Neutral Citation: [2022] UKFTT 00351 (TC)

Case Number: TC08604

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, Rosebery Avenue, London

Appeal references: TC/2017/08856 and TC/2019/02354

Anti-Dumping Duty – imports of citric acid – Community Customs Code, Article 201 - whether or not originated from China – yes – Union Customs Code, Articles 116 and 119 – repayment or remission – no error by the competent authorities – the appellant could reasonably have detected the error – the appellant did not act dishonestly or deceptively – the appellant did not exercise appropriate diligence or due care and acted with obvious negligence and so did not act in good faith in the restricted sense meant by Article 119 – appeal dismissed

Heard on: 16 and 17 June 2022
Judgment date: 29 September 2022

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MRS CATHERINE FARQUHARSON

Between

KILO LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Miss Helena Kisiel, Accountant, of Kisiel and Co

For the Respondents: Mr Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. These appeals relate to a C18 Post Clearance Demand Notice issued by HMRC to Kilo Ltd ("Kilo") for the payment of Anti-Dumping Duty ("ADD") in the sum of £249,720.59 plus VAT in the sum of £49,944.12 ("the Demand"). The Demand was made on 26 June 2017 and varied on review on 10 November 2017. It was in respect of imports of citric acid by Kilo during the period from 8 July 2014 to 16 March 2015, which were declared to have originated and been dispatched from Malaysia. HMRC's case is that the citric acid had in fact originated from China but had been shipped from China to Malaysia before importation to the United Kingdom. Kilo subsequently applied for remission or repayment of the Demand, which HMRC refused on 9 April 2019.

2. The appeal with the reference TC/2017/08856 is against the imposition of the ADD ("the ADD Appeal"). The appeal with the reference TC/2019/02354 is against the refusal to remit or repay the Demand ("the Repayment Appeal").

BACKGROUND

3. The following background was not in dispute.

4. Kilo carries on business in the handling and distribution of (amongst other things) chemicals for use as ingredients in food. These are imported to the United Kingdom from all over the world. Kilo, as with other companies in the same industry, must meet stringent demands of product traceability and identification for the purposes of obtaining British Retail Consortium approval. This then enables Kilo to supply large food manufacturers.

5. Mr Mark Taylor is a director of Kilo and has over 35 years' experience in the industry. Mr Rock was a senior manager of Kilo at the time of the relevant consignments. He is still employed by Kilo.

6. Prior to 2013, Kilo had imported citric acid from China. However, in 2013, Kilo was approached by various suppliers apparently offering citric acid from Malaysia. This was appealing to Kilo as having alternative suppliers outside China could help insulate against fluctuations in availability and price.

7. Kilo duly purchased and imported the citric acid between July 2014 and March 2015. These were all purchased through Globalchem Group Co Ltd trading as GLC Nutrition ("Globalchem") which was based in China. However, the consignors were companies named Extern Enterprise, Sunpower Manufacture, Rinting Harmoni Resources, and Superior Worldwide Industrial. These went through Port Klang in Malaysia. Mr Darren Rock dealt with all matters relating to the suppliers and these consignments. Mr Taylor had no involvement.

8. It was Kilo's understanding that the citric acid originated in Malaysia. Kilo relies in particular on the fact that each of the consignments relied upon documents entitled "Certificate of Origin" issued by the Malay Chamber of Commerce, Malaysia ("the Chamber of Commerce").

9. The European Anti-Fraud Office ("OLAF") subsequently investigated the origin of citric acid which purported to originate from Malaysia but which OLAF suspected in fact originated from China. An OLAF mission to Malaysia took place from 5 to 11 November 2015 in order to investigate the origin of citric acid imported from Malaysia to the European Union and in order to discuss the matter with the Malaysian authorities including the Ministry of International Trade and Industry ("MITI").

10. OLAF's mission report was issued on 18 January 2016. This included the following in the body of the report or in an explanatory note (which we include in the agreed background

upon the basis that it is not in dispute that this was what OLAF said, albeit that we note that Kilo makes it clear that it does not have any knowledge about whether or not OLAF's findings were accurate).

> "[Explanatory Note]
>
> …
>
> In the FCZ [Free Commercial Zone] any form of manufacturing activity is strictly forbidden. In the FCZ, there are allowed only simple commercial activities such as trading, breaking, packing, repacking, sorting, grading, labelling, relabelling, or repair of goods in storage or transit. However, in order to conduct such commercial activities, the operators in the FCZ have to obtain a written permission from the Port Klang Authority.
>
> For goods coming or going out through the seaport in Port Klang, there is no other alternative way than passing through the FCZ. The following procedures are applicable in the FCZ, which are managed and supervised solely by the Port Klang Authority:
>
> ZB1 Import (ZB1) – entering of goods into FCZ from overseas.
>
> ZB1 Export (the former ZB2 and hereafter and in the mission report referred to as ZB2) leaving of goods from FCZ to overseas.
>
> …
>
> ZB1 and ZB2 declarations consist of range of data such as country of origin/destination, consignor, consignees, number of container, vessel, bill of lading, etc.
>
> …
>
> In general, all goods entering the FCZ have to be covered by ZB1 declarations. The relevant declaration ZB1 has to be lodged to the Port Klang Authority within 30 days from the date of arrival of goods into the FCZ. However, if goods are declared immediately or within 30 days from their arrival for importation into Principal Customs Area (K1 declaration), the operator is released from his/her obligation of lodging a ZB1 declaration to the Port Klang Authority.
>
> If goods are re-exported from the FCZ, an operator is obliged to lodge to the Port Klang Authority, a ZB2 declaration. In the ZB2 declaration, an operator is obliged to insert register number of the corresponding ZB1 entry. This is an additional tool for the Port Klang Authority to supervise the movement of goods through the FCZ. It should be underlined that a ZB2 declaration can be lodged to the Port Klang Authority only when the corresponding ZB1 entry has been accepted and duly registered by them.
>
> …
>
> The Port Klang Authority confirmed that when a consignment is registered in the ZB1 registry and subsequently in the corresponding ZB2 registry, it is clear that such consignment has never been moved from FCZ to the Principal Customs Area of Malysia.
>
> However, the mission team identified several consignments which were registered in ZB1 (entering of Free Commercial Zone from China), ZB2 (leaving Free Commercial Zone to the European Union) and K2 (export from Principal Customs Area of Malaysia to the European Union). Such composition is itself contradictory as goods in question has never been in the

Principal Customs Area of Malaysia (registration in ZB1, and in ZB2) and therefore could not be subject to exportation procedure.

Based on these findings, and the whole context of procedures applied in the FCZ, it is concluded that the K2 declarations in question did not reflect the real movement of goods and were produced only to falsely lend credibility that the goods originated in Malaysia."

[Mission Report]

"Malaysia does not produce citric acid and all of the citric acid exported by Malaysia therefore constitutes a re-export of citric acid originating in other countries.

…

MITI provided OLAF with a list of exports of citric acid data (K2 data) extracted from the export declarations submitted to the Malaysian Customs. The list of all exports of citric acid to the EU contains 100 records. The containers listed in these 100 records were matched with the ZB2 data provided by MITI. The result of this matching exercise was that, out of 100 records, 26 containers with citric acid were also found in the ZB2 data which subsequently matched with the ZB1 data which indicates that these citric acid consignments had been transhipped and thus have Chinese origin …

…

Based on the information and documents provided by the Malaysian authorities, it was established that 635 shipments loaded with citric acid as listed in annex 3 originate in or were consigned from China. This list contains the ZB1 and ZB2 data in relation to products under tariff heading 2918 exported to the EY for the period 1.2.2012 to 23.9.2015. The citric acid was shipped from China to the FCZ in Port Klang and, after reloading, was consigned to the EU. It was not subject to any processing or manufacturing activity in the FCZ in Port Klang.

It was also established that 318 unique containers imported into the EU loaded with citric acid matched with the ZB1 and ZB2 data for consignments of citric acid (see under point 3.2.2).

…

In total, out of the 318 containers declared to the EU, 26 containers loaded with citric acid declared to the Malaysian Customs for exportation and consequently recorded as exports from the Principal Customs Area, were also matched with the ZB1 and ZB2 data. It appears that the sole purpose of these declarations was to mislead the authorities and to claim Malaysian origin for the goods concerned. This was reported by the mission team to MITI.

…

OLAF matched the consignments of imported citric acid already communicated by Member States with the relevant ZB1 and ZB2 data. This concerns data on consignments for which it had been established that the citric acid is originating in China (ZB1 data) and had been declared for export to the EU (ZB2 data). The consignments communicated by the EU Member States were compiled in one master list containing a total of 627 containers. The matching was carried out based on the container numbers. As a result, OLAF

> could so far match in total 318 containers for the following EU Member States: … UK 51.
>
> …"

11. On 15 December 2016, HMRC wrote to Kilo setting out their intention to raise a post-clearance demand. Following correspondence between HMRC and Kilo's representative, the Demand was issued on 26 June 2017 in the sum of £255,476.85 plus VAT of £51,095.37. Following further correspondence between the parties, this was varied by a review letter dated 10 November 2017 to £249,720.59 plus VAT in the sum of £49,944.12. The variation was because one import entry was not in fact subject to ADD.

12. On 9 March 2018, Kilo applied for repayment of the sums paid under the Demand pursuant to Articles 119 and 120 of the Union Customs Code (EU Regulation 953/2013) ("Article 119" and "Article 120" respectively). Following correspondence between the parties, HMRC refused this application by a letter dated 9 April 2019.

ISSUES

13. In the course of opening, Miss Kisiel helpfully clarified that Kilo was not pursuing any argument for repayment upon the basis of Article 120, as she accepted that there were no special circumstances which could be relied upon to do so.

14. There is no dispute as to the quantum of the duties if they were correctly imposed, subject of course to the application for repayment in full.

15. The parties helpfully agreed that the remaining issues in dispute are as follows:

(1) As regards the imposition of the ADD:

(a) Whether or not the citric acid originated in China.

(b) The impact of the certificates of origin.

(2) As regards the claim for repayment pursuant to Article 119:

(a) Whether there was an error of a competent authority for the purpose of Article 119.

(b) Whether Kilo could not reasonably have detected the error.

(c) Whether Kilo acted in good faith.

LEGAL FRAMEWORK

16. Save for as set out in paragraphs 18 to 20 below, the legal framework was not in dispute.

17. The relevant anti-dumping provisions are as follows:

(1) Council Regulation 1225/2009 ("the Basic Regulation") provides for protection against dumped imports from countries which are not members of the European Union. Article 13(1) provides as follows in respect of circumvention:

> "Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries, of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place. Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) may be extended to imports from companies benefiting from individual duties in the countries subject to measures when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community, which stems from a practice,

process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

…"

(2) Council Regulation (EEC) 1193/2008 ("the Definitive Regulation") is said in its heading to be, "imposing a definitive anti-dumping duty and collecting definitively the provisional duties imposed on imports of citric acid originating in the People's Republic of China." This relates to citric acid and trisodium citrate dihydrate within CN Codes 2918 14 00 and 2918 15 00.

(3) Commission Implementing Regulation (EU) 2015/82 ("the Continuation Regulation") is said in its heading to be, "imposing a definitive anti-dumping duty on imports of citric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 and of partial interim reviews pursuant to Article 11(3) of Regulation (EC) No 1225/2009." This therefore continued the effect of the Definitive Regulation. The Continuation Regulation took effect from the day following their publication in the *Official Journal of the European Union* and so on 23 January 2015.

(4) Commission Implementing Regulation (EU) No 2015/706 is said in its heading to be, "initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Commission Implementing Regulation (EU) 2015/82 on imports of citric acid originating in the People's Republic of China by imports of citric acid consigned from Malaysia, whether declared as originating in Malaysia or not, and making such imports subject to registration." The regulations took effect from the day following their publication in the *Official Journal of the European Union* and so on 2 May 2015.

(5) Commission Implementing Regulation (EU) No 2016/32 ("the Extension Regulations") is said in its heading to be, "extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) 2015/82 on imports of citric acid originating in the People's Republic of China to imports of citric acid consigned from Malaysia, whether declared as originating in Malaysia or not." The regulations took effect from the day following their publication in the *Official Journal of the European Union* and so on 16 January 2016.

18. There is a dispute between the parties as to whether or not HMRC are seeking to treat the Extensions Regulations as having retrospective effect. Miss Kisiel notes that Kilo's imports of citric acid were from 8 July 2014 to 16 March 2015 and so before the Extension Regulations came into force on 15 January 2016. Miss Kisiel also notes that the Extension Regulations do not say that they are retrospective and Article 4 states that, "This Regulation shall enter force on the day following its publication in the *Official Journal of the European Union*."

19. Mr Carey submits that HMRC is not relying upon the Extension Regulations but instead relies upon the pre-existing measures. He sets out the chronology as follows:

(1) The Basic Regulation provides for anti-circumvention measures.

(2) The definitive measures were due to expire on 4 December 2013, as set out in the "Notice of the impending expiry of certain anti-dumping measures" (2013/C 60/04).

(3) The definitive measures were extended for 15 months by virtue of Commission Implementing Regulation (EU) 2015/82 while investigations were undertaken.

(4) The Extension Regulations implemented the definitive measures from the date of them taking effect.

20. We accept Mr Carey's submissions. Whilst Miss Kisiel is correct to say that the Extension Regulations do not have retrospective effect, HMRC does not need to rely on those regulations and does not seek to do so. Instead, HMRC is relying upon the combination of the Basic Regulation, the Definitive Regulation, and the extension of the Definitive Regulation by virtue of the Continuation Regulation. We are reinforced in our view by the following explanation within the preamble to the Extension Regulations which sets out what the existing measures were prior to the Extension Regulations coming into force:

> "1.1. Existing measures
>
> (1) The Council, following an anti-dumping investigation ('the original investigation'), imposed a definitive anti-dumping duty on imports of citric acid originating in the People's Republic of China ('PRC') by Regulation (EC) No 1193/2008. The measures took the form of an *ad valorem* duty ranging between 6,6% and 42,7% ('the original measures').
>
> (2) The European Commission ('the Commission'), by Decision 2008/899/EC accepted the price undertakings offered by seven Chinese exporting producers or group of exporting producers together with the China Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters.
>
> (3) The Commission, by Decision 2012/501/EU, subsequently withdrew the undertaking offered by one exporting producer, i.e. Laiwu Taihe Biochemistry Co. Ltd ('Laiwu').
>
> (4) By Implementing Regulation (EU) 2015/82 the Commission following an expiry review and a partial interim review ('previous investigations') pursuant to Article 11(2) and (3) of the basic Regulation respectively, maintained the definitive measures and amended their level. The definitive anti-dumping duties in force on imports of citric acid originating in the PRC range between 15,3% and 42,7%."

21. The Combined Nomenclature Regulation (Reg EEC) No 2658/87 provides for the imposition of tariffs.

22. Article 201 of the Community Customs Code, Council Regulation (EEC) 2913/92 provides for a debt to be incurred where imported goods are misclassified:

> "Article 201
>
> 1. A customs debt on importation shall be incurred through:
>
> (a) the release for free circulation of goods liable to import duties, or
>
> (b) the placing of such goods under the temporary importation procedure with partial relief from import duties.
>
> 2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.
>
> 3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.
>
> Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought

reasonably to have known that the such information was false, may also be considered debtors in accordance with the national provision in force."

23. Regulation (EU) No 952/2013 (the Union Customs Code") deals with repayment and remission. The relevant articles of the Union Customs Code are as follows:

"Article 116 – General provisions

1. Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:

(a) …;

(b) …

(c) error by the competent authorities;

(d) ....

Where an amount of export duty has been paid and the corresponding customs declaration is invalidated in accordance with Article 174, that amount shall be repaid.

…

Article 119 – Error by the competent authorities:

1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 120, an amount of import and export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable, provided the following conditions are met:

(a) the debtor could not reasonably have detected that error; and

(b) the debtor was acting in good faith.

2. Where the conditions laid down in Article 117(2) are not fulfilled, repayment or remission shall be granted where failure to apply the reduced or zero rate of duty was as a result of an error on the part of the customs authorities and the customs declaration for release for free circulation contained all the particulars and was accompanied by all the documents necessary for application of the reduced or zero rate.

3. Where the preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the customs territory of the Union, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of point (a) of paragraph 1.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The debtor shall be considered to be in good faith if he or she can demonstrate that, during the period of the trading operations concerned, he or she has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.

The debtor may not rely on a plea of good faith if the Commission has published a notice in the *Official Journal of the European Union* stating that

> there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country or territory."

24. The term "competent authorities" is not defined in Article 119. It was held in *Illumitrónica – Illuminação e Electrónica Ld v Chefe Da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa* (Case C-251/00) [2002] ECR I-40433 at [40] that this includes:

> "…any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations. … The Court has made it clear that this applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration (*Faroe Seafood*, paragraph 88)."

25. Competent authorities are not treated as making an error if they have been misled. In *Cyproveg Ltd v HMRC*, TC06722 ("*Cyproveg*"), the First-tier Tribunal (Judge Brooks and Ms Akhtar) stated as follows at [105] to [107] (which, whilst not binding, we adopt as an accurate summary of the law):

> "[105] It is clear from *Faroe Seafoods* (at [89] to [92]) that the term "competent authorities" is not confined to the customs authorities determining the application for waiver of the post-clearance recovery but also includes customs authorities entrusted by the EU with the task of furnishing relevant information.
>
> [106] However, it is only errors that are attributable to acts of the competent authorities that confer entitlement to the waiver of post-clearance recovery of customs duties (see Case C-348/89 *Mecanarte v Chefe do Serviço da Conferência Final da Alfândega* [1991] ECR I-3277, CJEU at [23]; and *Illumitrónica* at [42]).
>
> [107] Those customs authorities must have created a legitimate expectation on the part of the importer (see *Faroe Seafoods* at [91]). The competent authorities cannot be regarded as having made an error if they have been misled in relation to the goods by incorrect declarations on the part of the exporter, whose validity they are not obliged to check or assess. In such circumstances, it is the person liable who must bear the risks arising from a commercial document which is found to be false when subsequently checked (see *Faroe Seafood* at [92])."

26. The term "good faith" has a restricted meaning in this context. It does not mean simply the absence of deception, but also requires the exercise of appropriate diligence and due care. In *Staatsecretaris van Financien v Heuschen & Schrouff Oriental Foods Trading BV* (Case C-375/07) [2008] ECR I-8599 the ECJ compared the "good faith" provisions in Article 220 of the Customs Code with the requirement of, "no deception or obvious negligence" in Article 239 and found that the same were to be treated as the same. The ECJ stated as follows at [57] to [59]:

> "[57] It must be stated at the outset that the procedures provided for in Articles 220 and 239 of the Customs Code pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations (see Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 46, and *Söhl & Söhlke*, paragraph 54).
>
> [58] It follows that the conditions to which the application of those articles is made subject, that is to say, in particular, that no obvious negligence may

> be attributed to the person concerned in the case of the second indent of Article 239(1) of the Customs Code and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 220 of the Customs Code, must be interpreted in the same manner (see, to that effect, *Söhl & Söhlke*, paragraph 54).
>
> [59] Consequently, as the Court has previously held, in order to determine whether or not a trader has demonstrated 'obvious negligence', within the meaning of the second indent of Article 239(1) of the Customs Code, it is appropriate to apply by analogy the criteria used in the context of Article 220 of the Customs Code to ascertain whether or not an error committed by the customs authorities was detectable by a trader (see , *Söhl & Söhlke*, paragraphs 55 and 56, and Case C-156/00 *Netherlands v Commission* [2003] ECR I-2527, paragraph 92)."

27. The burden of proof in such cases is upon an appellant by virtue of section 16(6) of the Finance Act 1994.

FINDINGS OF FACT

28. We make the following findings of fact. In doing so, we bear in mind that the burden of proof is upon Kilo and that the standard of proof is that of the balance of probabilities. We have considered the documentary evidence, the written statement on behalf of Kilo (Mr Mark Taylor), and the witness statements on behalf of HMRC (Mr Steven Holder, Mr David Halliwell, Mr Vesa Lehtonen, and Mrs Audrey Warburton). We heard oral evidence from Mr Taylor and from Mr Lehtonen. We note at the outset that both Mr Taylor and Mr Lehtonen were genuine and helpful witness who gave their evidence in a credible manner and were clearly seeking to assist the Tribunal.

(1) Kilo is a large business with long experience of importing chemicals from around the world.

(2) Kilo places a high emphasis upon being able to trace where their goods have come from. They have meticulous control systems in order to know when raw materials expire.

(3) Mr Taylor was not involved at all in the purchase of, or dealings with, the consignments in question. Mr Rock dealt with all matters relating to the citric acid, including the approach from the suppliers, the dealings with the suppliers, and the decision to purchase the citric acid. Mr Taylor's only involvement came after HMRC began to investigate the matter.

(4) We note that there is no evidence from Mr Rock. It is clear from his initial emails with Globalchem that he was alive to the possibility of anti-dumping duty. Beyond this, however, we are not, in a position to make any findings of fact as to his understanding or belief in respect of Kilo's dealings with the citric acid.

(5) The documents establish that Globalchem first approached Mr Rock by an email dated 18 December 2013. Although Globalchem was a Chinese company, it was offering shipment from Malaysia to the European Union. Mr Rock responded by asking for confirmation of the anti-dumping duty and seeking improved pricing. Globalchem replied on the same day saying that the European Union has no ADD against Malyasia for citric acid. Mr Rock then confirmed that Kilo was currently importing product from China and asked for data sheets and mesh sizes to consider further in order to discuss pricings.

(6) Although Kilo was dealing with Globalchem, the consignments were from a variety of companies based in Malaysia. As set out in paragraph 7 above, these were Extern Enterprise, Sunpower Manufacture, Rinting Harmoni Resources, and Superior

Worldwide Industrial. These companies were named on the certificates of origin, bills of lading, packing lists, and certificate of analysis. However, payment was always to Globalchem (at the request of Globalchem and as set out in various of the invoices). Mr Taylor said during his oral evidence that it was not concerning that a Chinese company was supplying goods through Malaysian companies as he knew other suppliers that did the same thing and he assumes that they were local agents. However, the only evidence of the position at the time is that Globalchem was the point of contact and so that there was no independent dealing with the Malaysian consignors.

(7) Mr Taylor said that in order to fulfil British Retail Consortium standards, Kilo had to ensure matters such as the labelling and identification of separate batches, the suitability of specification, and recognition by suppliers of internationally recognised industry standards of manufacturing and hygiene. He said that Kilo had been successfully audited in respect of the British Retail Consortium standards. However, there was no evidence that there had been any audit or approval of the consignments of citric acid in question within these appeals or that an such audit or approval confirmed (or could confirm) the real origin of the citric acid.

(8) Mr Taylor also explained the typical procedure for the ordering and payment of goods. He said that in order for Kilo's bank to clear payment, it will check the following: a certificate of analysis, a certificate of origin, a packing list, a commercial invoice, and an original bill of lading.

(9) The only evidence of any due diligence in respect of these consignments was a questionnaire entitled "Food Supplier Audit Form" in respect of Rinting Harmoni Resources. This included the factory address in Malaysia, the naming of a commercial contact as Liu Lijian, a statement that the premises have been approved by a major UK retailer (Brenntag/Prinova), and a statement that the supplier or agent and broker are approved against the British Retail Consortium or Third Party GFSI standard (being BRC, ISO22000, FSSC22000). However, there was no evidence as to who filled in these details, the rest of the detailed questionnaire was not completed, the company name was misspelt as "Rinting Harmony Resources", the questionnaire was not signed or dated, and there were no questionnaires from any other consignor. There was no evidence of any due diligence as regards Globalchem.

(10) A certificate of origin was provided for each of the consignments in the name of the respective consignor as exporter. The certificates are headed "Certificate of Origin", said to be issued in Malaysia, and bear a symbol beneath which is written "Dewin Perniagaan Melayu Malayis (Malay Chamber of Commerce)". The certificates are signed by the exporter, who declared that the goods were produced or processed in Malaysia. The certificates also state that, "It is hereby certified, on the basis of control carried out, that the declaration by the exporter is correct." However, the only signature by the Chamber of Commerce is within a stamped text box beneath this certification. The stamped text reads as follows:

> "Nor Paridah Hanum Mohd Nor
>
> Manager
>
> Certified to the best of our knowledge and belief and without liability on our part that the information contain to be correct
>
> Malay Chamber of Commerce Malaysia"

(11) The OLAF mission report explained that non-preferential certificates of origin were issued by the Chamber of Commerce under the supervision of the Ministry of

International Trade in Malaysia. The outcome of the mission was that citric acid in fact originated in China notwithstanding certificates of origin stating that it originated in Malaysia. In particular, 635 shipments of citric acid which originated in China were transhipped via Malaysia to the EU. These included the consignments of citric acid which are the subject of these appeals. OLAF also found that Malaysia does not manufacture citric acid.

(12) We accept the findings of the OLAF mission before us (particularly as set out in paragraphs 10 and 28(11) above) because there is no evidence to suggest that it is incorrect. For the same reason, we also accept the written and oral witness evidence of Mr Vesa Lehtonen (who was a member of the OLAF mission), which evidence effectively adopted the OLAF mission report.

(13) Miss Kisiel invited us to find that the Malaysian customs authorities were involved in a fraud. She relied upon the fact that movement between the areas controlled by the Port Klang Authority was strictly controlled, it would not ordinarily be possible to appear on both ZB1 lists and ZB2 lists, the sheer size of the port made transit between the areas unlikely without fraud, and various press reports. We do not accept that any of this is evidence of fraud by the Malaysian customs authorities. It provides insufficient detail and merely highlights that fraudulent activity took place (which is itself consistent with the findings of the OLAF mission) rather than providing any information as to who the fraud was committed by.

(14) Miss Kisiel said in closing that Kilo accepted that the consignments of citric acid did not originate from Malyasia and that they were transhipped from China. Even if Kilo had not made this concession, we would have found that, on the balance of probabilities, the citric acid originated in China. This is for the reasons set out in the OLAF mission. Further, whilst Kilo relies heavily upon the certificate of origin, the OLAF mission establishes that these certificates are incorrect. Kilo also relied upon the bank's approval of the paperwork. However, there is no evidence that the bank investigated the origin of the consignments further than noting the certificate of origin provided to it. Finally, Kilo relies upon the British Retail Consortium standards and audits. Again, however, there is no evidence that the true origin of these consignments formed any part of any audit.

THE ADD APPEAL

29. Miss Kisiel's submissions in respect of the ADD Appeal can be summarised as follows:

(1) The Extension Regulations did not have retrospective effect.

(2) There is no evidence as to how the origin changed from China to Malaysia.

(3) Kilo relied upon the certificates of origin stating that the citric acid was from Malaysia.

30. Mr Carey's submissions in respect of the ADD Appeal can be summarised as follows:

(1) HMRC are not relying upon the Extension Regulations.

(2) There is no need for HMRC to establish how the Malaysian certificates of origin came about.

(3) The certificates of origin are not definitive. In any event, the burden is upon the person liable to payment to establish that a certificate of origin is correct (see *Lagura Vermögensverwaltung GmbH v Hauptzollamt Hamburg-Hafen* (Case C-438/11) ("*Lagura*") at [38]) and the European Union does not bear responsibility for wrongful acts of suppliers (see *Pascoal & Filhos Ltd v Fazenda Pública* (Case C-97/95) [1997] ECR 1-4209 ("*Pascoal*") at [12]).

31. We find that Kilo has failed to establish that HMRC was not entitled to impose the ADD.

32. For the reasons set out in paragraphs 18 to 20 above, the operative regulations in the present case were the Definitive Regulation and the Continuation Regulation. Whilst we accept that the Extension Regulations were not retrospective, HMRC does not rely (and does not need to rely) upon the Extension Regulations.

33. For the reasons set out in paragraph 28(14) above, we find that the citric acid originated in China. There is no obligation upon HMRC to establish how any different certificates of origin came about as it is the actual origin rather than the declared origin which causes the ADD to be applied in the present case.

34. In any event, the certificates of origin are not capable of changing where the citric acid originated from. We agree with Mr Carey's reliance upon *Lagura* and *Pascoal.* As such, the fact that Kilo relied upon incorrect certificates of origin has no bearing upon the imposition of the ADD. Indeed, Miss Kisiel has not explained any legal basis for any contrary view.

35. We therefore dismiss the ADD Appeal.

THE REPAYMENT APPEAL

36. Miss Kisiel's submissions in respect of the Repayment Appeal can be summarised as follows:

(1) During oral closing submissions, Miss Kisiel said that the relevant competent authority was the Malayisan customs authority and not the Chamber of Commerce. She said that the error relied upon is the issue of a K2 and release from the port rather than the issue by the Chamber of Commerce by the certificate of origin.

(2) Kilo could not reasonably have detected the error as it had no knowledge of what was happening in Malaysia. Kilo acted with all due diligence and successful audits of Kilo were carried out by the British Retail Consortium.

(3) Kilo acted with all good faith.

37. Mr Carey's submissions in respect of the Repayment Appeal can be summarised as follows:

(1) The competent authority is the Malaysian customs authority, which has not made any error. The Chamber of Commerce is not a competent authority. Even if the Chamber of Commerce is a competent authority, there is no evidence that it made a mistake as opposed to being misled.

(2) There is no evidence of Kilo having carried out any due diligence.

(3) HMRC does not allege that Kilo acted in bad faith or that Kilo was involved in any deception. However, good faith requires for these purposes requires there to be no obvious negligence. There was obvious negligence here as there was an absence of any due diligence.

38. We find that Kilo has failed to establish an entitlement to repayment.

39. The relevant legal principles in respect of the Repayment Appeal are set out at paragraphs 23 to 27 above. We note that it is Article 119(1) which is applicable to the present case; Article 119(2) deals with reduced or zero-rated duty, and Article 119(3) deals with preferential treatment of goods. Each of the requirements set out in Article 119(1) must be made out by Kilo in order to succeed. As set out below, we find that Kilo has not established each (or, indeed, any) of the requirements.

40. As regards the issue as to whether there was an error of a competent authority, we find as follows:

(1) We note that in oral closing Miss Kisiel said that she was not relying upon any error by the Chamber of Commerce in issuing the certificates of origin and instead relies upon what she says is an error by the Malaysian customs authorities in issuing the K2 or allowing the consignments to be on both ZB1 and ZB2 lists. As such, whether the Chamber of Commerce is a competent authority or not, Kilo is not saying that the Chamber of Commerce was itself the competent authority or that it had made an error.

(2) In any event, we find that the Chamber of Commerce was not a competent authority for these purposes. The certificate of origin was not being used for information relevant to the recovery of customs duties because Kilo was not seeking to obtain a preferential rate of duty. In short, the Chamber of Commerce is not a customs authority.

(3) Even if the Chamber of Commerce were to be treated as a competent authority, we find that Kilo has not established that it made an error. For the reasons set out in the OLAF mission report, the exporters of the citric acid acted in a way which misled others into treating the origin of the citric acid as being Malaysia rather than China. There is nothing to suggest that the Chamber of Commerce were aware or should have been aware of this and so we infer that the Chamber of Commerce was misled. As explained in *Cyproveg,* competent authorities cannot be regarded as having made an error if they have been misled in relation to the goods by incorrect declarations on the part of the exporter, whose validity they are not obliged to check or assess. In any event, the certificates of origin themselves were signed and stamped upon the express basis that this was to the best of their knowledge and belief and that it was without liability on the part of the Chamber of Commerce that the information in the Certificate of Origin was correct (as set out in paragraph 28(10) above).

(4) Further, we find that Kilo has not established that the Malaysian customs authority have made an error. Again, for the reasons set out in the OLAF mission report, the customs authority was misled into treating the origin of the citric acid as being Malaysia rather than China.

41. As regards the issue as to whether Kilo could not reasonably have detected the error, we find as follows:

(1) We accept that Kilo could not reasonably have reached the findings of the OLAF mission as it understandably did not have access to sufficient information to investigate what had happened in Port Klang.

(2) However, Kilo could reasonably have detected that the origin of the citric acid was China. Kilo was dealing with, and paying, a Chinese company with no explanation as to why the consignors were Malaysian. There is no evidence of any direct dealings between Kilo and the Malaysian consignors. No due diligence was done on the Malysian consignors or on Globalchem. In particular, there is no evidence that the questionnaires referred to by Mr Taylor were completed in respect of any of these companies (and in this regard we repeat our findings set out in paragraph 28(9) above). Mr Rock was himself initially concerned about anti-dumping duty (as shown from his email exchange with Globalchem) and there is no evidence from him as to why his concerns were allayed. Further, this was all against a background in which Kilo had been purchasing its citric acid from China and had never purchased it from Malaysia.

(3) We appreciate that Kilo relied upon the certificates of origin. However, as set out above, the certificates of origin contained a disclaimer that they were without liability on

the part of the Chamber of Commerce and so these ought not to have overridden the obvious concerns set out in paragraph 41(2) above.

42. As regards the issue as to whether Kilo acted in good faith, we find as follows:

(1) We accept that Kilo did not act dishonestly or with deception.

(2) However, as set out in paragraph 26 above, "good faith" in this context requires the exercise of appropriate diligence and due care and acting without obvious negligence.

(3) For the reasons set out in paragraph 41 above, we find that Kilo did not exercise appropriate diligence or due care and acted with obvious negligence. In particular, there is no evidence that Kilo carried out any investigations into who it was dealing with or as to why a Chinese company was selling citric acid to them said to originate in Malaysia.

43. We therefore dismiss the Repayment Appeal.

DISPOSITION

44. It follows that, for the reasons which we have set out above, we dismiss both the ADD Appeal and the Repayment Appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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 CHAPMAN KC
TRIBUNAL JUDGE

Release date: 29th SEPTEMBER 2022