[2018] UKUT 302 (TCC)

Appeal number: UT/2017/0139

VAT and CUSTOMS DUTY – inward processing relief – EEC Regulations 2913/92 and 2454/93 – Post Clearance Demand Notice (C18) on failure to file returns – refusal of remission – whether HMRC would have granted an extension of time – whether obvious negligence – whether a special situation – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

NU-PRO LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JUDITH POWELL

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 11 June 2018

Tim Brown, instructed by The VAT People Ltd, for the Appellant

Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Nu-Pro Limited ("Nu-Pro") from a decision ("the Decision") of the First-tier Tribunal (Judge Peter Kempster) ("the FTT") dated 13 July 2017, the respondents being The Commissioners for Her Majesty's Revenue and Customs ("HMRC"). The Decision is reported as *Nu-Pro Limited v Revenue and Customs Commissioners* [2017] UKFTT 06004 (TC), and references below to numbers in square brackets are, unless otherwise apparent, references to paragraphs of the Decision. Permission to appeal was granted by the FTT (Judge Peter Kempster) on 21 September 2017.

2. The Decision concerned two decisions of HMRC. The first decision, on 13 October 2014 and following formal review, upheld the issue of a C18 Post Clearance Demand Notice ("C18") on 18 August 2014 in the sum of £1,178,325.88 in respect of alleged non-compliance with an Inward Processing ("IP") authorisation by reference to a failure to file a number of Inward Processing Relief ("IPR") returns. The second decision, on 1 December 2015 and following formal review, upheld the decision on 2 September 2015 to refuse Nu-Pro's application for remission of £136,224.88 of import duty and £1,040,831.73 of import VAT due as a result of the disputed C18.

3. The grounds for this appeal are that the FTT erred in its findings on three arguments made before it. Those three arguments were as follows. The first was that, as Nu-Pro submitted, it was not "obviously negligent". This argument was resolved against Nu-Pro by the FTT (at [130] and at [138] - [139]). For Nu-Pro to succeed in either of its appeals against the decisions of HMRC it had to win that argument. If that argument had been resolved in favour of Nu-Pro it would only have succeeded in its appeal against the first HMRC decision (issue of the C18) if, as Nu-Pro submitted, HMRC would have granted a further extension of time for the submission of the relevant bills of discharge for the purposes of Article 859 of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 ("the Implementing Regulation"). This argument was also resolved against it by the FTT (at [122]). As regards the second HMRC decision, if the first argument (no obvious negligence) had been resolved by the FTT in favour of Nu-Pro it would only have succeeded in its appeal against the second decision of HMRC if, as it alleged, there was a "special situation" for the purposes of Article 899 of the Implementing Regulation. The FTT also resolved that argument against Nu-Pro (at [136]).

The EU law concerning Inward Processing Relief

4. It is convenient at the outset to refer to the relevant EU law concerning IPR. The provisions relevant to this appeal are contained in Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code ("the Customs Code"). The detailed implementation of certain provisions of the Customs Code was, at the material time, effected through the Implementing Regulation.[1]

[1] Regulation (EEC) No 2913/92 has been superseded by Regulation 952/2013/EU ("the Union Customs Code"), but at the relevant time the material provisions of Regulation (EEC) No 2913/92 were applicable. Similarly, although Commission Regulation (EEC) No 2454/93 has been replaced, that Regulation applied at the relevant time for this appeal.

5. In brief, IPR is a system for relief of customs duties and VAT on imports of goods from outside the EU which are processed inside the EU and then re-exported. There are two ways in which relief is granted. One is the method of suspension whereby no duty or VAT is due on import and only becomes due if the goods are released to the EU market. The other allows for refund (or remission) on export where duty and VAT were paid on import.

6. There is no dispute that Nu-Pro applied for and was granted an Inward Processing Authorisation ("IPA") which was valid between 16 May 2011 and 16 May 2013 and that Nu-Pro applied to renew the IPA retrospectively on 30 January 2014 and again on 14 February 2014.

7. Article 4 of the Customs Code defines certain terms as follows:

> "(13) 'Supervision by the customs authorities' means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.
>
> …
>
> (16) 'Customs procedure' means:
>
> …
>
> (d) inward processing;
>
> …
>
> (21) 'Holder of the procedure' means the person on whose behalf the customs declaration was made or the person to whom the rights and obligations of the abovementioned person in respect of a customs procedure have been transferred.
>
> (22) 'Holder of the authorization' means the person to whom an authorization has been granted.
>
> …"

8. Nu-Pro incurred a customs debt by failing to file the bills of discharge within the 30-day permitted periods unless it could establish that the conditions set out in Article 859 of the Implementing Regulation were fulfilled. The possibility of relief is provided for at the end of Article 204(1)(b). Article 204 (so far as relevant) provides:

> "1. A customs debt on importation shall be incurred through:
>
> (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or
>
> (b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,
>
> in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question."

9. Article 860 of the Implementing Regulation provides:

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

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

> "The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204 (1) of the Code, provided:
>
> — they do not constitute an attempt to remove the goods unlawfully from customs supervision,
>
> — they do not imply obvious negligence on the part of the person concerned, and
>
> — all the formalities necessary to regularize the situation of the goods are subsequently carried out:
>
> …
>
> 9. in the framework of inward processing and processing under customs control, exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time; …"

11. In the present case for Nu-Pro to succeed in its appeal against the first decision of HMRC it had to show that it satisfied the condition set out in the second indent of Article 859 (not implying obvious negligence) and that the time limit described in Article 859(9) would have been extended had an extension been applied for in time.

12. The second decision of HMRC against which Nu-Pro brought its appeal relates to its application for remission and the following provisions of the Customs Code and the Implementing Regulation are relevant to an application for remission. Article 239 of the Customs Code (so far as relevant) provides:

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

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

> "1. Where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:
>
> — is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import or export duties concerned,
>
> — is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import or export duties concerned.
>
> 2. In other cases, except those in which the dossier must be submitted to the Commission pursuant to Article 905, the decision-making customs authority shall itself decide to grant repayment or remission of the import or export duties where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned."

14. Nu-Pro would only succeed in its appeal against the second decision of the HMRC (no remission) if, in addition to satisfying the no obvious negligence requirement, it was also in a special situation.

The facts

15. The facts were not in dispute before the FTT or before us and can be taken from the Decision at [18]-[71] as follows. We set them out in full, since at the heart of this appeal is the question whether the FTT was entitled, on the facts, to reach the conclusions it arrived at in those respects that are the subject of Nu-Pro's challenge:

> "18. I make the following findings of fact.
>
> 19. Nu-Pro is based in Stroud and operates in the aerospace and defence industries, providing a number of services including machining, sub-assembly and general processing.
>
> 20. On 29 September 2010 HMRC (Mrs Franks) visited Nu-Pro in connection with an IPR application submitted by an unconnected person; Nu-Pro was unaware that the application had been made, and it was subsequently withdrawn. Mrs Franks reviewed Nu-Pro's procedures in relation to imports and exports, and on 29 July 2011 she wrote to Nu-Pro setting out issues that must be addressed and points of assistance. She identified three breaches of IPR procedures and raised a C18 for a total of £607.81 duty and £4,003.69 VAT.
>
> 21. On 16 May 2011 Nu-Pro submitted an application for an IP authorisation, which was approved on 26 May 2011 ("the IPA") and was valid from 16 May 2011 until 16 May 2013.
>
> 22. On 30 January 2014 Nu-Pro applied to renew the IPA ("the Renewal Application") retrospectively, prompted by one of Nu-Pro's shipments being held up at Dover Customs because the IPA had expired over eight months previously. The Renewal Application omitted some information and was resubmitted on 14 February 2014.
>
> 23. On 23 April 2014 Mrs Francis and a colleague (Ms Evans) visited Nu-Pro, prompted by the Renewal Application, to review operation of its IPA. Mrs Francis considered there was a number of irregularities in Nu-Pro's operation of IPR; in particular, she identified that only one

IPR return had been filed during the lifetime of the IPA (a nil return for the period May to June 2011). Nu-Pro undertook to complete and submit to HMRC by 30 May 2014 all outstanding IPR returns.

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

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

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

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

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

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

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

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

Summary of relevant points of Witness evidence

Mr Williment's evidence

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

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

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

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

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

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

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

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

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

41. In response to questions in cross-examination:

(1) He would have passed Ms Frank's July 2011 letter straight to Mr Chester; as far as he was concerned, IPR was just an in-and-out procedure; he had not apprehended any problems; he accepted that deficiencies were drawn to the company's attention.

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

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

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

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

Mr Chester's evidence

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

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

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

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

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

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

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

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

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

51. On 29 May 2014 he received a phone call from Mrs Francis who advised him to stop the collation process of the IPR returns until he heard from her; she stated this was because HMRC were not clear on

what was happening in respect of Nu-Pro's IPR consignments and that she would ask her colleagues in the Large Business Unit to visit Rolls Royce to try to establish what was happening. He ceased work as instructed. He informed Mr Williment of this phone call due to the elation of stopping the process because of uncertainty.

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

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

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

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

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

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

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

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

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

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

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

Kind regards

Tony"

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

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

59.In response to questions in cross-examination:

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

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

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

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

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

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

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

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

Mrs Francis's evidence

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

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

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

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

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

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

61. At the visit she advised Mr Chester on IPR generally and specifically how to complete the returns. She was conscious that (i) an authorised person had a competitive advantage over other traders, and (ii) compliance failures could result in a customs debt. She specifically advised Mr Chester to read the terms of Nu-Pro's authorisation and also HMRC Notice 221. She arranged a further visit for 21 May 2014, which was lenient because HMRC would usually expect matters to be resolved within 14 days, and gave a deadline of 30 May 2014 for delivery of the outstanding returns.

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

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

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

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

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

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

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

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

(7) A C18 might be issued.

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

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

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

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

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

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

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

71. In response to questions in cross-examination:

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

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

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

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

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

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

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

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

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

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

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

The FTT Decision

16. The basis for Nu-Pro's contention that it was not liable in relation to the C18 assessment was that it had met the requirements for Article 859 of the Implementing Regulation to apply.

17. HMRC submitted to the FTT that Nu-Pro had failed to show that two of the requirements of Article 859 had been met; namely that the time limit allowed for the bills of discharge would have been extended by HMRC if it had been applied for in time and that it was not obviously negligent.

18. The basis for Nu-Pro's contention that it was entitled to remission of the amount was that it fell within Article 899(2) of the Implementing Regulation in that there was no obvious negligence by it, and that it was in a special situation. HMRC submitted that there was obvious negligence by Nu-Pro and that it was not in a special situation.

19. The FTT rejected both of Nu-Pro's contentions for the reasons given at [104] to [139].

The appeal

20. The three grounds for appeal are that the FTT erred in its consideration as to (1) whether HMRC would have granted a further extension of time for the purposes of Article 859(9), (2) whether Nu-Pro was obviously negligent and (3) whether there was a "special situation" for the purposes of Article 899(2). For the reasons given below, we do not consider that the FTT made any error of law in its consideration of any of these matters and, as we stated at the close of Mr Brown's submissions on behalf of Nu-Pro, we propose to dismiss Nu-Pro's appeal.

The law

21. It was common ground that, to succeed in its appeal at all, Nu-Pro must win on two grounds. It must win on the second ground which requires it to show that it was not obviously negligent. If it failed to win on that ground it would fail in its appeal against both decisions of HMRC. If it won on that ground it must also succeed on at least one of the other grounds as well (that HMRC would have granted a further extension or that there was a special situation or both).

22. We were referred to the recent case of *Rikki Cann Limited v Revenue and Customs Commissioners* [2016] UKFTT 0538 (TC) (Judge Philip Gillett) which discussed the construction of the expression "in time" for the purpose of both Article 859(1) and (9). What Judge Gillett said in *Rikki Cann* at [46] was referred to by Judge Kempster at [94] the final words of which are as follows:

> "… The only way we can interpret this provision meaningfully therefore is by reading the words 'in time' as meaning 'in time for an extension to be granted'."

23. That construction of the relevant provisions was not in dispute before us. We respectfully consider it to be correct. Nu-Pro accepted that the FTT set out the correct test for obvious negligence at [123] where it quoted paragraphs 51-60 of the judgment of the CJEU in *Firma Söhl & Söhlke v Hauptzollamt Bremen* (Case C-48/98) [2000] 1 CMLR 351 as follows:

"As regards the second part of the seventh question, it should be observed first of all that, as is evident from paragraphs 46 to 49 of this judgment, the second indent of Article 239(1) of the Customs Code and the other provisions of the Customs Code or the implementing Regulation which form the subject-matter of this judgment refer to the same concept of 'obvious negligence'.

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

53.Thirdly, it appears that the Customs Code brought together the provisions of customs law which had previously been dispersed in a large number of Community regulations and directives. When that happened Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1) was essentially reproduced in Article 239 of the Customs Code. Therefore, the case-law of the Court concerning the former must also apply to the latter.

54. It follows from the judgment in Case C-250/91 *Hewlett Packard France* [1993] ECRI-1819, paragraph 46, that Article 13 of Regulation No 1430/79 and Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. It follows that the conditions to which the application of those articles is made subject, that is to say that no negligence or deception may be attributed to the person concerned in the case of Article 13 of Regulation No 1430/79 and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 5(2) of Regulation No 1697/79, must be interpreted in the same manner.

55. Moreover, in its judgment concerning Article 5(2) of Regulation No 1697/79 in Case C-64/89 *Deutscher Fernsprecher* [1990] ECR I-2535, paragraph 19, the Court held that the question whether or not an error committed by the customs authorities was detectable by a trader had to be examined taking account in particular of the precise nature of the error, the professional experience of, and the care taken by, the trader.

56. By analogy with those criteria, in order to determine whether or not there is 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.

> 57. As regards the professional experience of the trader, it is necessary to examine whether or not he is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions.
>
> 58. As regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions.
>
> 59. It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader.
>
> 60. In those circumstances, the answer to the second part of the seventh question must be that in order to determine whether or not there is 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred and the professional experience of, and the care taken by, the trader. It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader."

24. We were not invited to depart from this statement of the test of obvious negligence. Nu-Pro accepted that the test whether it was obviously negligent was the same for the purposes of both Articles 859 and 899.

25. The third ground for appeal concerns the meaning of "special situation" for the purposes of Article 899. Nu-Pro did not dispute that the FTT had directed itself correctly by setting out at [134] the following statement of the CJEU in *Kaufring AG v European Commission* (T-186/97) [2001] 2 CMLR 1057:

> "216. It is settled case-law that Article 13(1) of Regulation No 1430/79 constitutes a general equitable provision (see in particular Case 283/82 *Schoeller & Söhne v Commission* [1983] ECR 4219, paragraph 7).
>
> 217. According to that provision the person liable to pay customs duties who demonstrates both the existence of a special situation and the absence of obvious negligence and deception on his part is entitled to the remission of those duties (see *Eyckeler & Malt*, cited above at paragraph 87, paragraph 134).
>
> 218. The case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business (see Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraphs 21 and 22, and Case C-61/98 *De Haan* [1999] ECR I-5003, paragraphs 52 and 53) and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties (Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* [1987] ECR 1525, paragraph 22).
>
> 219. As regards the condition concerning the absence of obvious negligence or deception on the part of the interested party, the Court held in *Hewlett Packard France* (cited above at paragraph 192), paragraph 46, that Article 13(1) of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit

> the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. Seen in that light, the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79, and therefore the conditions laid down by the latter provision must be assessed in the light of those laid down in Article 5(2) of Regulation No 1697/79.
>
> 220. Finally, since, according to settled case-law, the conditions laid down by Article 13(1) of Regulation No 1430/79 are cumulative (*Günzler Aluminium*, cited above at paragraph 192, paragraph 54, and Case C-370/96 *Covita* [1998] ECR I-7711, paragraph 29), remission must be refused if one of those conditions is not met."

26. From this we take the law to be as follows. First, in considering whether HMRC would have granted an extension "in time", this means "in time for an extension to be granted". In this case HMRC had already extended the original time period on several occasions and so we consider the question here is whether a further extension would have been granted if an application had been made within that extended period. Secondly, it is for Nu-Pro to demonstrate it was not obviously negligent. In considering that question the same test applies for Articles 859 and 899, and account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred and the professional experience of, and the care taken by, the trader. It is for the national court to determine on the basis of those criteria, whether there is obvious negligence. Thirdly, a special situation exists if it is clear from the circumstances of the case that (a) the trader in question is in an exceptional situation as compared with other operators engaged in the same business; and (b) in the absence of such circumstances that trader would not have suffered the disadvantage caused by the customs duties charged by the C18.

Application to the facts of the present case

Extension of time limit

27. Mr Brown submitted that the FTT erred in relation to its decision that HMRC would not have extended the time limit because it stated that as at least one extension had been granted the test was simply whether the new deadline was met. We accept that (at [117]) this is what the FTT said but that is not all it said. In particular at paragraph [122] Judge Kempster said:

> "For the avoidance of doubt, it is also clear to me from the contents of Mrs Francis's email dated 11 August 2014 and surrounding correspondence that any further extension request by Nu-Pro beyond 10 August 2014 would not have been granted by HMRC, had it been requested."

28. Mr Brown submitted that it is unclear what surrounding correspondence was considered but that if it was or included the review letter this tended to show no more than that it was uncertain whether an extension would have been granted. It is clear that Judge Kempster had considered the formal review letter dated 2 September 2015 written by Ms Libby Bowden because at [120] he set out an extract from it and in particular paragraph 77 where the Review Officer said that there "is no evidence and I

am therefore unable to comment on whether a further extension request had it been made would have been granted". The Review Officer was not expressing a view either way. There was, however, other correspondence between Nu-Pro and Mrs Francis as is evident from the facts found by the FTT. We do not therefore accept Mr Brown's submission, particularly as he was unable to identify what the FTT had ignored or had wrongly taken into account apart from the review letter which was neutral on the issue. Judge Kempster had reached his conclusion on the question at [122] and while we accept that Nu-Pro disagreed with his conclusion it was unable to show that the judge had taken into account anything he should not have done or ignored anything he should have taken into account. In our judgment, the FTT was entitled on the evidence to reach the conclusion that it did.

Obvious negligence

29. Mr Brown also made submissions in relation to the FTT finding (at [130], [138] and [139]) that Nu-Pro had been obviously negligent. He accepted that the FTT had correctly directed itself as to the test to be applied in resolving that issue but submitted it had applied it incorrectly when it considered the precise nature of the error, and the professional experience of and the care taken by the trader. In our judgment that submission must fail. The FTT considered each of these aspects individually and with care from [124] onwards. The main grounds of challenge by Mr Brown appeared to be that the FTT had inferred too much expertise on the part of Nu-Pro in import and export transactions and had found, wrongly in Mr Brown's submission, that it had gained relevant earlier experience merely because it had on an earlier occasion been concerned in a simplified version of the same system.

30. We do not accept that these challenges identify any error of law on the part of the FTT. At [124] Judge Kempster considered the complexity of the provisions and what was said in the relevant sections of Customs Notice 221 and concluded "I find that the contents of the Notice set out clearly and in terms comprehensible to the average businessperson the procedures to be followed in relation to IP, including the requirement to file returns and supply supporting documentation". He also referred to the authorisation letter which set out the requirement for suspension returns. The judge did consider Nu-Pro's previous experience. At [125] he referred to Nu-Pro's business activities involving import and export transactions of high value aerospace components and the fact that Nu-Pro had involvement with IP going back to 2010. He acknowledged that this was the simplified form of IPR. This reference was, however, by way of a background note rather than something which formed the basis of the judge's decision. Accordingly, although Mr Brown disputed that Nu-Pro was involved with import and export transactions of high value it is clear to us that this conclusion (even if incorrect) was not material to the FTT's decision. Judge Kempster did not say that the earlier involvement of Nu-Pro in a simplified system of IPR gave it the necessary expertise to operate IPR but at [126] and [127] simply recorded that Nu-Pro had showed a lack of care and a failure to properly engage in IPR procedures in 2010 when it was operating the simplified system and that this had resulted in a C18 being issued at that time. That was, we consider, relevant context in which to consider the events leading up to the issue of the C18 in the case before the FTT.

31. Having reviewed that background, Judge Kempster set out in some detail at [129] his reasons for saying that the specific failures which had given rise to the disputed C18 showed a lack of care on the part of Nu-Pro. Mr Brown submits that

these reasons also showed error on the part of the FTT. At [129](1) Judge Kempster referred to Nu-Pro's failure to familiarise itself with the authorisation letter. Mr Brown submitted that this was wrong because Nu-Pro had relied upon a management letter relating to a different procedure. At [129](2) Judge Kempster quoted from the criteria set out in *Firma Söhl*, namely the requirement to seek "all possible clarification" where there were doubts. Mr Brown submitted that this was irrelevant since Nu-Pro had entertained no doubts. Finally, Mr Brown argued that it was difficult for Nu-Pro to get the required information together and it had stopped work on the returns because the HMRC officer told it to do so and it had thought it could rely on the officer to help deal with outstanding matters.

32. We do not accept those submissions as evidencing any error of law in the approach or conclusions of the FTT. It is clear that Judge Kempster had referred to and explained his reasons for rejecting similar arguments at [129](3), (5) and (6) as well as giving further reasons at (4) for his finding that Nu-Pro's failures demonstrated obvious negligence on its part. None of Mr Brown's submissions in this appeal go any way towards showing that the FTT erred in law. Indeed, far from accepting those submissions, we conclude that it is difficult to imagine a clearer case of obvious negligence.

Special situation

33. As we have rejected the contention that the FTT erred in finding there was obvious negligence on the part of Nu-Pro it is strictly unnecessary for us to consider whether Nu-Pro would have succeeded in showing that the FTT erred in finding that it was not in a special situation. As we heard Mr Brown's submissions in this respect, we set out, albeit very briefly, our conclusions on that issue.

34. Mr Brown submitted that the FTT was wrong to state, at [136], there was no special situation prior to the fire; the fire was, he argued, the special situation. We do not consider that the FTT made any error of law in this respect. The FTT at [136] referred to submissions about special circumstances prior to the fire only to dismiss any notion that any such circumstances had occurred. Nu-Pro does not take issue with the FTT's conclusion that there were none. But at [137] the FTT does consider whether the fire itself was a special situation. The FTT's finding in that respect was that, although the fire was peculiar to Nu-Pro, it was not a special situation for these purposes because the fire was not the situation that caused the failure to file the returns; the FTT found that the proximate cause of Nu-Pro's default was that it had not taken care to understand and comply with its IPR authorisation. The FTT also referred to the fact that Nu-Pro had been granted extra time to accommodate the upheaval resulting from the fire. That conclusion is entirely consistent with the principles set out in the judgment of the CJEU in *Kaufring*, at paragraph 218. The FTT was also correct, relying on *Firma Söhl*, in noting the requirement that the conditions for remission must be interpreted strictly. We note further that whilst the FTT did not mention the apparently unchallenged evidence of Mrs Francis recorded at [66] that Mr Chester had told her that the fire had not affected the offices and most of the required paperwork was ready that evidence would in our judgment have served only to reinforce the FTT's conclusion.

Decision

35. For the reasons we have given, we dismiss Nu-Pro's appeal.

ROGER BERNER
JUDITH POWELL

UPPER TRIBUNAL JUDGES

RELEASE DATE: 26 September 2018