VAT is another reason why HMRC should have been notified of the change of address.

52. HMRC stresses that even at the date of Ms Gilmore's witness statement there had been no notification of the change "as per VAT 700/1" ie to Grimsby.

53. At the point in the proceedings when Mr Hayhurst was making these points, Mr Sharma produced to Mr Desor a photograph on his mobile phone of a letter he said he had from the VAT office showing that the VAT team were aware of the Farringdon address earlier than had been suggested. Because of this and of other questions the Tribunal had about the VAT registration of the appellant, we directed after the hearing that HMRC should provide a comprehensive account of the VAT history of the appellant. This they did on 23 January 2018, and included submissions on the effect of that history

54. In those submissions they withdrew the contentions set out in §50 to §52. The correct position was that at the latest on 24 June 2014 the appellant had obtained an EORI number (EORI means Economic Operator Register and Identification) from a team in Cardiff and had given their then correct address as Cavendish. An EORI number is required for any trader wishing to import goods It does not require VAT registration before it can be obtained, and at the time the appellant had not at that time registered for VAT. We were informed by HMRC in the post-hearing submissions that a screenprint of a DTR (Departmental Trader Record) for the appellant which was in our bundle was incorrect to record as it did that the VAT Registration Date for the trader was 24 June 2014.

55. This screenshot as of 20 December 2017 does however show that the PPOB (Principal Place of Business) was Cavendish. EORI guidance tells a trader to inform them of a change of address. HMRC say that this is legally required by Art 4m(2) of the Implementing Regulation which states

> "When registering economic operators and other persons for an EORI number, Member States may require them to submit data other than the data listed in Annex 38d where that is necessary for purposes laid down in their national laws"

56. Annex 38d includes address details. HMRC say this means that the appellant was under an obligation to follow HMRC's EORI guidance and to notify it of a change of address. This is reinforced they say by art 199 of the Implementing Regulation

> "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."

57. Because various teams in HMRC had different systems it was, they say, incumbent on the appellant to notify the correct team (the EORI team) of a change in address, ie from Cavendish to Farringdon, and this they failed to do. We find that the appellant did not change the address from Cavendish to Farringdon on the DTR for the purposes of customs duty and input VAT, though we do not need to decide for this purpose whether they were under a legal obligation to do so.

58. As to VAT itself, the appellant applied to register for that tax on 24 September 2015. They were registered with effect from 4 June 2014 their date of incorporation. The address on the VAT1 application form was Farringdon, which explains the letter Mr Sharma produced.

59. HMRC say that the appellant did not notify the EORI team of their VAT number and had they done so they would have been issued with a new EORI based on the VAT number. This would have resulted in the EORI records being updated with the new address.

60. In our view this is all irrelevant. It is clear now that the appellant informed HMRC as an entity of its new address in September 2015, but the original demand notes were issued to the old address, Cavendish.

The reissue of some demand notes

61. We now turn to the 16[1] notes reissued to Farringdon following their return as RLS. The appellant does not deny receiving these and we find that it did.

[1] or possibly 17, but we assume 16 as it is favourable to the appellants to do so.

62. We have referred to the fact that an officer of HMRC, Cheryl Robinson, appears to have discovered the new address of the appellant no later than 19 April 2016 as that is set out in Ms Gilmore's evidence which says that the first reissue of a C18 was on 21 April. Mr Hayhurst's skeleton suggests that she found it by searching the internet. HMRC were also told by the appellant on 19 May 2016 that the registered office of the appellant was at Farringdon and had been at all times at which C18s were issued. Despite the discovery by Ms Robinson and the notification by the appellant, C18s and letters continued to be sent to Cavendish after 19 April and after 19 May and indeed until the last of them in August 2016.

63. The explanation given by HMRC is, as mentioned in §§49 and 50, that the appellant did not inform the correct person in HMRC, namely the variations team in Grimsby. The post-hearing submissions have retracted that and replaced it with the accusation that the appellant should have told the EORI team. But since Ms Gilmore admitted that the address could be changed on NIRU's own systems we cannot understand why demand notes and decision letters continued to be issued to Cavendish, even after the time when the notes and letters returned to HMRC as RLS were being reissued to Farringdon.

64. Those reissued letters (NIRU4) said of the appellant's rights to contest the demand note:

> "If you do not agree with the decision to issue the C18 demand, there are two options available. Within 30 days of the date of the decision you can either:
>
> 1. Request a review of the decision by someone not involved in making the disputed decision. Your request must be in writing and should set out the reasons why you do disagree.
>
> [address given]
>
> 2. Appeal direct to the Tribunal who are independent of HMRC.
>
> If you opt to have your case reviewed you will still be able to appeal to the Tribunal if you disagree with the outcome."

65. No information was given to show how an appeal might be made to the Tribunal. The recipient was directed to a leaflet HMRC 1 about reviews and appeals obtainable from HMRC's website.

66. From the papers we can see that in the period between the first reissue (21 April 2016) and the date 30 days after the last reissue, probably a date at the end of July 2016 but possibly later depending on the unclear position of C18 number 219127, the communications from the appellant to HMRC are:

> (1) A phone call from the appellant on 4 May 2016 who put their agent on the phone to ask how a particular C18 reissued on 22 April to Farringdon had arisen.
>
> (2) An email on 12 May 2016 from the clearing agents used by the appellant and copied to the appellant, attaching a BoD the failure to supply which had caused a C18 to be reissued on 28 April 2016 to Farringdon.
>
> (3) A letter on 16 May 2016 from Mr Sharma informing HMRC NIRU Team that they changed their address "last year but our agent couldn't get

change new address on their system. All imports and export entries have got our previous address at [Cavendish]. Please note our new address as below under sign."

67. Letters from NIRU to the appellant were issued in this period as follows:

(1) On 13 May 2016 NIRU wrote to the appellant at Farringdon "further to our letters of 24.01/2016 and 24/02/2016". These were a Reminder letter and "Right to be Heard" letter sent before the C18 was issued in relation to the C18 referred to in the email of 12 May 2016 in §63(2). They were sent to Cavendish. The letter informed the appellant that a decision letter with the demand note had informed the appellant of their rights but that the 30 day period allowed had elapsed, so that a review out of time request would be required and would only be allowed for a "compelling reason". For some reason NIRU took it upon themselves to tell the appellant that an appeal to the Tribunal was possible but was also out of time and permission would only be granted if there was also a compelling reason.

(2) On 19 May 2016 NIRU wrote to the appellant at Farringdon "further to our letters as per table below". This covered 8 further demand notes and letters and was in the same terms as the 13 May letter.

(3) On 29 June 2016 NIRU wrote to the appellant at Farringdon "further to our letters dated as above". This referred to 3 further demand notes in the same terms as the two previous letters.

(4) On 23 June a letter from HMRC to the appellant telling it again to notify the change of address to Grimsby.

68. We agree with HMRC that the appellant did not ask for a review within 30 days of the issue of any of the reissued notices. *A fortiori* it did not ask for a review within 30 days of the date of the original issue (which is the relevant date in HMRC's submission). Nor did it seek to make appeals to the Tribunal within 30 days of the notification of either the reissued or the original decisions.

69. We find that in relation to the 16 reissued demand notes there was a delay of between 10 and 13 months after the date given by s 16(1B)(a) FA 1994 for making appeals to the Tribunal.

The reissue of all the demand notes

70. The next relevant event was the reissue of all 40 demand notes and decision letters on 2 November 2016, including those which had been reissued to Farringdon between April and June 2016.

71. On 22 November 2016 the firm requested a review of them. On 25 November 2016 HMRC replied stating that the request was out of time and no review would be undertaken. They referred the firm to the right to ask the Tribunal for permission to appeal.

72. The next correspondence from HMRC was a demand from Debt Management in HMRC seeking £335,207.33 in duty and import VAT on 41 demand notes.

73. On 16 June 2017 the appellant, through the firm, appealed to the Tribunal.

74. On the face of it, in relation to 24 demand notes and decision letters there is nearly 7 months between the date of the refusal to review and the application for permission to appeal.

But was there actually any delay in the November 2016 cases?

75. The discussion above has assumed that the relevant deadlines that should have been observed by the appellant if it wanted to make appeals or have reviews without the need to seek our permission are 30 days from the date of notification of the decisions, although we disagree with HMRC about when the relevant decisions were notified.

76. That leads on to the question whether our findings about the date of notification have a legal effect which is different from the one HMRC have pressed on us. In relation to relevant decisions falling within s 13A(2)(a) FA 1994, HMRC is, in sections 15A to 16 FA 1994, seeking to fulfil its obligations under the CCC, in particular articles 243 and 245 in Title VIII:

> "*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.
>
> …
>
> 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."

77. Article 243.1 is in mandatory terms – "shall have" means "must have". It hardly needs saying that the right is unqualified. And we have seen (§43) from art 221 of the CCC that a decision must be "communicated" and that, we have held, involves making the person subject to a customs debt aware of the decision to impose it.

78. The right is to a two stage appeal. It is not in our view arguable that paragraphs (a) and (b) in art 243.2 are alternatives, as they are expressed as being an initial and a subsequent right, although there is nothing to prevent a person dispensing with the initial stage and going straight to the independent body. The word "may" is used because it is not mandatory for anyone affected to exercise their rights if they do not wish to for whatever reason, but that choice can only be made by a person who has received the communication and been made aware of their rights.

79. In our view sections 15A to 16 FA 1994 have to be read in a way which is consistent with article 243, and does not frustrate the rights there.

80. HMRC issued, in the sense of despatched, the 24 decisions not previously reissued to the appellant on 2 November 2016. There is no suggestion that they were not successfully communicated, and the fact that the firm wrote to HMRC on 22 November about them shows they were.

81. Section 15A FA 1994 then comes into play, for the first time in relation to these decisions, as it applies if "HMRC notify a person (P) of a relevant decision by HMRC". Under s 15A FA 1994, when HMRC notify a decision to a person, P, they must at the same time notify P of an offer to review the decision. This is the granting of the right to appeal to "the customs authorities designated for that purpose" in art 243(2)(a) CCC, as the customs authority in the United Kingdom, the member state in which the decision was taken and in which the appeal must be lodged, is HMRC.

82. The right of appeal to an independent body given by art 243(2)(b) CCC without using the initial stage is given by s 16(1B) FA 1994.

83. In both cases UK legislation requires the relevant right to be exercised within 30 days of the date of the document notifying the decision – s 15C(1)(b) where the initial appeal to HMRC is initiated and s 16(1B)(a) where the second stage is resorted to without the initial stage. There is provision for that relatively tight deadline to be extended with the permission of HMRC and the Tribunal respectively.

84. In this case there was some discussion about the dates on documents. HMRC say that the reissued documents would have been dated with the original dates, and it seems to follow from this that they maintain that the 30 days in the paragraphs we have referred to in s 15C(1) and s 16(1B) FA 1994 run from those original dates, even in relation to the reissued decisions.

85. We do not accept that this interpretation can be correct, even if it is literally the case that the documents bear the original issue date. The "date of*"* the document, the statutory term, is not necessarily the same as the date *on* the document. In our view the date of the documents is the date they were despatched, ie 2 November 2016.

86. On 22 November 2016 the firm asked, on behalf of the appellant, for a review of the decision to issue the demand notes by someone not involved in making the disputed decision. That was an exercise by the appellant of its first stage right in the CCC and was within 30 days of the date *of* notice of the decisions (and so did not need the permission of any body to be accepted).

87. HMRC's reply to the firm on 25 November, from an officer not involved in the decision making process, said that that officer had given careful consideration to the request for a review, but that the decision for which the review was requested was issued to "you" on 3 March whereas the letter requesting the review was received by HMRC on 24 November.

88. It was, said the reviewing officer, therefore outside the 30 day period, but HMRC could, under s 15E(2) FA 1994, allow an out of time request if the applicant had a reasonable excuse for not accepting the offer of a review within the time limit and the request was made without unreasonable delay once the excuse ceased. In this case, he said, the request failed to fulfil both criteria. The letter then told the firm of the appellant's right to seek permission from the tribunal under "section 16D [*sic*] of the 1994 Finance Act".

89. The letter was however legally incorrect. Where there is an in time request for a review, then s 15C FA 1994 applies, not s 15E, and HMRC "must review the decision", neither of the conditions set out in s 15C(3) or (4) being present.

90. Where HMRC are obliged to undertake a review then they are required to give their conclusions of the review within 45 days of the date they received the request, that is by 7 January 2017 – s 15F(8). They obviously did not do so.

91. They are also obliged by s 15F(9) in such a case to notify P, the appellant here, of the conclusion which the review is treated as having reached, which in all cases to which s 15F(8) applies is to uphold the decisions.

92. In a case where s 15F(8) applies an appeal may be made to the Tribunal. The rule in s 16(1B) that an appeal must be made within 30 days of the decision is disapplied in any case where s 15F(8) applies, and in that case, s 16(1E) applies. That sets the time limit for an appeal as 30 days from the "conclusion date", a term defined in s 16(1G) as the date of the document notifying the conclusion of the review.

93. There is no such document and no such date. Therefore the notice of appeal to the Tribunal made on 16 June 2017 is not out of date.

94. This conclusion relates only to the 24 decisions first reissued on 2 November 2016. In relation to the 16 decisions reissued to Cavendish before the 2 November, then the request for a review made on 22 November is out of time but not for the reason HMRC gave. By s 16(1D) FA 1994 the appellant had 30 days from the 25 November 2016 to make the appeals. As it did not do so, it does indeed need the permission of this Tribunal, and this is what we continue to decide.

Were the delays serious and significant?

95. This question needs to be answered only in relation to the 16 decisions reissued to Cavendish before the 2 November. A delay of anything between 10 and 13 months is by any test a serious and significant one. HMRC point out that in *Romasave Ltd v HMRC* [2015] UKUT 254 (TCC) the Upper Tribunal considered that 3 months was serious and significant in relation to a time limit of 30 days, and we can see nothing to distinguish that case from this.

Discussion - the second Denton stage

96. The second stage as laid down by *Denton* is an enquiry into the reasons for the delay, or why "the default occurred" in the language of that case.

97. The only correspondence of any sort from the appellant or the firm in the period from the 25 November letter to the notice of appeal on 20 June 2017 that seeks to explain the delay is in the notice of appeal itself, which at section 6 says that the appeal is made late because firm were "trying to get all the information from our clients".

98. In his skeleton argument Mr Desor said:

> "After this [the HMRC letter of 25 November 2016] we requested our clients for all the relevant information and submitted a formal appeal on 16 June 2017".

99. In a section of his skeleton headed "Reasons for the late appeal" Mr Desor said:

> "Due to various circumstances including:
>
> 1. Change of address by clients and letters from HM Revenue & Customs going to the wrong address resulting in our clients not getting the Post Clearance Demand Notes in time.
>
> 2. Lack of experience by the directors in dealing with the paperwork relating to imports of clothing.
>
> 3. Goods being re-exported from the Ports to Dubai, where [e]ffectively they have never actually come to the United Kingdom.
>
> 4. The directors thinking that their agents would be dealing with the paperwork.
>
> Due to all these reasons, the appeals to HM Revenue & Customs were not submitted on time." [The numbering is the Tribunal's]

100. In cross-examination of Mr Sharma, Mr Hayhurst attempted to get any further explanations for the delay from him, but although Mr Sharma answered him every time he asked the question, the answer he gave was not an answer to the question. What his answers did show to us was that Mr Sharma clearly thought that since the duty demands had been raised because he had not supplied the BoDs on time (or at all) his priority task had been to produce the BoDs and that this would result in the demands being withdrawn.

101. Of the reasons for the late appeal given by Mr Desor, grounds 2, 3 and 4 are grounds of appeal against the decision to issue the demand notes. They cannot be reasons for the failure to make the appeal, as they all happened before November 2016.

102. Nor can ground 1 assist, as it explains why the decisions were not initially received, but by December 2016 when the appellant was informed of its right of appeal against the refusal to review, the decisions had all been successfully received.

103. Nor can the ground in the appeal notice affect the matter. We cannot see any reason why a lack of further (unspecified) information prevented the firm from completing a simple appeal form in December 2016. Neither the appellant nor Mr Desor could reasonably misunderstand what they had been told by HMRC.

104. The conclusion on the second *Denton* stage is that there was no reasonable excuse for the delay.

Discussion - the third *Denton* stage

105. At the third stage we must evaluate "all the circumstances of the case, so as to enable [the tribunal] to deal justly with the application". It is here that the remaining *Data Select* questions come in.

106. We do not need to spend much time on the reason for the time limit, a *Data Select* question, in section 16 FA 1994. It is so that HMRC knows within a reasonable time whether or not it will need to devote resources to defending an appeal in the Tribunal and to enable it to mobilise those resources at the earliest opportunity to comply with tribunal directions eg to produce a Statement of Case which would be the first step.

107. The consequences for the parties should we grant permission, a *Data Select* question, is this. For the appellant it gives it the opportunity to contest the pre-November reissued decisions. For HMRC it is that it will need to defend these

decisions as well as the November decisions. Obviously in its skeleton HMRC evaluated the prejudice to it on the basis that it would succeed on all or none of the demand notices, which is not the situation we have found to exist.

108. The consequences for the parties should we deny permission, a *Data Select* question, is this. For the appellant it denies it the opportunity to contest the pre-November reissued decisions. This will involve it in being liable for duty and import VAT of over £300,000. The appellant says it cannot afford the full amount and will have to go into liquidation. The same may be true of the reduced amount on the pre-November decisions, but it will clearly be a huge burden for this company. We are satisfied from having seen the evidence the appellant put forward in its hardship application (which was granted) that this would be so.

109. There is another aspect to this. Mr Desor pointed out that the appellant pays duties when it imports clothing for its own stocks for sale. We got the impression from Mr Sharma, and it is to some extent borne out by the accounts of the appellant we had, that the re-export sales are on commission. If that is so, then the appellant has no possibility of recouping any duty from the importers in Dubai in prices, and we suspect that it has little possibility of recouping it from the Indian exporters.

110. Whether it has recourse to anyone else given the "grounds of appeal" etc we do not speculate on and do not take into account. The point is that this could be a disproportionately large burden for the appellant to bear given the economics of its business.

111. Neither side mentioned the possibility of the appellant being able to set off the import VAT element against its own liability to VAT and in view of the doubts expressed by this Tribunal in *Hemisphere Freight Services Ltd v HMRC* [2017] UKFTT 740 (TCC) (a decision of Judge Thomas, the judge in this case, and Mr Abrams) we make no allowance for this possibility in assessing the consequences for the appellant. For HMRC the consequences will be that any appeal proceedings will be limited to 24 demand notes rather than 40, but the saving in time and resources involved would seem to be very limited.

112. Tribunals and courts are enjoined by eg *Hysaj* not to consider the merits of the appeals, unless they are what the parties in the Court of Appeal in *R (oao Rowe & ors) v HMRC* [2017] EWCA Civ 2105 called a "slam dunk" case (see [58]).

113. HMRC clearly consider that there is a slam dunk argument in this case, because as we said in §2 they tacked on an application to strike out to their statement of case on the issue before us, and Mr Hayhurst dealt with it in his skeleton.

114. We have looked at the merits briefly, as we made clear to Mr Hayhurst. We informed him that there seemed to us from the papers we had that there was at least an arguable, rather than fanciful, case that the appellant would be able to invoke article 859 of the Implementing Regulation in its favour. Nor on the other hand do we accept that the appellant is bound to succeed. Thus we do not accept that the merits should weigh in the balance.

115. Weighing all the circumstances in the balance we say that the length of the delay tells against the appellant, as does the total lack of convincing reasons for the delay. We ignore the merits. As to the consequences, or as it is often put, the prejudice to the

parties, then in our view the prejudicial consequences for the appellant outweigh those for HMRC by some margin.

116. But this outweighing arises in part because of our holding that appeals against the 25 November decisions were not out of time and so will go to appeal. We are clear that but for this factor we would in all probability have found against the appellant.

117. But because the 24 decisions will go to appeal we think that it is in the interests of justice for the other 16 to do so as well. There is no distinction whatever in the arguments that can be deployed between the two sets of decisions, so the prejudice to HMRC is almost nil (probably just extra photocopying).

Decision

118. Under s 16(1D)(c) FA 1994 we give permission to the appellant to appeal to the Tribunal against the 16 demand notes reissued to the appellant before October 2016.

119. The appeals against the 24 decisions reissued for the first time on 2 November 2016 are not out of time and do not need our permission.

120. 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: 12 FEBRUARY 2018