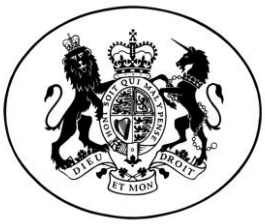
[2019] UKFTT 420 (TC)



TC07235

Appeal number: TC/2017/00428

CUSTOMS DUTY – inward processing relief – whether movement to another member state before re-export chargeable event under Art 203 CCC – held not – whether failures to keep proper records and file bill of discharge on time chargeable event under Art 204 CCC – held yes – whether relief afforded by Art 859 CCIP – held no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROLLS ROYCE PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 18 – 20 June 2019

Jeremy White, counsel, for the Appellant

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

DECISION

1. This appeal concerns a decision by HMRC to issue a C18 Post Clearance Demand Note ("the C18") in the sum of £2,381,357.45 for a number of alleged breaches by Rolls Royce PLC ("RR") of their Inward Processing Relief (IPR) authorisation.

2. The C18, dated 7 June 2016, assessed RR to customs duty in respect of 3 industrial gas generators that had been imported under the IPR procedure. The figure of £2,381,357.45 includes £335,699.58 import duty in respect of the 3 generators. HMRC plus import VAT and interest.

3. The IPR procedure covers the import of raw materials without payment of duty, their processing into manufactured goods (compensating products) and the re-export of those products from the UK. The main control issue for customs authorities for such goods is the diversion of raw materials or compensating products onto the home market without being entered to free circulation on payment of duty.

4. IPR is also used for the import of goods needing repair without payment of duty, the repair of those goods, and the re-export of those goods. This case concerns the import for repair of 3 large, valuable, gas generators, based on the RB211 jet aircraft engine. The generators were owned by persons outside the EU (RR's customers) and the repairs were carried out by RR under Incoterms "Ex Works (EXW)" terms of trade. This meant that RR's customers were responsible for removal of the generators from RR's repair premises and for all customs formalities of export from the EU following their repair.

THE LAW

5. The law relating to IPR is extensive and is set out in European Council Regulation (EEC) 2913/92, the Community Customs Code ("the CCC"), and European Commission Regulation (EEC) 2454/93, the Implementing Regulations, (the CCIP"). The key provisions relevant to this appeal are set out below.

6. Article 203 of the CCC provides as follows:

> "**Article 203**
>
> 1. A customs debt on importation shall be incurred through:
>
> - the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

- the person who removed the goods from customs supervision,

- any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

- any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

- where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed."

7. Article 204 of the CCC provides as follows:

"**Article 204**

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

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

8. Article 221(3) of the CCC provides that an entry into the accounts of a customs debt, ie the C18, must be communicated to the alleged debtor within the period of three years of the incurrence of the customs debt as follows:

> "**Article 221(3)**
>
> Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of article 243 is lodged, for the duration of the appeal proceedings."

9. Article 215(2) of the CCC provides:

> "**Article 215(2)**
>
> 2. Where the information available to the customs authorities enables them to establish that the customs debt was already incurred when the goods were in another place at an earlier date, the customs debt shall be deemed to have been incurred at the place which may be established as the location of the goods at the earliest time when existence of the customs debt may be established."

10. Article 512(3) of the CCIP makes an important provision regarding the transfer of good intra-community prior to their re-export, as follows:

> "**Article 512**
>
> 3. Transfer to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case, the arrangements shall not be discharged until the goods or products declared for re-exportation have actually left the custom territory of the Community."

For these purposes it should be noted that "the office of exit" referred to in article 512 may be another member state.

11. Importantly, article 859 of the CCIP provides relief from a customs debt arising under article 204 of the CCC in certain circumstances as follows:

> "**Article 859**
>
> 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:

1. exceeding the time limit allowed for assignment of the goods to one of the customs-approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time limit would have been extended had an extension been applied for in time;

2. in the case of goods placed under a transit procedure, failure to fulfil one of the obligations entailed by the use of that procedure, where the following conditions are fulfilled:

(a) the goods entered for the procedure were actually presented intact at the office of destination;

(b) the office of destination has been able to ensure that the goods were assigned a customs-approved treatment or use or were placed in temporary storage at the end of the transit operation;

(c) where the time limit set under Article 356 has not been complied with and paragraph 3 of that Article does not apply, the goods have nevertheless been presented at the office of destination within a reasonable time;

3. in the case of goods placed in temporary storage or under the customs warehousing procedure, handling not authorized in advance by the customs authorities, provided such handling would have been authorized if applied for;

4. in the case of goods placed under the temporary importation procedure, use of the goods otherwise than as provided for in the authorization, provided such use would have been authorized under that procedure if applied for;

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

6. in the case of goods in temporary storage or entered for a customs procedure, removal of the goods from the customs territory of the Community or their introduction into a free zone of control type I within the meaning of Article 799 or into a free warehouse without completion of the necessary formalities;

7. in the case of goods or products physically transferred within the meaning of Articles 296, 297 or 511, failure to fulfil one of the conditions under which the transfer takes place, where the following conditions are fulfilled:

(a) the person concerned can demonstrate, to the satisfaction of the customs authorities, that the goods or products arrived at the specified premises or destination and, in cases of transfer based on Articles 296, 297, 512(2) or 513,

that the goods or products have been duly entered in the records of the specified premises or destination, where those Articles require such entry in the records;

(b) where a time limit set in the authorisation was not observed, the goods or products nevertheless arrived at the specified premises or destination within a reasonable time;

8. in the case of goods eligible on release for free circulation for the total or partial relief from import duties referred to in Article 145 of the Code, the existence of one of the situations referred to in Article 204 (1) (a) or (b) of the Code while the goods concerned are in temporary storage or under another customs procedure before being released for free circulation;

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;

10. exceeding the time-limit allowed for temporary removal from a customs warehouse, provided the limit would have been extended had an extension been applied for in time."

12. I was also referred to the following cases:

Nu-Pro Ltd v Revenue and Customs Commissioners [2017] UKFTT 562 (TC)
Dnata Ltd v Revenue and Customs Commissioners [2016] UKFTT 0682 (TC)
Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg (C-262/10)
Hamann International GmbH v Hauptzollamt Hamburg-Stadt (Case C-337/01)
Ministerie van Financiën v Papismedov and others (Case C-195/03)
Terex Equipment Ltd v HMRC (C-430/08)

THE AUTHORISATION LETTER

13. At the time of the events which are the subject of this appeal RR was permitted to operate the IPR process in accordance with an authorisation letter from HMRC dated 5 May 2011. RR had however been permitted to operate the IPR process for a number of years and this was simply the most recent in a series of authorisations.

14. It is not appropriate to set out the authorisation letter in full but the following key provisions are directly relevant.

"**5. Entry of goods to IPR and EU**

a. You must ensure that goods imported under this authorisation are declared using the full (SAD) declaration procedure. If you have access to CHIEF or use an agent this can be an electronic declaration (DTI) entry. If you do not have access to CHIEF you must send your (SAD) declaration to Central Processing Unit, Custom House, Furness Quay, Salford M50 3XX for customs input (CIE).

In addition to the above, CFSP authorisation role number EDCBGT details the terms and conditions which allow you to make simplified declarations to IPR and EU. The date of acceptance of the simplified declaration is the date of entry to IPR or EU. This must be noted in your records. A supplementary declaration must be sent to and accepted by CHIEF before the end of the fourth working day of the month following the month in which the simplified declaration was accepted.

Supplementary declarations to enter goods to IPR or EU or the SAD declaration must include:

the commodity code(s)/description(s) of the goods entered in Boxes 31 and 33 of the SAD should correspond to those stated at (4):

the following CPC(s) must be declared on importation in SAD Box 37

For IPR

5100000

For EU

4000023; 4000024; 4000027

Further information on the use of these CPCs can be found in Volume 3 Appendix El of the Tariff;

and

SAD Box 44 must include the authorisation number stated above and include the name and address of the supervising office indicated at (1) above.

b. If you receive goods from another IPR authorisation holder see (7) below.

c. If you receive goods previously held under customs warehousing the following CPCs must be declared in Box 37 of the SAD: 5171000

11. Throughput Period (Council Regulation (EEC) No 2913/92 Article 118(1)

Goods entered under this authorisation should be disposed of as identified in Paragraph 12 within 2 years of the date they were entered to this authorisation. If a longer period is needed you must contact the supervising office to apply for an extension.

The date your goods are entered will be aggregated as follows:

Monthly - all goods entered during the course of each month will be regarded as entered on the last day of the month in question. For example, the throughput period for any goods entered during January will start on 31 January.

For simplifications under IPR for aircraft/satellite construction or repair - see annex B.

12. Disposal of Goods

To discharge your liability on goods at (4), the main compensating products indicated at (8) (or unprocessed goods indicated at (4)) must be put to an eligible disposal within the throughput period agreed for the goods at (11). Disposals may be made by:

re-export/export outside the EC. If you have access to CHIEF or use an agent this can be an electronic declaration (DTI) entry. If you do not have access to CHIEF you must send your (SAD) declaration for customs input (CIE). The following CPC(s) must be entered on Form C88 (SAD) in Box 37

3151000.

Further information on the use of these CPCs and the information required can be found in Volume 3 Appendix El of the Tariff.

transfer to another IPR authorisation holder, refer to (13).

declaration to Community Transit under the New Community Transit System (NCTS) - a copy of the Transit Accompanying Document (TAD) showing the Movement Reference Number (MRN) must be provided. If a manual CT declaration needs to be made under "Fallback" procedures, copies 1, 4 and 5 of the SAD should be completed and produced to Customs.

For goods used in aircraft/satellite construction or repair see Annex B.

Further information on the use of these CPCs and the information required can be found in Volume 3 Appendix El of the Tariff.

If SCPs will be released to free circulation, payment on the value of the SCP at the rate of duty applicable to that product may only be claimed in direct proportion MCPs re-exported from the EC.

13. Transfers

IPR goods

a. Goods held under this authorisation may be moved to or from the customs office(s) of entry/exit and between operators or locations included within this authorisation, without official customs documents. **Your records must show the location of the goods at all times**.

b. Transfers to or from other IPR authorisations holders may be made by SAD declaration. The consignee must request that you complete a SAD in their name and advise you of their C&E 810 IPR authorisation number. If the

consignee will be using a Simplified IPR authorisation, they must advise you of details for completion of statement identifiers that will be required in Box 44 of the SAD IPR entry. The following details must be included on the SAD entry Boxes 31 and 33 – the commodity code(s)/description(s) of the goods entered to IPR before they were processed;

Box 37 — enter CPC: 5151000

Further information on the use of these CPCs can be found in Volume 3 Appendix El of the Tariff.

Box 44 — the "consignors' and "consignees" C&E 810 IPR authorisation numbers. If the consignee is using a Simplified IPR authorisation, there will be no consignee authorisation number to quote but IPR statement identifiers in respect of the consignees processing operation must be completed (refer to Tariff Volume 3 Appendix C5).

Box 47 — enter the amount of customs charges suspended/paid on the IPR goods at (4) contained in the goods being transferred.

c. Use of Local Clearance Procedures are approved under this authorisation solely for the purpose of transferring suspension goods. This does not replace or allow use of CFSP which must be applied for separately if required. Transfers to or from another IPR suspension authorisation holder (excluding IPR simplified authorisation users) may also be made using the 3 copy SAD procedure (SAD copies 1, 4 and an additional copy 1 are used). Refer to Notice 221 for details to be included on the transfer SAD.

If you supply IPR suspension goods using a 3 copy SAD you must notify the supervising office at (1) above of the proposed transfer before transfer takes place by e-mail Send SAD copy 1 to your supervising office, retain the additional copy 1 and send copy 4 with the goods to the receiving authorisation holder. You must ensure the receiving IPR authorisation holder issues a receipt for the consignment and keep this with your records.

If you receive IPR goods under the 3 copy SAD procedure, you must ensure you receive SAD copy 4 with the goods and issue a receipt to the supplying authorisation holder specifying the date of their entry into your records.

You are approved to use commercial documents to send/receive IPR suspension goods to/from another IPR suspension C&E 810 authorisation holder. Refer to Notice 221 for details to be included on the commercial document

If you supply IPR goods you must notify the supervising office at (1) before the transfer takes place when requested. Retain a copy of the commercial document and send the original with the goods to the receiving authorisation older. You must ensure the receiving IPR

authorisation holder issues you a receipt for the consignment and keep this with your records.

If you receive IPR goods you must ensure you receive the transfer commercial document with the goods and issue a receipt to the supplying authorisation holder specifying the date of entry into your records.

Simplified transfer of goods to Rolls-Royce Deutschland as detailed in appendix E of the C&E 810.

15. Records (Article 516 and Annex 37 of Commission Regulation (EEC) 2454/93

Your records must be made available to the supervising office when requested and must be kept for a minimum of 4 years after disposal of all goods held under this authorisation. These records must contain the following details:

IPR

- the declaration made to enter goods at (4) to IPR, transfer declarations and IPR re-export/export entries together with commercial documents such as consignment notes, invoices and bills of lading, to provide supporting evidence of all receipts and disposals made;

- the rate of import duties, quantity and customs value of goods when they are entered under this authorisation;

- when and where processing at (7) takes place:

- CN code and description of each type of goods at (8);

- (rate of yield), the quantity of goods at (4) used during processing to produce goods identified at (8).

16. Suspension Returns

Suspension returns on form C&E 812 must be received by the supervising office within 30 days of the end of the throughput period stated at (15) above. The authorisation holder is responsible for ensuring C&E 812 is received by the supervising office by the due dates. Failure to do so may result in relief being refused. No reminders will be issued by the supervising office.

Quarterly returns see annex D.

Aircraft/satellite simplifications are approved — see annex B.

The use of this authorisation is subject to the conditions laid down in Council Regulation (EEC) No 2913/92 establishing the Community Customs Code and

Commission Regulation (EEC) No 2454/93 which lays down provisions for its implementation.

This authorisation is subject to the right of HM Revenue and Customs to vary it.

If you fail to comply with any of the conditions of this authorisation you may render yourself liable to a civil penalty — refer to Notice 301."

THE FACTS

15. I received three witness statements and heard oral evidence from Ms Teresa Heck (Officer of HMRC) and two witness statements and oral evidence from Mark Sowerby, Senior Customs Manager for RR. I found both witnesses to be fundamentally credible and reliable. I also received substantial bundles of documents supporting their witness statements.

16. I make the following findings of fact.

17. RR handles, on average, approximately 90,000 customs movements each year, and employs a number of logistics specialists to manage this.

18. The generators in question were repaired at a RR establishment at Ansty, Coventry. This was a multi-facility site and included operations of both RR Plc and RR Power Engineering ("RRPE"), which was predominantly involved in supporting the RR industrial energy business. RR disposed of its industrial energy business at the end of 2014, which resulted in the effective closure of the Ansty site. This meant that a number of the key individuals involved in the logistics and records relating to the repair of these generators were made redundant around the end of 2014. The records relating to this business were therefore transferred to other RR sites following the closure of the Ansty site, which meant that they were inevitably not in the best of order when HMRC were examining the issues under appeal in March/April 2016.

19. The IPR authorisation under which RR operated stipulated that any items imported under the IPR procedures for repair or maintenance should be re-exported within two years of their importation. This is referred to as the throughput period.

20. In March/April 2016 HMRC carried out an audit of RR's records relating to IPR during which they found a number of irregularities. As a consequence HMRC raised 28 C18s, assessing RR to customs duty on items imported into the IPR regime on which they considered insufficient records, or incorrect filings had been made. RR accepted the duty assessment on most of these items but undertook an exercise to regularise the position regarding the high value items, including the three generators which are the subject of this appeal.

21. The facts and chronology of events relating to these three generators are set out below.

Generator Serial Number: 1780-604; Import Reference: 1230-036542C ("604")

Import

22. On 8 May 2012 RR instructed Horizon International Cargo Ltd to enter the goods into the UK. The IPR authorisation code on this form was in fact incorrect and related to a previous authorisation.

23. On 9 May 2012 the goods entered the UK. The reference quoted in Box 37 of the import document was marked "CPC 5100000", 51 being the correct code for the IPR duty suspension system.

Re-export

24. On 18 June 2013 Rolls Wood Group provided an Advice Note saying that the goods were ready for collection

25. On 8 July 2013 RR sent an Entry Instruction and RR Customs Invoice to their customer's agent, on which an instruction was given to export the goods under customs code "CPC 3151000", which was the correct code, 31 meaning the re-export of goods which are not in free circulation and 51 referring to the IPR suspension system. This instruction also stated "Please send a copy of export C88 with Air Waybill C.O.S to [RR]…"

26. No copy of the C88 was received and there was no evidence to suggest that this failure to supply the C88 copy had been followed up by RR.

27. On 9 July 2013 the goods were dispatched **from France** to the customer, in Nigeria, but in Box 37 of the French Export Declaration the code used was "CPC 1000000", which means the permanent dispatch/export of goods from free circulation, ie with no reference to any previous procedure). This was therefore an incorrect code. No evidence was provided or was available to the tribunal as to how the goods were moved from the UK to France.

28. A letter in the documents bundle from Air France to RR stated: "We confirm that above shipment did board on flight…" This letter was dated 10 July 2013, but was probably sent following a request for further information from RR, after the audit of March/April 2016.

Post re-export

29. On 29 July 2014 RR filed a Bill of Discharge ("BoD") on which it was stated in respect of this generator "Goods collected ex-works & transported then exported from France, Documentation confirms IP goods".

30. A RR Field Service Report dated November 2016 confirmed that the generator was back in service with the customer.

31. In a letter dated 20 May 2016 from RR to HMRC, RR stated: "This engine was instructed for re-export in July 2013 with carriage arranged by Global Star

International. The export was completed out of France against entry 34177603 dated 9th July with departure recorded at Office of Exit FR 00677A."

32. An undated HMRC audit report spreadsheet, probably dating from April 2016, stated against this generator: "No evidence of export".

33. It was acknowledged by Mr Sowerby that when RR gave its instructions to its customer's agent it believed that the goods would be exported directly from the UK. RR had no knowledge that the goods were to be exported via France and no idea where the generator was. Their only check that the goods had been re-exported was that there was no complaint from their customer that the generator had not been received and that the Field Service Report from their own staff confirmed that the generator was back in operation in November 2016.

34. The C18 was issued on 7 June 2016, which was less than three years after the date on which the generator was re-exported.

Generator Serial Number: 1780-510; Import Reference: 120-069136T ("510")

Import

35. On 16 May 2012 the goods were entered into the UK and the code used in Box 37 was CPC 5100000, ie the code for importation under the IPR process

Apparent re-export

36. On 16 August 2012 Rolls Wood Group issued an Advice Note advising that the generator was ready for collection.

37. On 30 August 2012 RR sent an invoice for the maintenance work to their customer, BP.

38. On 10 September 2012 an amendment to the entry documentation, dated 13 August 2012 was filed, amending the community code to the correct category for a generator.

39. On 11 September 2012 RR issued an Entry Instruction to their customer's agent instructing that the generator should be re-exported using code - "CPC 3151000" (31 meaning the re-export of goods which had been in duty suspension under the IPR process and which were not in free circulation. The instruction also carried the request to the customer's agent "Please send a copy of export C88 with Air Waybill C.O.S to [RR]…"

40. No copy of the C88 was received and there was no evidence to suggest that this failure to supply the C88 copy had been followed up by RR.

41. On 12 September 2012 a printout from CHIEF, the HMRC customs movements system showed ICS Code X9, which means that the export had been terminated, either because it had been cancelled, seized, destroyed, released to Queen's

warehouse or the initial customs export lodgement had been timed out. No-one was able to explain why this entry had appeared on CHIEF because the generator was subsequently known to have been returned to the customer outside the EU. It is possible that something as simple as a failure in the scanning of the barcode had occurred, but no evidence was available as regards this and no explanation was offered with any confidence by either party.

42. A warning of this failure should have been sent to the customer's agent, Geodis Wilson UK Ltd, but I received no evidence as to whether this had or had not happened. RR had no knowledge of this failure at the time.

43. On 2 September 2012 an unsigned French Export Accompanying Document was produced showing a CPC code in Box 37 of CPC "3151000", ie the correct code for the re-exportation of goods which had been held in duty suspension under the IPR process and, on 12 September 2012, Geodis Wilson UK Ltd, the customer's agent, provided a Customs Entry Advice.

Post re-export

44. On 29 July 2014 RR filed the relevant BoD but the spreadsheet produced by HMRC following their audit in 2016 stated: "Unable to trace reference". Another HMRC spreadsheet from around the same time in 2016 stated: "Evidence of export required". Nevertheless, Ms Heck confirmed in her evidence that she considered the BoD satisfactory in respect of 510.

45. A letter from HMRC to RR dated 20 May 2016 states: "This item was instructed for re-export in September 2012 and was pre-entered for shipment on entry 444-A01443P on the 12th September 2012. It appears thereafter as though the engine travelled to France on an Export Accompanying Document with departure from the EU via Office of Exit FR 002730".

46. On 27 July 2016, ie after the HMRC audit, Geodis France wrote to RR saying: "We confirm you that the PO 110265/ISG/CON relating to the below invoice has been shipped in Algeria via sea by Geodis Oil and Gas Logistics Services".

47. On 2 August 2017 there was an email from Mr Grant (Rolls Wood Group) attaching "… minutes of a meeting with the Operator … in which there is a confirmation that they have the Engine on site (1780-510), and in operation at this time…"

48. The C18 was issued on 7 June 2016, which was more than three years after the date on which the generator was re-exported.

Generator Serial Number: 1780-687; Import Reference: 011-004093H ("687")

Import

49. On 21 September 2012 the goods entered into the UK. In Box 37 the CPC code was given as CPC 5100000, again being the correct code for entry under the IPR process.

Re-export

50. On 3 January 2013 RR issued an Export Consignment Specification and an Entry Instruction, instructing their customer's agent to use CPC code "CPC 3151000", being the correct code for the re-export of goods held under duty suspension under the IPR process. The instruction also carried the request "Please send a copy of export C88 with Air Waybill C.O.S to [RR]…"

51. No copy of the C88 was received and there was no evidence to suggest that this failure to supply the C88 copy had been followed up by RR until 23 October 2014.

52. On 4 January 2013 Ms Walker, of RR urgently requested import details, and eventually received an undated Air Waybill.

53. Some time later, probably around 23 October 2013, RR obtained a French Export Declaration dated 7 January 2014, but the CPC code inserted in Box 37 was "CPC 1000000", being the code for the permanent dispatch/export of goods from free circulation. This was therefore the incorrect code.

Post re-export

54. On 23 October 2014 Ms Walker, of RR, emailed Global Star International, the customer's freight forwarding agent: "[The paperwork] I need is … [Generator 687] going to Total, Lagos, Nigeria. Documents raised 3rd January 2013. Please could you send AWB & C88 to myself and Jean as soon as possible please."

55. On 29 October 2014 Ms Heck and Mr Sowerby met to discuss the filing of the BoD relating to this generator. At this time, Mr Sowerby knew there were deficiencies in the data because of the problems at Ansty. Key personnel involved in the production of this data at Ansty had already left the site and therefore RR logistics staff had visited the site to obtain the relevant documentation.

56. Ms Heck's handwritten notes of the meeting state: "provisional rtns to be submitted by due date and updated by end November with final figures." The due date for the BoD was 31 October 2014 and there is a dispute between the parties as to whether or not RR was granted a formal extension of time for the submission of the BoD. Mr Sowerby sent provisional figures to Ms Heck on 3 November 2014 and filed the formal BoD on 28 November 2014.

57. Mr Sowerby stated that he believed that, at the meeting, he had agreed with Ms Heck that there would be a formal extension of the deadline to 30 November 2014 and that in the meantime he would send her provisional figures as soon as possible, hopefully by 31 October 2014. Ms Heck, on the other hand, said that she had agreed to extend the deadline to 30 November 2014 but only on the condition that the provisional figures were provided by 31 October, which they were not.

58. On cross-examination however Ms Heck accepted that she could not remember precisely what was in her mind at this time and indeed could not remember whether or not Mr Sowerby had actually asked for an extension. Certainly there is no reference in the immediately subsequent correspondence that Mr Sowerby had failed to meet the deadline or that any extension of the deadline was conditional on the filing of provisional figures by 31 October, and that this condition had not been fulfilled.

59. Ms Heck explained that it was very rare for HMRC to extend the deadline for submission of a BoD because of pressure from the EU. Their normal policy therefore was to agree only one extension per trader. In the case of RR I was shown evidence to the effect that an extension had been granted to RR on two other occasions, once in respect of Q2 2010 and once in respect of Q4 2016, this latter occasion being a verbal agreement.

60. I therefore find as a matter of fact that, on this occasion, a formal extension of the deadline for the submission of the BoD had been granted to 30 November 2014 and that this was not conditional on the submission of provisional figures by 31 October.

61. On 31 October 2014 Ms Walker emailed Global Star International saying: "I have just been loading the detail from your document and notice that the CPC 3151000 that was instructed, has not been used, you have 1000000". Global Star International replied "This is the code we use for a definitive exportation".

62. On 28 November 2014 RR filed the BoD stating as regards this generator: "Known to have been exported to Total in Nigeria. NES (this was a reference to the National Export System Number) pending from agent". Ms Heck did not consider this description sufficient. No NES number was eventually produced because it did not exist.

63. On 9 December 2014 Mr Sowerby emailed Ms Heck to say: "The latest on the Ansty engine S/No 687 is that it was discharged via a T1 on 7/1/2013. File ref is AN0135. I will need to obtain a copy and forward this on when received".

64. The HMRC spreadsheet produced following its audit in March/April 2016 states as regards 687: "no export details". A further undated note of HMRC's audit findings states: "T1 export no evidence of export".

65. On 20 May 2016 RR wrote to HMRC stating: "The engine appears to have been shipped to Total in early January 2013 using a French transport company – TransProjets. We have written confirmation from Global Star International of export from French Office of exit FR 00677A against entry number 30659532."

66. The C18 was issued on 7 June 2016, which was more than three years after the date on which the generator was re-exported.

HMRC ALLEGATIONS

67. In their Amended Statement of Case HMRC allege with respect to each generator certain incurrences of a customs debt. Those alleged incurrences are set out below.

68. **Generator 604**

(1) On 8 July 2013, the goods were removed from customs supervision when moved to France without any customs formalities, thus triggering a customs debt under Article 203 of the CCC.

(2) On 8 July 2013, the goods were removed from customs supervision when removed from France under the incorrect CPC Code 1000, thus triggering a customs debt under Article 204 of the CCC as being the "(a) non-fulfilment of … obligations arising … from the use of [IPR]" or "(b) non-compliance with a condition governing the placing of the goods under [IPR]".

(3) On 8 July 2013, RR moved the goods to France without any customs formalities in breach of RR's conditions of authorisation, thus triggering a customs debt under Article 204.

(4) RR did not retain records of IPR re-export/entries, specifically there are no records of the removal from the UK to France. RR had intended the goods to be re-exported from UK.

(5) The BoD was not completed correctly and was inaccurate. The BoD listed Generator 604 as having been "discharged by re-export" when it was not discharged by re-export because the wrong export CPC code had been used. It was the code which should be used for export from free circulation.

(6) RR submitted an incomplete or inaccurate BoD.

(7) RR failed to obtain or retain a record of export within 30 days after end of throughput period, thus triggering a customs debt under Article 204.

69. **Generator 510**

(1) RR did not retain records of the re-export or any related entries because there were none. No entry declaration could be provided because any entry was invalidated.

(2) The BoD was not completed correctly and was inaccurate because it listed Generator 510 as having been "discharged by re-export" when it was not, at least formally, discharged by re-export because of the invalidation. In addition the BoD referred to a 'NES' number that was invalid.

(3) There was no "evidence of export" because the goods were not presented at the customs office of exit, ie France.

(4) RR had filed an incomplete or inaccurate BoD, in contravention of Article 204 of the CCC.

(5) RR failed to obtain or retain a record of export within 30 days after end of throughput period, which again constituted a breach under Article 204 of the CCC.

70. **Generator 687**

(1) There is no evidence of export. This implies an allegation of unlawful removal, which would trigger a custom debt under Article 203 of the CCC.

(2) This would also constitute a breach of RR's conditions of authorisation.

(3) On 7 January 2013 the goods were removed from customs supervision when removed from France under the incorrect CPC Code 1000, thus triggering a customs debt under Article 204 of the CCC as being the "(a) non-fulfilment of … obligations arising … from the use of [IPR]" or "(b) non-compliance with a condition governing the placing of the goods under [IPR]".

(4) RR failed to obtain or retain a record of export within 30 days after end of throughput period

(5) The BoD filed by RR was late, thus offending Article 204 of the CCC.

(6) RR filed an incomplete or inaccurate BoD, thus offending Article 204 of the CCC.

(7) RR falsely stated that the goods had been exported.

SUBMISSIONS ON BEHALF OF RR

71. RR's responses to these allegations are set out below.

(1) Export formalities for all three of the generators were the responsibility of RR's customer under Incoterms Ex Works (EXW) terms. RR gave clear instructions to these agents but the instructions were ignored.

(2) RR's customer's agent did not place the goods under either the export procedure or the Community transit procedure in the UK before moving the goods to France. Instead the goods were placed under the export procedure in France. The goods were therefore, as a matter of fact, exported from the EU.

(3) Article 512(3) of the CCIP expressly provides as follows:

> "Transfers to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case the arrangements shall not be discharged until the goods or products declared for re-exportation have actually left the customs territory of the Community."

(4) This argument is also supported by section 8.10 of HMRC's Public Notice 221 which sets out HMRC's views on the IPR process:

> "8.10 Can I move under the arrangements to an Office of Exit in another member state and submit my re-export declaration there?

It is possible to do this but, as well as checking that the Customs Authorities at the Office of Exit will allow this, it is also advisable to check with other member states through which you will pass what documentation they will expect to see accompanying the goods. Some member states may not approve this method of movement.

You should also note that, as there is no Transit guarantee, your IP liability is not discharged until the re-export declaration is submitted in the Member state at the Office of Exit. You will also need to make sure you can obtain copies of all the relevant export documents for your IP records."

(5) Article 859(7) of the CCIP envisages that failure to fulfil one of the conditions set out in Article 511 of the CCIP will be a failure within the meaning of Article 204 rather than one within Article 203:

"7. in the case of goods or products physically transferred within the meaning of Articles 296, 297 or 511, failure to fulfil one of the conditions under which the transfer takes place, where the following conditions are fulfilled:

(a) the person concerned can demonstrate, to the satisfaction of the customs authorities, that the goods or products arrived at the specified premises or destination and, in cases of transfer based on Articles 296, 297, 512(2) or 513, that the goods or products have been duly entered in the records of the specified premises or destination, where those Articles require such entry in the records;

(b) where a time limit set in the authorisation was not observed, the goods or products nevertheless arrived at the specified premises or destination within a reasonable time;"

(6) Therefore, there was no incurrence of a customs debt under Article 203.

(7) Instead it is necessary to consider whether there was a failure under Article 204, and if so whether that failure had "no significant effect".

(8) The movement conditions specified by the IP authorisation are confusing. In section 13 the authorisation states:

"(a) Goods held under this authorisation may be moved to or from the customs office(s) of entry/exit ... without official customs documents. Your records must show the location of goods at all times."

(9) In section 12 the authorisation states that:

"Disposals may be made by:

re-export/export outside the EC.

transfer to another IPR authorisation holder, or

declaration to Community Transit ..."

(10) There is therefore nothing in the authorisation which derogates from Article 512(3). Indeed section 13 of the authorisation provides that transfer of the goods to the office of export, ie France, is permitted "without official customs documents".

(11) Even if there was a failure to comply with movement conditions, such a failure had no significant effect within the meaning of Article 204 of the CCC and Article 859 of the CCIP.

(12) RR denies that it was guilty of obvious negligence in respect of the movements.

(13) By virtue of Article 215(2), it is only necessary to consider BoD failures if there was no incurrence of a customs debt by reason of a movement failure.

(14) RR contends that the BoDs were complete and accurate containing clear auditable references to the imports and also to the export movements.

(15) RR did hold evidence of export prior to the submission of the BoDs. RR made this information available to HMRC at their request.

(16) Was it a condition of the authorisation that the BODs had to be complete and accurate?

- The CCC and CCIP contain no such condition.

- The authorisation itself contains no such condition.

Therefore, it was not a condition of the authorisation that the BoDs had to be complete and accurate.

(17) Notwithstanding the above, if there was prima facie any breach of condition, any defect in the BoDs should have been regularised by extending the period for supplying a BoD under Article 521(1) of the CCIP or amendment under Article 78 of the CCC, both taking effect from the date of the BoD to vitiate any breach of condition, preventing any incurrence of a customs debt.

(18) Failing that, any such breach of condition would have no significant effect, preventing any incurrence of a customs debt.

(19) Was it a condition of the authorisation that evidence of export had to be obtained and retained at the BOD due dates?

- The CCC and CCIP contain no such condition.

- The authorisation itself contains no such condition.

Therefore, it was not a condition of the authorisation that evidence of export had to be obtained and retained at the BoD due date.

(20) Notwithstanding the above, if there was prima facie any breach of condition, any such breach of condition would have no significant effect, preventing any incurrence of a customs debt.

(21) In the specific case of Generator 510 RR believe that the EAD was presented to French customs and that the IP procedure was discharged by export even though, formally, the export was invalidated.

(22) If the export declaration was invalidated, generator 510 left the EU without definitively being placed under the export procedure. Therefore generator 510 was unlawfully removed from customs supervision and therefore, a customs debt was incurred under Article 203 on or about 12 September 2012.

(23) In the alternative, the export failure would involve, on or about 12 September 2012, a failure to fulfil an obligation arising from the use of IP under Article 204.

(24) Under either Article 203 or 204, any such customs debt would be out of time to be recovered by the C18 dated 7 June 2016. Furthermore, no later incurrence could take place with respect to the BoD, neither in relation to completeness/accuracy nor export evidence.

DISCUSSION

72. It is perhaps helpful at this stage to set out some of the background features of IPR.

73. The IP regime suspends customs duties and VAT on imports from outside the EU for traders holding the requisite authorisation. The IP regime is only available to traders who are specifically authorised by their national tax authorities. Having IP authorisation therefore confers a very real economic advantage to a trader.

74. This was set out clearly by the CJEU in the case of *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (C-262/10):

> "40. It must be observed that the inward processing procedure in the form of a system of suspension constitutes an exceptional measure intended to facilitate the carrying out of certain economic activities. That procedure involves the presence, on the customs territory of the European Union, of non-Community goods, which carries the risk that those goods will end up forming part of the economic networks of the Member States without having been cleared through customs (see Case C-234/09 *DSV Road* [2009] ECR I-7333 , paragraph 31).
>
> 41. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom. Similarly, the consequences of non-compliance with their obligations must be strictly interpreted (see Joined Cases C-430/08 and 431/08 *Terex Equipment and Others* [2010] ECR I-321, paragraph 42).

75. In *Hamann International GmbH v Hauptzollamt Hamburg-Stadt* (Case C-337/01), at [28], the CJEU considered the interplay of Articles 203 and 204.

> "In order to answer the question as thus reformulated, it is appropriate to note, as a preliminary point, that Articles 203 and 204 of the Customs Code have different spheres of application. Whilst the first provision covers conduct leading to the goods' being removed from customs supervision, the second covers failure to fulfil obligations and non-compliance with the conditions of the various customs schemes which have no effect on customs supervision."

76. A number of questions arise under this appeal and, in some areas, Mr White, on behalf of RR, put forward arguments in the alternative which were mutually exclusive. However, the primary questions to be determined are:

> (1) Did the movement of the goods to France constitute unlawfully removing the goods from customs supervision for the purposes of Article 203 of the CCC?
>
> (2) Did the movement of goods to France constitute a breach of RR's conditions of IP authorisation for the purposes of Article 204 of the CCC?
>
> (3) Did RR comply fully with the other conditions of its IP authorisation?

77. Secondary questions then arise:

> (1) Can more than one customs debt be incurred from different, sequential factual circumstances? In other words, if the movement of the goods to France prior to their re-export did constitute unlawfully removing the goods from customs supervision, thus giving rise to a customs debt under Article 203 of the CCC, does the fact that a debt has arisen under Article 203 preclude the possibility of a debt arising under Article 204 of the CCC? Similarly does the fact that customs debts might be incurred under Article 204 for more than one reason mean that only the first debts arising can be assessed and that subsequent debts are precluded from being assessed by reason of the incurrence of the earlier debts?
>
> (2) If customs debts arose directly from the transfer of the generators to France, either under Article 203 or Article 204 of the CCC, then were the C18s raised in respect of generators 510 and 687 out of time, having been issued more than three years after the date of that transfer?
>
> (3) Even if RR did not fully comply with its obligations under its IP authorisation, and has thereby incurred a customs debt under Article 204, is it protected from a customs debt arising by means of the operation of Article 859 of the CCIP because those failures had no significant effect on the correct operation of the customs procedure in question?

78. I will address these issues in turn.

Was the movement of the goods to France unlawful?

79. As argued on behalf of RR, Article 512(3) of the CCIP expressly provides as follows:

> "Transfers to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case the arrangements shall not be

discharged until the goods or products declared for re-exportation have actually left the customs territory of the Community."

80. This argument is also supported by section 8.10 of HMRC's Public Notice 221 which sets out HMRC's views on the IPR process:

> "8.10 Can I move under the arrangements to an Office of Exit in another member state and submit my re-export declaration there?
>
> It is possible to do this but, as well as checking that the Customs Authorities at the Office of Exit will allow this, it is also advisable to check with other member states through which you will pass what documentation they will expect to see accompanying the goods. Some member states may not approve this method of movement.
>
> You should also note that, as there is no Transit guarantee, your IP liability is not discharged until the re-export declaration is submitted in the Member state at the Office of Exit. You will also need to make sure you can obtain copies of all the relevant export documents for your IP records."

81. HMRC on the other hand submitted that such a removal does constitute an unlawful removal of the goods from customs supervision, relying on the judgement in *Hamann*. However, that case predates the introduction of Article 512 of the CCIP and as such cannot be regarded as directly relevant. In addition, the Advocate General in *Hamann* came to the opposite conclusion, having drawn support from the subsequent introduction of Article 512. I do not therefore find this case particularly helpful in this regard.

82. I therefore come to the conclusion that the removal of the goods to France prior to their export from the Community was not an unlawful removal of the goods from customs supervision.

Did the movement of the goods to France constitute a breach of RR's conditions of authorisation?

83. Section 13 of RR's IPR authorisation letter states:

> "Goods held under this authorisation may be moved to or from the customs office(s) of entry/exit and between operators or locations included within this authorisation, without official customs documents. **Your records must show the location of the goods at all times**."

84. The movement of the goods to France is therefore clearly permitted under this authorisation. However, the authorisation letter also states "Your records must show the location of the goods at all times."

85. It was acknowledged by Mr Sowerby that RR did not even know that the goods were to be exported via France. In fact, until they carried out the further research following the HMRC audit, they had very limited proof in their records that the goods

had in fact been exported. It was even suggested that RR were relying on the fact that their customers had not complained that the goods had not turned up. It should perhaps be remembered in this context that the goods in question were not goods which were minor spare parts or other small items. The goods in question were industrial sized generators, each worth of the order of £3.5m.

86. In my view therefore, the transfer of the goods to France prior to their export from the EU, although prima facie permitted under the terms of RR's authorisation, was a breach of RR's conditions of its authorisation to use the IPR procedure because their records did not, and could not, show the location of the goods at all times. They simply did not have this information.

Did RR comply fully with the other conditions of its IP authorisation?

87. HMRC have alleged a number of other possible breaches of the conditions RR's authorisation apart from the transfer of the goods to France prior to their export from the EU:

(1) Generators 604 and 687 were removed from customs supervision incorrectly when they were removed from France under the incorrect CPC Code, 1000, thus incurring a customs debt under Article 204 of the CCC as being the "(a) non-fulfilment of … obligations arising … from the use of [IPR]" or "(b) non-compliance with a condition governing the placing of the goods under [IPR]".

(2) RR did not retain records of IPR re-export or entries, specifically there were no records of the removal of the goods from the UK to France. In all three cases RR had intended and expected that the goods would be re-exported from UK.

(3) The BoDs were not completed correctly and were inaccurate.

(a) The BoD listed Generator 604 as having been "discharged by re-export" and Generator 687 as "known to have been exported to Total in Nigeria. NES pending from agent" when neither generator had been properly discharged by re-export because the wrong export CPC code, 1000, had been used for both of them. 1000 was the code which would have been used for export of goods from free circulation.

(b) The BoD for Generator 510 was not completed correctly and was inaccurate because it listed Generator 510 as having been "discharged by re-export" when it was not, at least formally, discharged by re-export because of the invalidation of the export procedure. In addition the BoD referred to a 'NES' number that was invalid.

(4) RR failed to obtain or retain a record of export within 30 days after end of throughput period in respect of any of the generators, thus triggering customs debts under Article 204.

(5) The BoD filed by RR in respect of Generator 687 was late, thus incurring a debt under Article 204 of the CCC.

88. I have already found that as a matter of fact the time limit for submission of the BoD in respect of Generator 687 was extended by Officer Heck. This last allegation, number (5), therefore falls away.

89. I must therefore address the other alleged infringements and the arguments put forward by RR.

Did RR file BoDs which were incomplete or incorrect?

90. Mr White argued that there was no requirement in either the IPR authorisation or the CCC or CCIP that the BODs had to be complete and accurate?

91. I find this a very strange argument. It seems to me that a BoD which is not complete and accurate is not a proper BoD. What otherwise would be the point if a trader could fulfil their BoD obligations by filing an incomplete or incorrect return? This simply does not make sense to me.

92. In addition, the declaration which the trader is required to make on the face of the BoD return form itself, a C&E 812, which is the form which the authorisation letter requires RR to use, states "I declare the information I have given on this form is accurate and complete."

93. I cannot therefore accept this argument. By its very nature and purpose, the BoD is, in my view, required to be accurate and complete.

94. The more important question therefore is whether or not the BoDs were as a matter of fact, accurate and complete.

95. In the case of all three generators the BoDs stated that the goods had been discharged by re-export. Re-export is in this context a technical term and means exported from a procedure such as IPR. If goods are exported from free circulation, even if they have been previously imported into the EU, they are said to be exported, not re-exported.

96. In the case of generators 604 and 687 they had both been exported under the CPC Code 1000, which is the code for a normal export from free circulation. This might sound like a rather trivial offence but it was clearly not an error and was done deliberately by the freight forwarding agent. Importantly, the use of this code means that the customs authorities are unable to track goods which have been imported under the IPR regime. They are simply unable to reconcile what has been imported under IPR with what has been exported following an IPR procedure.

97. In the case of Generator 510 HMRC records did not show that it had left the UK in the first place, even though when it had been exported from France it had done so under the correct CPC Code. Again therefore HMRC were unable to track its movements.

98. I therefore find that the BoDs were indeed inaccurate and incomplete in respect of all three generators.

Was it a condition of the authorisation that evidence of export had to be obtained and retained at the BOD due dates?

99. RR argued that there was no such requirement in either the CCC or CCIP or in the authorisation letter.

100. The legislation in this area is strangely constructed in that Article 515 of the CCIP states:

> "The customs authorities **shall require** the holder, the operator or the designated warehousekeeper to keep records, except for temporary importation or where they do not deem it necessary."

101. Article 516 of the CCIP than goes on to set out a list of the records which should be retained.

102. These provisions are then repeated, in a slightly different format, in the authorisation letter, which is how HMRC complies with the requirement in Article 515 as set out above. The authorisation letter states, at section 15, as follows:

> "Your records must be made available to the supervising office when requested and must be kept for a minimum of 4 years after disposal of all goods held under this authorisation. These records must contain the following details:
>
> IPR
>
> - the declaration made to enter goods at (4) to IPR, transfer declarations and IPR re-export/export entries together with commercial documents such as consignment notes, invoices and bills of lading, to provide supporting evidence of all receipts and disposals made;
>
> - the rate of import duties, quantity and customs value of goods when they are entered under this authorisation;
>
> - when and where processing at (7) takes place:
>
> - CN code and description of each type of goods at (8);
>
> - (rate of yield), the quantity of goods at (4) used during processing to produce goods identified at (8)."

103. RR maintained that this formula meant that they were not required to retain these records as such, but that they were merely required to be able to produce the relevant records when asked to do so by HMRC.

104. I accept that the wording of the authorisation letter could perhaps have been clearer in this regard and should perhaps have started with the words "Your records must contain". However, in my view, they state quite clearly: "These records **must** contain the following details:" and that reference to "These records" can only refer to the expression "Your records" in the first line of

section 15. Reading these two sentences together therefore produces the statement that:

"**Your records must contain the following details**:

IPR

- the declaration made to enter goods at (4) to IPR, transfer declarations and IPR re-export/export entries together with commercial documents such as consignment notes, invoices and bills of lading, to provide supporting evidence of all receipts and disposals made;"

105. It is clear to me that RR did not comply with this requirement.

106. It is also clear from the authorisation letter that RR were required to keep these records for a period of four years after the disposal of all the goods held under this authorisation. Having failed to keep the correct records in the first place it must follow that they did not keep them for four years after the goods had been exported.

Can more than one customs debt be incurred from different, sequential factual circumstances?

107. I have found that the transfers of the goods to France prior to their export from the EU was not unlawful. RR did not therefore incur a customs debt under Article 203 of the CCC at that time. I am not therefore concerned with the argument that a debt arising under Article 203 precludes a customs debt from arising under Article 204.

108. There remains however the question as to if a customs debt is incurred in circumstances such that there is more than one event giving rise to such a debt under Article 204, does the existence of an earlier debt preclude the incurrence of a second or third customs debt, ie, which debt, if any, takes precedence? If, as I have found, a customs debt was incurred under Article 204 when the goods were exported to France, because RR contravened some of the conditions of its IP authorisation, then, in the case of two out of the three generators, the C18s relating to those infringements were out of time. However, I have found that infringements giving rise to a customs debt under Article 204 also took place as regards failing to keep proper records and failing to file accurate and complete BoDs. I must therefore ask if the incurrence of the earlier customs debts arising under Article 204 on the exportation of the generators in some way prevents later subsequent customs debts from being incurred under Article 204.

109. There is a broad principle underlying EU customs law that a person may not be subject to customs duty twice on the same goods. This principle is mentioned in a number of the cases cited to me. It was suggested that this was primarily in respect of the possibility of rival duty charges from two different member states, but this was not clear from the authorities. I must nevertheless agree with the fundamental principle that there should be no question of the same goods being subject to customs duty twice, however that possibility may arise.

110. Similar issues, also relating to IPR, were addressed in the case of *Döhler*. In that case the taxpayer imported goods under IPR for processing but failed to file a BoD within the permitted timeframe. It was therefore charged with a customs debt in respect of the duty due on all the goods in question at their original import, on the basis that all the goods had at that time effectively been released into free circulation. This debt arose under Article 201.

111. The taxpayer subsequently filed a BoD showing that some but not all the goods had been re-exported, and thus asked for a reduction in the amount of duty payable to the amount which would have been payable on the release into free circulation of those goods which had in fact been so released. The tax authorities however considered that by failing to file a BoD on time the taxpayer had infringed Article 204(1)(a), and this by itself would cause a customs debt to be incurred in respect of the goods which had in fact been exported.

112. The taxpayer appealed, essentially on the grounds that the incurrence of the earlier customs debt under Article 201, on release of the goods into free circulation, prevented the incurrence of another customs debt under Article 204.

113. The taxpayer argued that its failure to comply with the requirement to file a BoD could not give rise to a customs debt because the debt arose after the goods had been exported, effectively discharging the relevant customs procedure. In response the CJEU said, at [38] and [39]:

> "38. No provision of the Customs Code or its Implementing Regulation, in the versions in force at the relevant time, supports the notion that it is necessary, as regards the effect of a failure on the incurrence of a customs debt, pursuant to Article 204 of the Customs Code, to distinguish between an obligation which must be carried out before the discharge of the relevant customs procedure and an obligation which must be carried out after such discharge, or between a 'principal' and 'secondary' obligation.
>
> 39. Furthermore, Article 204 of the Customs Code states, in its first paragraph, that a customs debt is incurred through 'non-fulfilment of one of the obligations arising … from the use of the customs procedure under which they are placed', therefore applying to all obligations arising from the relevant customs procedure. In addition, it must be pointed out that Article 859(9) of the Implementing Regulation expressly provides that exceeding the time-limit allowed for submission of the bill of discharge is not a failure which gives rise to a customs debt where certain conditions, set out in that article, are fulfilled."

114. The Court continued at [45] to [48]:

> "45. Therefore, it must be held that the non-fulfilment of an obligation, linked to the benefit of an inward processing procedure in the form of a system of suspension, which must be carried out after the discharge of that customs procedure – in the present case the obligation to submit the bill of discharge within the period of 30 days prescribed in the first indent of the first

subparagraph of Article 521(1) of the Implementing Regulation – gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt pursuant to Article 204(1)(a) of the Customs Code, where the conditions set out in Article 859(9) of the Implementing Regulation are not met.

46. As regards the risk, mentioned by the referring court and by Döhler, of the incurrence of a double customs debt in the main proceedings for the goods which were not re-exported, it must be pointed out that the customs union precludes the double taxation of the same goods (Case 252/87 *Kiwall* [1988] ECR I-4753, paragraph 11).

47. It is therefore for the referring court to ensure that the custom authorities do not impose a second customs debt for goods in respect of which a customs debt has already been incurred on the basis of an earlier chargeable event.

48. In the light of the above, the answer to the question referred is that Article 204(1)(a) of the Customs Code must be interpreted as meaning that the non-fulfilment of the obligation to submit the bill of discharge to the supervising office within 30 days of the expiry of the period for discharging the relevant procedure set down in the first indent of the first subparagraph of Article 521(1) gives rise to a customs debt in respect of the entire quantity of the imported goods covered by the bill of discharge, including goods re-exported outside the territory of the European Union, where the conditions set out in Article 859(9) of the Implementing Regulation are not considered to be fulfilled."

115. In summary this judgement makes it clear that the incurrence of an earlier customs debt, arising in the present appeal as a result of failures in the export procedures, does not rule out the possibility of a subsequent customs debt being incurred by a failure to carry out the procedures required to be followed **after** the goods have been exported.

116. Having determined then that there are two, or possibly three, failings which might trigger a customs debt under Article 204 in this appeal, the CJEU states that it is then for the national courts, which in this case must mean this tribunal, to ensure that the multiple triggering of customs debts does not lead to double taxation.

117. I therefore find that customs debt are incurred under Article 204 in respect of all three generators by reason of RR's failure to comply with the terms of their authorisation letter, both as regards the export of the generators to France and the failures to file complete and accurate BoDs and the failure to keep proper records.

Even if RR did not fully comply with its obligations under its IP authorisation is it protected from a customs debt arising by means of the operation of Article 859 of the CCIP?

118. Having found that customs debts did arise in respect of all three generators under the provisions of Article 204 I must now ask if RR is effectively protected from these debts by reason of the operation of the proviso to Article 204(1) of the CCC in conjunction with Article 859 of the CCIP.

119. Article 204(1) states:

> "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."

120. Article 859 then provides a definition and a qualification of the words "no significant effect" as follows:

> "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.

121. There then follows a list of possible events which might be regarded as "failures" for the purposes of Article 204, which I do not need to examine in detail at this stage.

122. Article 859 sets out three preliminary conditions for its savings provisions to apply:

> (1) Do the failures constitute an attempt to remove the goods unlawfully from customs supervision?
>
> (2) Do the failures not imply obvious negligence on the part of the person concerned?
>
> (3) Were all the formalities necessary to regularise the position subsequently carried out.

123. As regards question (1), there is no dispute between the parties as to whether or not this was a deliberate attempt to remove the goods from customs supervision. It is quite clear that no such ill intent was involved.

124. All the formalities were not subsequently regularised as envisaged by question (3), but RR's argument is that:

> (1) Changing the various export codes after the event would have achieved nothing. The generators were by that time back with their customers, outside the EU, and such action would have been irrelevant.
>
> (2) RR could of course have re-submitted accurate and complete BoDs once it had obtained the correct information, but this it did not do.
>
> (3) As regards the keeping of records, especially those concerning the whereabouts of the generators after they had left RR's premises, could not have been regularised subsequently. Records of the locations of the generators at the time of their export to France were not kept. Better records of the events were eventually gathered together, following the HMRC audit in March/April 2016, but Mr Sowerby acknowledged that these were less than perfect because of the problems caused by the closure of the Ansty site.

125. The more difficult question posed by Article 859 however is whether or not RR demonstrated obvious negligence in respect of these events.

126. The meaning of "obvious negligence" was consider in the case of *Nu-Pro Ltd* in both the FTT and the UT. Both the FTT and the UT quoted extensively from the case of *Firma Söhl & Söhlke v Hauptzollamt Bremen* (C-48/98) [2000] 1 CMLR 351 at paras [55] to [60] which gives clear guidance on the approach to be taken by the national courts:

> "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 noncompliance 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."

127. The key factors to be considered therefore are:

(1) The complexity of the provisions non-compliance with which has resulted in the customs debt being incurred,

(2) The precise nature of the error,

(3) The professional experience of the trader, and

(4) The complexity of the provisions.

128. RR is by any standards a very experienced trader. Mr Sowerby estimated that RR dealt with approximately 90,000 customs movements in the average year and had been trading on a similar basis for many years. The provisions may be complex, but any trader with this much experience must be expected to be totally familiar with the provisions and, most importantly, familiar with its obligations under those provisions.

129. RR's main defence to any allegation of negligence is that it dealt with its customers on ex-works terms such that as soon as the repair work was complete it was the responsibility of RR's customers or, more correctly, its customer's agent, to remove the goods and handle all the necessary formalities. The underlying reasons for all the failures therefore were the failings of RR's customers' agents.

130. RR maintains that it gave clear instructions to the agents as to the correct export codes to be used and clear instructions that the relevant export paperwork should be sent to RR as soon as it was available. I totally agree that this is what RR did. The question is, was this sufficient?

131. In *Söhl & Söhlke*, at [58], the Court states:

"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.**"

132. It is also clear from the terms of RR's authorisation letter that responsibility for ensuring the correct application of the IPR procedures rests and remains with RR until all formalities have been complied with, including maintaining all the necessary records and the filing of the necessary BoDs.

133. In the case of these three generators RR simply gave instructions to their customers' agents and then made almost no efforts to follow up their instructions with the agents in order to obtain information as to what had actually happened to the generators and to obtain the outstanding paperwork. If they had followed things up in this way within a reasonable time after they had issued their instructions to the agents then they would have discovered all the issues which subsequently came to light. They would have been able to regularise the issues and would have been able to file complete and accurate BoDs on time.

134. RR cannot simply blame the agents and deny any further responsibility. They remained responsible for the completion of all formalities, the retention of the necessary records and filing complete and accurate returns even though day to day control of the generators had passed into the hands of the agents. As a very experienced operator of customs procedures RR should have known this and should have taken the necessary steps to fulfil their obligations.

135. It is interesting to note that, following the appointment of Mr Sowerby, in 2014, RR no longer deal with customers' equipment which is being repaired under IPR procedures on an ex-works basis, presumably because of these risks. Likewise Ms Heck said, in her evidence, that she always regarded the repair or maintenance of customers' equipment on an ex-works basis as being a significant risk factor in the operation of IPR.

136. I therefore find that the failures identified above, which gave rise to the incurrence of customs debts under Article 204, do imply obvious negligence on the part of RR. RR cannot therefore avail itself of the protection offered by Article 859.

DECISION

137. For the reasons set out above therefore I find that:

(1) The movement of the goods to France prior to their re-export outside the EU did not constitute unlawfully removing the goods from customs supervision for the purposes of Article 203 of the CCC.

(2) The movement of the goods to France prior to their re-export outside the EU did however constitute a breach of RR's conditions of its IPR authorisation for the purposes of Article 204 of the CCC because RR failed to maintain records of the location of the goods at all times.

(3) RR did not comply fully with the other conditions of its IPR authorisation. In particular it did not maintain proper records and did not file accurate and complete BoDs on time, again incurring customs debts under Article 204 of the CCC.

(4) More than one customs debt can be incurred from different, sequential factual circumstances, but this cannot give rise to double taxation of the same goods.

(5) The C18s issued in respect of generators 510 and 687 were out of time as regards the debts incurred as a result of RR's failures to comply with the specific obligations of its IPR authorisation regarding the export of the generators to France as set out in Section 13 of the authorisation letter.

(6) RR did however fail to comply with other terms of its authorisation letter in respect of generators 510 and 687, specifically it did not maintain proper records as required by section 15 of the authorisation letter and did not file complete and accurate BoDs as required by section 16 of the authorisation letter. The C18s were not therefore out of time in respect of these failures.

(7) RR is **not** protected from a customs debt arising under Article 204 as a result of these failures by means of the operation of the proviso to Article 204 and Article 859 because these failures showed obvious negligence on the part of RR.

138. I therefore find that this appeal should be dismissed.

139. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 26 June 2019