TC02121

Appeal numbers: MAN/08/7064, 7065, 7078
MAN/09/7010
TC/2010/05815

CUSTOMS DUTY – inward processing relief – failure to lodge C99 bills of discharge within the relevant time limit – customs debt under Article 204 Community Customs Code – whether obvious negligence – yes – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

K C ENGINEERING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at North Shields on 26 April 2012 with subsequent written submissions by the Respondents on 30 May 2012 and by the Appellant on 21 June 2012

Mr Keith Chester, director for the Appellant

Mr Richard Chapman of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. The present appeals are concerned with inward processing relief ("IPR") for the purposes of customs duty and VAT on importation of goods. There are 5 appeals each arising out of C18 post clearance demands for customs duty and VAT on a number of imports by the appellant. As appears below the appellant orally withdrew the appeal reference MAN/09/7010 at the hearing. The remaining 4 appeals cover the following demands:

Appeal	Date of C18	Customs Duty £	Import VAT £
MAN/08/7064	10.12.2007	2,065	13,747
MAN/08/7078	12.2007	360	908
MAN/08/7065	05.2008	nil	463
TC/2010/05815	11.03.2010	2,947	6,993

2. In relation to each appeal I understand that the import VAT charged is recoverable by the appellant in its VAT return following payment. Apart from the cashflow implications of having to pay the VAT before receiving credit for it, the sums at stake therefore are effectively the amounts of customs duty charged by the C18s.

3. In relation to each demand, goods were imported by the appellant using the IPR procedure. The goods were then exported but in each case the appellant failed to lodge a C99 bill of discharge with HMRC within the time allowed by the relevant provisions

4. I set out below my findings of fact in relation to the general background, the law in relation to inward processing relief in so far as it is relevant for present purposes and my findings of fact in relation to each of the appeals. Findings of fact are based on the oral evidence of Mr Chester, a director of the appellant and the undisputed documentation which was before me.

Background

5. The following background was not in dispute and I make findings of fact as follows. The appellant supplies oil film bearings to large international companies principally in the UK and Europe. The bearings are used in many applications ranging from helicopters to power stations. Since about 1993 the appellant has also provided a service whereby it refurbishes bearings so as to restore them to operating

performance. Where a customer for refurbishment services is based outside the EU the goods are imported under the IPR procedure and once the work is done they are exported back to the customer. In general the appellant ought to be able to carry out this aspect of its business without incurring any liability to customs duty or VAT on importation, subject to the terms of the IPR procedure.

6. The first import of bearings for refurbishment was in about July 1993. Since then the appellant has steadily progressed this aspect of the business such that there is a reasonable flow of work mostly from the UK and Europe and it makes a significant contribution to the overall business. There was a large increase in the volume of this work from outside Europe in 2004-05. Much of this derived from contracts with Malaysian businesses. During the period 2004 to 2007 the appellant would be dealing with 1 or 2 items per month from businesses outside Europe, 20 to 30 items from businesses in Europe and 50 to 60 items from businesses in the UK.

Law in relation to IPR

7. The following provisions of the Community Customs Code (*Council Regulation 2913/92/EEC*) and the Implementing Regulation (*Commission Regulation 2454/93/EEC*) are relevant for present purposes.

Article 4 of the Customs Code provides:

> *"For the purposes of this Code, the following definitions shall apply:*
> *...*
> *(7) 'Community goods' means goods:*
>
> *...*
>
> *imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation,*
>
> *...*
>
> *(8) 'Non-Community goods' means goods other than those referred to in subparagraph 7.*
>
> *Without prejudice to Articles 163 and 164, Community goods shall lose their status as such when they are actually removed from the customs territory of the Community.*
>
> *...*
> *(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.*

(17) *'Customs declaration' means the act whereby a person indicates in the prescribed form and manner a wish to place goods under a given customs procedure.*"

Article 37 of the Customs Code provides:

"*1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to control by the customs authority in accordance with the provisions in force.*

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182."

Article 59 of the Customs Code provides:

"*1. All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure.*

2. *Community goods declared for an export, outward processing, transit or customs warehousing procedure shall be subject to customs supervision from the time of acceptance of the customs declaration until such time as they leave the customs territory of the Community or are destroyed or the customs declaration is invalidated.*"

Article 78 of the Customs Code provides:

"*1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.*

2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. ...

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure

concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them."

Article 79 of the Customs Code provides:

"*…release for free circulation shall confer on non-Community goods the customs status of Community goods.*"

Articles 114 to 129 of the Customs Code relate specifically to IPR. Article 114 provides:

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

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

2. The following expressions shall have the following meanings …

(d) Compensating products: all products resulting from processing operations."

Article 118 of the Customs Code provides:

"1 The customs authorities shall specify the period within which the compensating products must have been exported or re-exported or assigned another customs-approved treatment or use. That period shall take account of the time required to carry out the processing operations and dispose of the compensating products.

2 The period shall run from the date on which the non-Community goods are placed under the inward processing procedure. The customs authorities may grant an extension on submission of a duly substantiated request by the holder of the authorisation."

Article 182(3) of the Customs Code provides:

"… Where goods placed under an economic customs procedure when on Community customs territory are intended for re-exportation a

customs declaration within the meaning of Articles 59 to 78 shall be lodged …"

Article 203(1) of the Customs Code provides:

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

Article 204 of the Customs Code provides:

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

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or
(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

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

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

Article 521 of the Implementing Regulation provides:

"*At the latest upon expiry of the period of discharge, irrespective of whether aggregation in accordance with Article 118(2), second subparagraph, of the Code is used or not:*
- in the case of inward processing (suspension system) or processing under customs control, the bill of discharge shall be supplied to the supervising office within 30 days;
…
Where special circumstances so warrant, the customs authorities may extend the period even if it has expired."

For present purposes the period of discharge is the period specified in Article 118 of the Customs Code.

Article 859 of the Implementing Regulation 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 regularise 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..*"

8. The meaning of the term "obvious negligence" for the purposes of the Customs Code and the Implementing Regulation has been considered by the Court of Justice of the European Union on many occasions. The following passage is taken from *Firma Sohl & Sohlke v Hauptzollamt Bremen Case C-48/98*:

> "*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."

Practical operation of IPR

9. IPR provides relief to promote exports from the EU and assists EU processors to compete on an equal footing in the world market. Duty, including import VAT, is relieved on certain imports of non-EU goods which are processed in the EU. Authorisation to use IPR is required but in the present case the appellant used the simplified authorisation procedure. The acceptance of the entry declaration under the IPR customs procedure code is effectively the authorisation for that particular entry.

10. Customs duties are suspended when the goods are first entered to IPR in the EU. Various authorisations and conditions must be met before an importer can take advantage of IPR. For present purposes the following are relevant:

(1) Appropriate entries must be made on the single administrative document (Form C88) completed at the time of importation, including the correct IPR customs procedure code.

(2) Goods must be processed and re-exported within the applicable time limit, usually 6 months.

(3) A bill of discharge (C99) must be sent to HMRC within the applicable time limit.

11. The period of 6 months within which the goods must be processed and re-exported derives from *Article 118* of the Customs Code. That period is known as the "throughput period" and is specified in Customs Notice 221A. The C99 is used to complete the IPR procedure and it must be sent to HMRC at the National Import Reliefs Unit ("NIRU") within 30 days of the end of the throughput period.

12. Where an importer has failed to comply with the conditions described above a customs debt will arise under *Article 204* of the Customs Code unless it is established that the failure has no significant effect on the correct operation of IPR. That will be the case where the circumstances are as described in *Article 859* of the Implementing Regulations. For present purposes I am concerned with whether the failure implies obvious negligence on the part of the appellant and whether all formalities necessary to regularise the situation have since been carried out.

Findings of Fact

13. I have set out certain background findings above. In this section I am concerned specifically with events in the period from the middle of 2007 to 2008. During this period an employee of the appellant, Miranda Lee, was responsible for dealing with customs duty procedures and documentation. At first Mr Chester referred to her as the office manager, but later in his evidence he described her as a junior clerk. Mr Chester accepted that it was his later description which was the most accurate. She did however have responsibility for day to day administrative matters in the company. Mr Chester left such matters to her, including customs duty administration, at least until problems surfaced following a visit by HMRC. Mr Chester thought and I find as a fact

that she had done very little if any research into customs requirements, including those in relation to IPR. In Mr Chester's words "*it is easy to support an argument that she could have done better*".

14. Later in his evidence Mr Chester said Miranda Lee left her employment with the appellant in November or December 2010. From the middle of 2007 to the middle of 2008 she was responsible for lodging the C99s with NIRU when goods imported under IPR were subsequently exported. He described the position in the following terms:

> "*If anyone was responsible, it was her.*"

15. This suggests, and I find as a fact, that there was a lack of organisational control over who was responsible for dealing with customs formalities and in particular the lodging of forms C99 with NIRU. Miranda Lee was notionally responsible for lodging C99s but there was no system in place to ensure that she fully understood the importance of the task or that she was carrying it out adequately or at all.

16. A customs officer visited the appellant at some stage in the summer of 2007 in order to audit customs declarations made by the appellant. There is no evidence as to the circumstances of that visit but it ultimately led to a C18 post clearance demand in the sum of £130,669. The basis of the demand was the use of incorrect customs procedure codes on the export of goods under IPR in the period November 2004 to May 2007. There is no evidence as to whether C99s were lodged in relation to the relevant goods. Following a review, the appellant appealed the decision under reference MAN/2008/5050 ("the 5050 Appeal"). I am not concerned with the 5050 Appeal as such, because the respondents subsequently remitted the amount claimed. However the appellant relies on the circumstances surrounding the 5050 Appeal in the present appeals.

17. On 18 December 2007 the appellant received a letter from NIRU ("the December Letter"). It related to entry *191 004922D* on 4 May 2007 and stated as follows:

> "*We have received a **belated** bill of discharge for the above entry.*
>
> *As you are aware a C18 has already been issued for this entry because your company failed to submit the bill of discharge within thirty days of the expiry of the throughput period, as previously notified to you.*
>
> *On this occasion the C18 has been cancelled, as under Article 859 of Commission Regulation 2454/93 the Commissioners are able to accept a belated return to regularise the situation and therefore no debt is due.*
>
> *This Article has an 'obvious negligence' clause and so any future belated returns will not result in cancellation of the debt as you have been made fully aware of your responsibilities and any further breaches will be classed as negligence.*"

18. There was no evidence before me as to the details of this entry or the circumstances in which goods were re-exported. There is a document in the bundle which is a C18 post clearance demand note in the sum of £7,768.35 which appears to relate to this entry however it is dated 11 February 2008. In other words it was issued nearly 2 months after the December Letter.

19. The earliest reliable evidence from which it can be inferred that the appellant was specifically notified of the need to lodge C99s is the December Letter. The best I can say on the evidence is that the requirement was specifically drawn to the attention of the appellant at some stage shortly before 18 December 2007. Mr Chester was out of the country between 4 December 2007 and 24 February 2008 however I find on the balance of probabilities that Miranda Lee would have known of its contents and the matters which led to it being sent including the need to lodge C99s.

20. By letter to the appellant dated 13 February 2008 the visiting officer, Mr Phil Raymond, refers to his visits on 25 September 2007, 2 October 2007 and 17 October 2007. He records discussions as to the incorrect use of commodity codes on importation and the incorrect use of customs procedure codes on export. It was the errors on export declarations which led to the C18 in the 5050 Appeal. There was no reference to any failure to lodge C99s.

21. I set out in relation to each appeal, in chronological order, the circumstances in which the C18 demands came to be issued:

MAN/08/7064

22. The C18 was issued on 10 December 2007 and relates to customs duty of £2,065 and VAT of £13,747. The entry date on which the goods were imported into the UK was 23 March 2007. The goods had a declared customs value of £76,491. They were re-exported on 9 May 2007.

23. The throughput period for this entry therefore ended on 23 September 2007 and the appellant ought to have lodged a C99 with NIRU by 23 October 2007. No C99 was provided.

24. Mr Chester said that the reason no C99 was lodged by the time stipulated was because the appellant was too busy trying to sort out the issues in relation to the 5050 Appeal. In addition he said that the system in place would not have identified the need for a C99 because the goods were exported fairly quickly after they had been imported.

25. Mr Chester described the issues in relation to the 5050 Appeal. He said that this involved tracking down 25 imports and matching exports over a 3 year period. Each movement involved different quantities of bearings which had to be reconciled. This involved identifying the agents acting including those based in Malaysia, the customs procedure codes used and locating the airway bills. This is what they were concentrating on in the latter part of 2007 following the previous visits.

26. Mr Chester was asked whether it was not obvious negligence that the appellant failed to have a system in place that would trigger the need for a C99. He frankly accepted that it would be, but only if the appellant was sufficiently aware of the consequences. He said that the appellant was not sufficiently aware of the consequences of failing to lodge a C99 because HMRC had effectively encouraged a belief that the form was not necessary. It was not until after the appellant received the letter dated 18 December 2007 that it regarded production of a C99 as important.

27. Mr Chester's evidence as to why no C99 was lodged for this import entry was somewhat confused. At first he thought that Miranda Lee would have realised by July 2007 that a C99 was required. I was not taken to any documentary evidence to support that date. It appears inconsistent with the first visit mentioned in the documents, namely 25 September 2007 and which eventually led to the 5050 Appeal. There were no notes of visit produced and the 5050 Appeal related only to incorrect procedure codes rather than the absence of a C99. Indeed the first reference to a lack of C99s in connection with this appeal appears to be the review letter dated 19 May 2008. In the circumstances it is not clear how or when Mr Chester or the appellant became aware that the C18 demand related to a failure to lodge a C99.

28. The review letter confirmed the decision. In doing so the review officer relied upon the December Letter as the reason why there was obvious negligence on the part of the appellant. That cannot have been a relevant factor, given that the failure to lodge a C99 had occurred before 18 December 2007. Indeed the C18 was issued prior to that date. Mr Chapman accepted as much.

29. I deal below with the question of obvious negligence and whether HMRC encouraged the appellant to believe that it was not necessary to lodge a C99.

30. Mr Chester said that he only became aware that the C99 had still not been lodged when he read the respondents' skeleton dated 19 April 2012. He therefore sent a C99 to HMRC on 25 April 2012, the day before the hearing of the appeal. Mr Chapman accepted that this had the effect of regularising the situation for the purposes of *Article 859 Implementing Regulation*.

MAN/08/7078

31. The C18 was issued at or about the beginning of December 2007 and relates to customs duty of £360 and VAT of £908. The entry date on which the goods were imported into the UK was 6 March 2007. The goods had a declared customs value of £4,500. They were re-exported on 30 March 2007.

32. The throughput period for this entry therefore ended on 6 September 2007 and the appellant ought to have lodged a C99 with NIRU by 6 October 2007. No C99 was provided until 29 July 2008, after the C18 demand had been issued.

33. Mr Chester said that the reason no C99 was lodged with HMRC was because the need to lodge it was "*not on the radar*" in March 2007. At this time Mr Chester's evidence was that HMRC had encouraged the appellant to believe that it was not necessary to lodge a C99.

MAN/09/7010

34. The C18 was issued on 19 March 2008 and relates to customs duty of £18 and VAT of £151. The entry date on which the goods were imported into the UK was 14 July 2007. The goods had a declared customs value of £810. The date of re-export is not clear.

35. The throughput period for this entry ended on 14 January 2008 and the appellant ought to have lodged a C99 with NIRU by 13 February 2008. A reminder was sent by HMRC on 14 January 2008. No C99 was provided by the due date.

36. During the course of cross-examination Mr Chester indicated that he would concede and withdraw this appeal. He did so solely on the basis that the sums involved were trivial.

MAN/08/7065

37. The C18 was issued on or about 20 May 2008 and relates to VAT of £463. The entry date on which the goods were imported into to UK was 19 October 2007. The goods had a declared customs value of £2,530. They were re-exported on 14 December 2007.

38. The throughput period for this entry ended on 19 April 2008 and the appellant ought to have lodged a C99 with NIRU by 19 May 2008. HMRC issued a reminder on 19 April 2008. No C99 was provided until 22 May 2008. The C99 was signed by Miranda Lee who was described as office manager.

39. On 10 June 2008, after the appellant had received the post clearance demand, Miranda Lee emailed NIRU. She asked them to advise "*when the due date for the IPR expired, as I just received a post clearance demand note for goods that have a C99*". Further in the email chain on the same day she stated:

> "*Can you tell me why, if the import/export was completed on the correct CPC codes why do you have to complete a C99 as well, is this our responsibility or the supplier that we use to complete the delivery?*
>
> *I thought that you only needed to complete a C99 when the export has not been trackable?*"

40. This email from Miranda Lee betrays a complete misunderstanding of the IPR procedure at a time when there could be no justification for the appellant not to have had systems in place to ensure compliance with the procedure.

41. By letter to HMRC dated 29 July 2008 Mr Chester wrote as follows:

> "*We had been assured by our agent that the documents were submitted to HMRC. We now realise of course that we should have checked within the allowed time period that this was in fact the case … We will now ensure*

that bills of discharge are not only sent but that we check HMRC have received them in due time.

On the basis that this additional requirement has only recently come to our attention we consider it unreasonable for HMRC to enforce this demand note…"

42. Mr Chester said that the C99 was not triggered by the letter dated 18 December 2007 because the import and export were prior to that date. They were very busy at the time and still trying to deal with the 5050 Appeal. It had taken time to develop a system to deal with C99s. He thought it likely that it was receipt of the C18 demand note that in fact prompted Miranda Lee to send the C99. I accept that evidence.

TC/2010/05815

43. The C18 was issued on or about 11 March 2010 and relates to customs duty of £2,947 and VAT of £6,993. The entry date on which the goods were imported into the UK was 21 July 2009. The goods had a declared customs value of £36,841. They were re-exported on 12 February 2010.

44. The throughput period for this entry ended on 21 January 2010 and the appellant ought to have lodged a C99 with NIRU by 19 February 2010. A reminder was sent by HMRC on 21 January 2010 although the appellant had no record of receiving it. The C99 was dated 19 February 2010 although an email from Miranda Lee to the carriers indicates that it was not lodged until 15 March 2010. On that date Miranda Lee emailed the carrier in the following terms:

"*This matter is still unresolved I still need to know what the export entry number was in order for me to complete a C99 for HMRC …*"

45. She had been chasing this information since 18 February and received the necessary details by email dated 15 March 2010. On that date she lodged the C99.

46. On 22 March 2010 Miranda Lee wrote to HMRC stating that typically the appellant would not expect to have any goods for processing for more than 6 months and that their "*internal tracking log*" had been amended to include a "*deadline for export column*".

47. Mr Chester said that by this stage "*the need for a C99 was well and truly on the radar*" but that the need for an extension of time to the throughput period in circumstances where goods were not processed within the usual 6 month period was not on Miranda Lee's radar. I accept that evidence.

Submissions

48. The submissions of both parties in substance were directed towards whether there was 'obvious negligence' within *Article 859 Implementing Regulation*. Mr Chester provided helpful written opening and closing submissions. I have carefully considered these documents and include a relatively brief summary here.

49. Mr Chester's principal submission was that the company only became aware of the need to lodge forms C99 and that HMRC would seek to assess duty where C99s were not lodged when it received the December Letter. He submitted that there had been a change in policy on the part of HMRC in relation to enforcing the C99 requirement. The change of policy only became apparent after the visit in 2007 and more specifically after the December Letter had been received. In the light of those circumstances it could not be said that the appellant was obviously negligent in failing to lodge forms C99 prior to that date.

50. The basis of this latter submission was his own experience of dealing with HMRC and also a *Joint Customs Consultative Committee ("JCCC") Paper (06) 31* issued in June 2006. This stated that from 1 August 2006 importers using IPR would receive a letter from NIRU when they first used a new computer system which had just gone live. The letter would advise importers of the conditions relating to the procedure. If no C99 was received by the end of the throughput period then a reminder would be generated. If it was still not received 30 days thereafter then a C18 would be issued automatically. As indicated above in relation to the 7010 and 7065 appeals reminder letters were issued.

51. Mr Chester considered that it was not correct to describe the appellant as an experienced importer. That description seemed to follow as a matter of course from the December Letter. He challenged that description and the significance of the letter. He also submitted that the relevant time limits in relation to appeals 7064 and 7078 had expired prior to 18 December 2007.

52. Whilst Mr Chester acknowledged that the appellant had made mistakes he did not think it right to describe those mistakes as obviously negligent. He relied on the HMRC internal manual in relation to IPR, specifically IPR270500. This states as follows:

> "*The care taken by the trader will normally be in direct correlation to their experience. It should be recognised that errors will arise, it is unreasonable to expect otherwise, but all authorisation holders should have systems in place to ensure that errors are identified as soon as possible after they occur and that measures are taken to ensure that similar errors do not arise again.*"

53. Mr Chester submitted that the appellant had put such systems into place. It had done that against a background of dealing with existing problems, training staff and running an expanding business. The circumstances did not amount to obvious negligence. Indeed, he felt that HMRC were deliberately seeking to obtain what he described as a "windfall tax" from unsuspecting traders.

54. Mr Chapman submitted on the basis of *Firma Sohl Sohlke* that the question of obvious negligence was to be determined by reference to the following 5 factors:

(1) The complexity of the regulations.

(2) The professional experience of the appellant.

(3) Whether the appellant had taken due care to comply with the regulations.

(4) The 5050 Appeal and the effect on the appellant of having to deal with issues raised by HMRC in relation to the 5050 Appeal.

(5) HMRC's conduct, in particular how it had previously approached failures to lodge C99s.

55. The first three of those factors derived from the authority referred to above. The two additional factors were specific to the facts of the present case, and in particular were relevant in considering whether the appellant had taken due care to comply with the regulations.

56. Mr Chapman referred me to a judgment of the ECJ in *Terex Equipment Ltd v HMRC [2010] STC 575* in which the court said at [42]:

> "*42. It must be observed, first of all, as the Commission of the European Communities maintains, that the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying out of certain economic activities. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom. Similarly, the consequences of non-compliance with their obligations must be strictly interpreted.*"

57. At the risk of over simplifying the respondents' case, Mr Chapman's broad submission was that in all the circumstances the appellant had been obviously negligent in relation to the failures in each of the appeals. In particular he submitted:

Complexity

(1) The C99 requirements were not complex. A form had to be lodged within 30 days of the export taking place. There was nothing inherently complex about the requirement and it was described in HMRC published guidance. Overall the relief had the capacity to be complex but the requirement to lodge a C99 was straightforward. Similarly, the provision as to exporting within the throughput period and the opportunity to apply to extend that period were straightforward. Any practical difficulty in implementing the relief was a matter to be considered as part of the third factor.

Experience

(2) Mr Chapman accepted that on the facts of the case this was a relatively neutral factor. The appellant had a moderate amount of experience of importing and exporting outside of the EU. In particular it might be said that it was sufficiently experienced to be professional in the way it went about complying with the requirements of IPR.

Due Care

(3) It was important to consider the appellant as a corporate entity. It was not a question of whether Mr Chester had exercised due care but whether the company itself had taken due care. Mr Chester himself had pointed to the inadequacies of Miranda Lee and the company's systems. Even if fault lay with the company's agents, the company ought to have had a system in place to monitor compliance with the requirements of IPR. The fact that the appellant had other priorities at the time, for example dealing with the 5050 Appeal, did not absolve the appellant from taking due care to ensure compliance. The system itself was plainly deficient.

The 5050 Appeal

(4) Even if the appellant was "firefighting" in relation to matters arising from the 5050 Appeal it should still have ensured that systems were in place to deal with other requirements of IPR.

HMRC Policy

(5) Mr Chapman did not accept that any conduct of HMRC had contributed to the appellant's failure to comply with the requirements of IPR. Even if there had been a change in policy as to enforcement of the need for a C99 bill of discharge that would not detract from the obligation on the appellant to take due care in observing those requirements. It might be different if there was evidence that HMRC had expressly said that there was no need to comply but there was no evidence that was the case.

58. Mr Chapman submitted that the December Letter was not very significant in terms of obvious negligence. He accepted that the review officers had been wrong to rely on it in carrying out their reviews in appeals 7064 and 7078. The breaches had already occurred before the December Letter was received. However in relation to appeals 7065 and 5815 the December Letter was an additional reason why the appellant was obviously negligent.

59. I was not addressed by either party on the proviso in *Article 859(9) Implementing Regulation*, that is whether the time limit for lodging a C99 would have been extended if an application had been made in time. I shall assume therefore in favour of the appellant that this proviso was satisfied and that I am only concerned with the proviso requiring no implication of obvious negligence in the failure to comply with the time limits.

60. It was also not in dispute that all the formalities necessary to regularise the breaches had been carried out subsequently, albeit on the eve of the appeal in relation to appeal 7064.

61. There was no evidence before me as to whether or not there had been any change of policy by HMRC in relation to the need for importers seeking to take advantage of IPR to lodge a C99 with NIRU, or as to whether there had been any

change in the enforcement of that requirement by HMRC. Mr Chapman agreed to provide details of any such policy change in writing after the oral hearing. On 30 May 2012 the respondents lodged a witness statement of Janet Guest a Higher Officer of HMRC in the Inward Processing Policy Team. She states that there has been no change of policy regarding the submission and enforcement for non-compliance of C99 bills of discharge.

62. I gave Mr Chester an opportunity to make written observations on that witness statement and he did so on 21 June 2012. He did not dispute the contents of the witness statement and I accept the evidence which it contains. However Mr Chester observed that whilst the policy might not have changed, in his experience the practical implementation and enforcement by HMRC of the requirement to lodge a C99 had changed.

Decision

63. I have had regard to the detailed submissions of the parties. I accept that the legislative provisions requiring a C99 to be lodged are not complex. They are described in HMRC public notices. In particular *Public Notice 221A* in relation to IPR was published in June 2006. It states in clear terms at 3.1:

> "*The following general conditions apply to this procedure:*
>
> - *Within 30 days from the end of the throughput period, a bill of discharge must be sent to NIRU.*"

64. Further details are given at 3.5 which states in bold:

> "*Failure to render returns within 30 days following the end of your throughput period will result in the issue of a demand for outstanding duty and VAT plus compensatory interest.*"

65. I accept Mr Chapman's submission that whilst the appellant had moderate experience of customs procedures at the time of the relevant imports this is not a significant factor in considering whether there is obvious negligence.

66. I have had regard to the obligations imposed on importers who wish to take advantage of IPR. In particular the observation of the CJEU that the beneficiaries of the scheme "*are required to comply strictly with the obligations resulting therefrom*".

67. It is against this background that I set out my decisions in relation to each appeal separately. In general terms whether the appellant had taken due care to comply with the regulations and whether, in the round, its failure to comply was due to obvious negligence.

7064

68. I have to consider whether HMRC somehow encouraged the appellant to believe that it was not necessary to comply with the IPR obligations, and in particular

lodging a C99 bill of discharge. Mr Chester said it was extremely likely that the appellant had not produced C99s in a timely manner prior to 2007, but that HMRC had never identified that fact or sought to claim duty or otherwise enforce the requirement.

69. There was little documentary evidence available to me in relation to the period prior to 2007. I have no reason to believe, however, that compliance with C99s was any better in that period than it was with the present appeals. Indeed, I accept Mr Chester's evidence that it is likely to have been worse. However I do not consider that a period of non-compliance which goes unenforced by HMRC entitles an importer to effectively avoid the consequences of non-compliance. In my view it would require some express indication by HMRC to the effect that C99s were not required before an importer could say that his conduct was not obviously negligent.

70. I accept that the appellant was struggling to deal with issues arising out of the 2007 visits and the 5050 Appeal during late 2007 and early 2008. Again, however I do not accept that this gives the appellant any basis upon which to say that his lack of ongoing compliance was not obviously negligent.

71. I accept that not every mistake will amount to negligence, still less obvious negligence. I also take into account that the appellant had not received the December Letter when the time for lodging the C99 expired. However on the facts of the present case I am satisfied that the appellant failed to put in place a system to deal with the requirements of the IPR procedure. I am also satisfied that this resulted in a failure to lodge the C99 by 27 October 2007. In all the circumstances I find that this amounted to obvious negligence.

7078

72. The circumstances in relation to this appeal are not materially different to those in relation to appeal 7064. In all the circumstances I find that the failure to lodge a C99 by 6 October 2007 amounted to obvious negligence.

7065

73. By May 2008 the appellant could not have been encouraged by any lack of enforcement by HMRC. It had received the December Letter and also the C18 demands in relation to appeals 7064 and 7078.

74. In my view, particularly in light of the emails from Miranda Lee in June 2008, I find as a fact that the appellant had not taken reasonable steps in the period from 18 December 2007 to May 2008 to introduce a system to ensure C99s were lodged on time. In all the circumstances I find that the appellant was obviously negligent in failing to lodge the C99 by 19 May 2008.

5815

75. Again, by this stage the appellant could not have been encouraged by any lack of enforcement by HMRC.

76. This appeal was dealt with in the Statement of Case and in the decision under review as a failure to submit a C99 on time. There was also a failure to re-export the goods within the throughput period and there was no application to extend the time to re-export the goods. However this was not a reason given by the respondents for issuing and maintaining the C18 demand. It is however indicative of the failure to ensure that proper systems were in place even in 2010 to properly apply the IPR procedure.

77. I find as a fact that the appellant had not taken reasonable steps by then to introduce a reliable system to ensure C99s were lodged in time. By February 2010 the Appellant had more experience of importing under IPR and was aware from previous experience that its systems were not robust. However Miranda Lee did not show any urgency at all in seeking details from the carrier in order to complete the C99. She appears to have left it to the last minute and beyond before seeking the necessary information. The fact that the goods were not exported until 12 February 2010, outside the 6 month throughput period, does not mitigate a failure to have reasonable regard to the time limits for submission of the C99.

78. In all the circumstances I find that the appellant was obviously negligent in failing to lodge the C99 by 19 February 2010.

Customs Value

79. Mr Chester raised as a separate ground of appeal the customs value of the goods on which duty was charged. He gave evidence that the value of the goods imported was very small because they were effectively scrap until they had been refurbished. Whether or not that is the case, and I consider that there is an element of exaggeration here, there is no evidence as to the actual value of the goods imported. Further, it appears that the values on which duty has been calculated are the values declared by or on behalf of the appellant. I am not satisfied that they are excessive.

80. Indeed in this respect it seemed that Mr Chester's main complaint was that the value of the goods bore no relationship to the value of the services the appellant was providing. Goods may have a significant value compared to the relatively small income the appellant earned from processing the goods. Unfortunately in the circumstances of the appellant's business that is how the Customs Code operates and I am bound to apply the law to the facts as found.

81. For all the reasons given above I must dismiss the four remaining appeals – MAN/08/7064, MAN/08/7065, MAN/08/7078 and TC/2010/05815.

82. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 5 July 2012