Neutral Citation: [2023] UKFTT 289 (TC)

Case Number: TC08760

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2018/03045

CUSTOMS DUTY – special procedure – end-use authorisation – was a customs debt incurred? – yes – dates incurred? – until provision of guarantee – if so could there be retroactive authorisation – no – remission – whether exceptional circumstances – yes – appeals allowed

Heard on: 7**,** 10 and 11 November 2022
Judgment date: 13 March 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: JULIAN SIMS

Between

OCEAN CHOICE INTERNATIONAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Valentina Sloane KC

For the Respondents: Joanna Vickary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

The decisions under appeal

1. The appellant appeals against the following decisions of the respondents ("HMRC") namely:-

> (1) The decision dated 15 November 2017 to issue to the appellant a C18 Post Clearance Demand Note ("the C18") in respect of 15 imports of prawn and shrimp ("the Goods") between 1 March and 25 April 2017 ("the Relevant Period") with a total value of £2,237,613.74 for which the appellant had claimed end-use relief of zero per cent duty. The C18 was in the sum of £447,479.61 and was upheld by the statutory review dated 28 March 2018 (the "Liability Decision"). The appellant appealed to the Tribunal on 25 April 2018.
>
> (2) The decision dated 17 September 2019, which refused the appellant's application for remission of the said duty, and which was upheld by the statutory review dated 5 November 2019 (the "Remission Decision"). The appellant appealed to the Tribunal on 18 December 2019.

2. By Direction of the Tribunal dated 24 April 2020, the appeals have been consolidated.

The hearing

3. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. The documents to which we were referred comprised a Bundle consisting of 576 pages, an Authorities Bundle extending to 1868 pages and a Supplementary Bundle comprising both documents and legislation extending to 97 pages. We heard evidence from Officers David Halliwell and Jennifer Buckner for HMRC. The witness statement of Mrs Sheila Riviere for the appellant was not challenged.

Preliminary Issues

4. In the appellant's Skeleton Argument it was argued that the Remission Decision included not only the refusal to remit the duty but also a refusal to refuse to reissue an end-use authorisation but with retroactive effect.

5. In their Skeleton Argument, HMRC had argued that there was no appealable decision in relation to a failure to grant, what they described as, "retrospective" authorisation, and therefore the appellant's appeal was misconceived in that regard. Of course, the Tribunal has jurisdiction only in relation to appealable decisions.

6. After hearing argument, the issue was reserved until full submissions had been heard. That was on the basis that the Tribunal should decide as a matter of fact whether a decision had been made and if so as a matter of law whether it was an appealable decision. In the event, it was ultimately conceded that HMRC had decided not to grant retroactive authorisation and that that was an appealable decision. That decision was included in a letter of 17 May 2019. We agree with that analysis.

Overview

7. The appellant is a wholly owned subsidiary of a Canadian company, Ocean Choice International L.P. Its principal activity is the importation, wholesale and distribution of Canadian seafood in Europe. These imports took place prior to Brexit and therefore it was importing non-EU goods into the European Union ("EU").

8. The appellant has imported seafood under end-use relief since 2008. The Union Customs Code ("UCC") governs customs matters within the EU including Customs Special

Procedures. End-use is one such and allows goods to be released for free circulation in the EU at a reduced or zero rate of duty. Regulation (EU) No 952/2013 is the UCC. We have set out in the Appendix the relevant excerpts from the UCC. Hereinafter where we refer to any Article it is an Article of the UCC unless otherwise stipulated.

9. Regulation (EU) 2015/2447 is the Implementing Regulation ("the IR"). Regulation (EU) 2015/2446 is the Delegated Regulation ("the DR").

10. Both parties accept that the end-use procedure is defined in Article 254 and that, in accordance with Article 211, in order to use the end-use procedure, a trader must be authorised by, in the UK, HMRC.

11. End-use is a customs procedure whereby goods entered for free circulation into the EU may be given favourable tariff treatment at a reduced or zero rate of duty on condition that they are put to a prescribed use. The procedure is designed to facilitate trade and ease of movement of goods within the EU. In order to obtain end-use relief, the importer must be the holder of an end-use authorisation. The goods must be put to a prescribed use within a certain period of time. The importer must keep records on the goods and their treatment. If the goods are not put to the prescribed end-use, duty will be due.

12. The appellant holds seafood under bond for entry as required or enters it directly upon arrival into the UK to free circulation or end-use relief.

13. The seafood entering into the EU under end-use relief was then sold to qualifying customers for further processing. A very small percentage of goods were processed on behalf of the appellant by a third party packer.

14. In 2016, the EU customs regime was overhauled. As HMRC put it in an email to the appellant dated 23 June 2016, the UCC "represents the biggest change to Customs Legislation…in over 20 years."

15. Prior to December 2016, the appellant had held a valid end-use authorisation from HMRC for every calendar year.

16. HMRC acknowledge that the appellant is an honest trader and has had an exemplary compliance record since 2008. They also acknowledge that there has been no loss of duty.

17. For over 15 years the appellant has used the services of an independent expert customs adviser.

18. In the course of 2016, and early 2017, both the appellant and their customs adviser repeatedly sought information and advice from HMRC. That was in a context where, in an article dated 8 December 2016 discussing the UCC in the industry press, it was reported that:-

> "The whole of Europe seems to be in disarray about how to implement it [UCC], with the UK seemingly trying to implement the new Rules most rigorously … there is no consensus. There is no uniform approach or interpretation on these Rules and Regulations … Information from HMRC has been unclear, ambiguous, piece meal and issued late. Even requesting info numerous times from the supervising office has resulted in the response 'we don't know' on many occasions said source A who did not wish to be named for fear of alienating customs officials".

That press article did identify the fact that there was a particular concern that importers would need to provide a financial guarantee.

19. We observe from the correspondence in the Bundle that not all of the appellant's enquiries were answered and on a number of occasions HMRC simply did not respond to questions posed or arguments advanced.

20. Between 1 March 2017 and 25 April 2017, the appellant imported the 15 shipments, being the Goods, which are the subject matter of the Liability Decision. The Goods had a value of £2,237,613.74 and were declared to end-use relief.

21. HMRC argue that at the time of those imports the appellant "did not have in place the required form of guarantee". The appellant concedes that the bank guarantee was sent to HMRC on 20 April 2017. There were four imports between that day and 26 April 2017 when HMRC wrote to the appellant authorising the guarantee with effect from 26 April 2017.

22. HMRC argue that there is a mandatory customs debt of 20% and that the circumstances of the default do not satisfy the terms for repayment or remission laid down by the UCC. Where a customs debt has arisen that is only if the requirements of Article 116(1) are satisfied.

23. The appellant denies that there is a customs debt but in the event that there is such a debt the appellant then seeks the equitable relief of Article 120 which falls within Article 116(1)(d). The appellant also relies upon Article 119 which falls within Article 116(1)(c).

24. Furthermore the appellant seeks retroactive authorisation in terms of Article 211(2).

The issues for determination by the Tribunal

25. The appellant argues that the following issues fall for determination by the Tribunal, namely:-

(1) Has the appellant incurred a customs debt under the customs legislation?

(2) If the appellant incurred a customs debt under the customs legislation, is remission justified in all the circumstances of this case?

(3) If the appellant incurred a customs debt under the customs legislation, should the original end-use authorisation be revoked and the matter regularised by a retroactive end-use authorisation?

(4) If the appellant incurred a customs debt, did it do so even after the guarantee had been provided?

It was latterly conceded by Ms Vicary that the third and fourth issues are simply a sub-set of the first issue.

26. HMRC had originally argued that there are only two issues, namely:-

(1) In relation to the validity of the C18 the issue is whether the appellant is liable to import duties of 20% on the Goods pursuant to Article 79(1) of the UCC for non-compliance with a customs procedure, and

(2) In relation to the Remission Decision, the issue is whether, in accordance with Article 120(1) the appellant is able to demonstrate the existence of any special circumstances in which no deception or obvious negligence may be attributed to it; and, in accordance with Article 120(2) such circumstances will exist only where it is clear from the circumstances of the case that the appellant is in an exceptional situation as compared with other operators engaged in the same business.

27. However, we agree with the appellant that, HMRC having conceded the position on the refusal to grant retroactive authorisation, in reality there are four issues. Therefore the issues are:-

(a) Is there a customs debt because the appellant is liable to import duties of 20% on the Goods pursuant to Article 79(1) of the UCC because of non-compliance with a customs procedure?

(b) If so, was further debt incurred after 20 April 2017?

(c) If so, should the original end-use authorisation be revoked and the matter regularised by a retroactive end-use authorisation?

(d) If the appellant incurred a customs debt under the UCC, is remission justified in all the circumstances of this case?

Overview of HMRC's case

28. HMRC make it explicit at paragraph 15.8 of their Skeleton Argument that:-

> "…it is the release of goods to End-Use in the absence of an authorised guarantee that has given rise to a breach of the Customs Special Procedure regime and, in turn, led to the incurrence of the customs debt before this Tribunal".

29. The appellant is responsible for submitting accurate and complete documents to HMRC. The customs declarations made by the appellant in respect of the Goods were inaccurate because they utilised the end-use code which implied that a guarantee was in place.

30. The requirement for an authorised guarantee is fundamental to end-use procedure and the appellant was in the same position as other traders. There were no special circumstances and thus remission could not be granted in terms of Article 120 and none of the grounds in Articles 117 to 119 was made out.

Overview of the appellant's case

31. As the end-use authorisation had been issued and was stated to be valid, the appellant had recommenced importation.

32. The security was provided within the three month deadline specified by HMRC.

33. The appellant has consistently argued that HMRC had told them that end-use authorisation would not be issued until the Customs Comprehensive Guarantee ("CCG") was in place.

34. The application for a CCG had been accepted and the level of required security had been reduced to one third by HMRC. They had been told to obtain securities within three months of 10 February 2017. Given the terms of the end-use authorisation which did not mention securities and said only that the guarantee had to be adequate (which they knew HMRC considered that it was because of the reduction), they thought that everything was in order. They would not have imported had they not thought so.

35. The end-use procedure had been operated correctly with the goods put to the specified use and all necessary records kept. The guarantee had not been called upon.

36. Retroactive authorisation should have been granted since the appellant meets all of the conditions in Article 211(2).

37. HMRC operated the end-use procedure, and in particular the guarantee and authorisation process, in breach of the UCC. It should not have granted the authorisation or released the imports before the security was provided and approved. Article 119 applies.

38. There are special circumstances and in particular other traders both in Ireland and in the UK were treated differently. Article 120 applies.

The Law

Jurisdiction

39. Section 13A Finance Act 1994 ("FA94"), so far as material, describes a "relevant decision" as follows:

"(2) A reference to a relevant decision is a reference to any of the following decisions—

(a) any decision by HMRC, in relation to any customs duty …of the [European Union], as to—

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged; … or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled….

…

(j) any decision by HMRC which is of a description specified in Schedule 5 to this Act."

40. Insofar as relevant, Schedule 5 provides:-

"The following decisions, so far as they are made for the purposes of the Community Customs Code and are decisions the authority for which is not contained in provisions outside that Code and any directly applicable legislation made for the purpose of implementing that Code, that is to say—

…

(d) any other decision as to whether or not the requirements of any procedure for goods which are to be or have been presented to the Commissioners, or any other formalities in relation to any such goods, have been satisfied or complied with or are to be waived, or as to the measures to be taken, including any requirements to be imposed, in consequence of the inability or other failure of any person to comply with the required procedure.

…

(f) any decision, in any particular case, as to whether or not the carrying out of any processing or other operations or the use of any procedure is to be, or continue to be, authorised or approved;

…

(m) any decision as to whether or not any person is to be required to give any security for the fulfilment, in whole or in part, of—

(i) any obligation to pay any customs duty or any agricultural levy of the European Union; or

(ii) any obligation to comply with a condition of any permission, designation, approval, authorisation or requirement mentioned in any of the preceding sub-paragraphs or with any provision for the purposes of which any decision falling within any of those sub-paragraphs is made.

…

(o) any decision as to whether or not a decision falling within this paragraph is to be varied or revoked, including a decision as to whether or not the time at which any such decisions is to take effect is to be deferred."

41. It is common ground that, as the Tribunal in *Euro Packaging UK Limited* [2017] UKFTT 160 (TC) stated at paragraphs 101 to 104, the jurisdiction of the Tribunal is governed by sections 16(4) and (5) FA94 which read:

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

The Tribunal has full appellate jurisdiction.

Overview of the UCC

42. Article 79(1)(c) provides that a customs debt on import will be incurred where, in relation to end-use, there has been non-compliance with a condition of the customs procedure. Article 79(2)(b) provides that the time that a customs debt is incurred is when the customs declaration is accepted and it is subsequently established that there has been non-compliance with a condition. Article 79(4) states that in that regard the debtor is the person who is required to comply with the condition; in this case the appellant.

43. Article 211(1) specifies that it is mandatory that the use of the end-use procedure is authorised by HMRC and that the conditions for the use of the procedure are set out in the end-use authorisation.

44. Article 211(3)(c) states that the authorisation "shall be granted only" to a trader has provided a guarantee in accordance with Article 89 which sets out the general provisions for guarantees.

45. Article 92 sets out the forms of guarantee that are acceptable. Article 93 permits HMRC to refuse to accept a form of guarantee where it is incompatible with the functioning of the customs procedure. Article 94 lays down conditions in relation to the guarantor giving HMRC discretion to refuse to approve the guarantor or guarantee if it does not ensure payment within a prescribed period.

46. Article 195(1) provides that where HMRC requires a guarantee the goods shall not be released for the customs procedure in question until such a guarantee is provided. Release of goods is defined in Article 5(26) as:-

> "'release of goods' means the act whereby the customs authorities make goods available for the purposes specified for the customs procedure under which they are placed".

47. Article 119 provides for repayment or remission of the customs debt where there has been an error on the part of HMRC.

48. Article 120 provides for repayment or remission of the customs debt in the interests of equity where there are special circumstances and there is no deception or negligence by the trader. The trader must be in exceptional circumstances compared with other traders.

49. Article 23 provides for annulment, revocation or amendment of a decision which does not conform to the legislation.

50. Article 211(2) provides for mandatory authorisation with retroactive effect provided eight conditions are met. It does not require the provision of a guarantee.

51. Under the heading "Measures to be taken by the customs authorities", Article 198(1)(b)(iii) provides that where a guarantee has not been provided within a specified period, then HMRC can take any necessary measures including confiscation, sale, destruction or disposal of the goods.

52. Although it deals with a breach of an obligation and not a condition, HMRC rely on *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* C-262/10 ("Döhler") in which the CJEU described the position thus:

> "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).

….

> 43. Consequently, the incurrence of a customs debt does not, in circumstances such as those in the main proceedings, have the nature of a penalty, but must rather be regarded as the consequence of the finding that the conditions required to obtain the advantage derived from the application of the inward processing procedure in the form of a system of suspension have not been fulfilled. The procedure implies the granting of a conditional advantage, which cannot be granted if the applicable conditions are not respected, thereby making the suspension inapplicable and consequently justifying the imposition of customs duties."

53. Full details of the authorisation and special procedures are contained within HMRC's public Notice 3001.

"Notice 3001: Customs Special Procedures for the Union Customs Code"

54. This Notice, unlike some other HMRC public Notices, does not have the force of law.

55. Section 1.2 which is headed "What has changed" highlighted the fact that the UCC and the IR had made a number of changes, including:-

> "● the mandatory requirement for a guarantee to cover potential and/or actual debts."

56. Section 2.5 includes the following para:

> "You should ensure that you have applied for a customs comprehensive guarantee – form CCG1 or submit the CCG1 at the same time as your application for authorisation. Please note that a CCG can take up to 120 days to issue. Your authorisation cannot be issued until the CCG1 form has been processed …".

57. At section 2.8 which is headed "Guarantees, guarantee waivers" it reads:-

> "In order to operate a special procedure it is a requirement that a guarantee be taken to cover the actual and potential debt liability. This will include customs duty and in certain cases Import VAT."

In this case there is no VAT as seafood is zero rated.

58. The other relevant paragraphs of that section read:-

> "For EnU [end-use], although the goods are technically released under the customs debt rules of Article 77.1.a UCC which establishes an actual debt at the time of release, there is still a "potential" debt, under the EnU arrangements until such time as the "specific use" is completed. If, following release the goods were "diverted" to an "ineligible" use then the "relief" granted at the point of clearance would be invalid and the full duty would become due. The guarantees and reference amounts need to take account of the time delay between the customs declaration stating they are EnU goods and the "completion" of the EnU requirements.
>
> If you can meet the conditions in paragraph 2.6 above and certain other criteria you may be eligible for a guarantee waiver or reduction, otherwise a guarantee to cover your liabilities will be required."

The appellant had qualified for, and been granted, a guarantee reduction to 30% (see paragraph 61 below).

59. Annex C to Notice 3001 includes at 12 the completion notes for the application for end-use relief and under the heading " 16-Additional information" it has a further heading "Guarantees" and the narrative includes:-

> "In order to operate a special procedure it is a requirement that a guarantee be taken to cover the actual and potential debt liability. This will include customs duty and in certain cases Import VAT.
>
> This amount may be reduced or waived depending on the level of comprehensive guarantee authorisation held (100%, 50%, 30% or 0%)
>
> …
>
> You must hold a guarantee (or have been approved for a guarantee waiver) before making an application for a special procedure. Your application will not be accepted if you do not have a guarantee in place at the time of application, and will be returned to you."

The latter paragraph was highlighted in bold in the Notice.

The IR

60. Referencing Articles 92(1)(b) and 94 of the UCC, Article 151(1) reads:-

> "1. The undertaking given by a guarantor shall be approved by the customs office where the guarantee is provided (customs office of guarantee) which shall notify the approval to the person required to provide the guarantee."

The DR

61. Article 84(2) provides that where a trader meets seven specified conditions then the comprehensive guarantee (for which the appellant had applied) shall be reduced to 30%.

The background facts and the relevant documentation

62. The appellant's then existing end-use authorisation was due to expire at the end of 2016 and it applied to HMRC for a new end-use authorisation and suspended its imports whilst waiting for that authorisation to be issued. The appellant had asked for an extension of the existing authorisation but that was refused.

63. On 28 July 2016, HMRC had told the appellant in an email that one of the main changes was that "you need to provide a financial guarantee with any new application". Officer Birch sent the appellant an end-use application form and questionnaire and suggested that the appellant go to the website to look at Notice 3001. He stated that:-

> "The application form for financial guarantee is there 'CCG1'. I recommend you start the application for financial guarantee well before your current authorisation expires and in advance of submitting your new application…".

64. On 22 September 2016, Jane Slade, of the appellant, wrote to the officer stating that she was about to commence the renewal and asked what form she should download from the website since there had been "some changes". He responded that day enclosing an application form (which was stated not to be on the website yet) and questionnaire and again pointed out that a financial guarantee should be provided with the application. The officer directed the appellant to the website and suggested searching for "CCG1".

65. On 1 December 2016, the appellant's application for a Customs Comprehensive Guarantee ("CCG") dated 24 November, but sent to HMRC on 30 November 2016, was received by HMRC. They responded on 6 December 2016 giving the appellant a CCG reference and requesting completion of a questionnaire. The appellant provided that by email on 9 December 2016 and at the same time asked for confirmation as to when the end-use application could be submitted.

66. Having received no response from HMRC, on 15 December 2016, Mrs Riviere submitted an application for end-use authorisation to the HMRC Authorisations and Returns Team at CITEX ("CITEX") hoping that the application could be processed since there was a CCG reference.

67. On 21 December 2016, the CCG Team responded to the email of 9 December 2016 stating that the end-use application should not be submitted to CITEX until a decision letter was issued by the CCG Team. In a separate email on that date they stated that whilst the application for a CCG had been formally accepted on 9 December 2016, in accordance with Article 22(2), HMRC would "now consider your eligibility" for a CCG and would issue a decision within 120 days (Article 22(2) simply specifies the timescales within which HMRC must intimate decisions).

68. On 28 December 2016, CITEX wrote to Mrs Riviere returning the end-use application stating that the application could not be processed and that she should resubmit the application once the "… required guarantee is in place and you are able to provide confirmation of the same when you re-apply".

69. Following a number of phone calls and emails to HMRC, on 23 January 2017, CITEX called the appellant stating that the end-use application should now be submitted and it was lodged with the questionnaire on 25 January 2017. The questionnaire stated that:- "The purpose of this document is for you to supply the information necessary to assess whether you meet the criteria for a CCG". The preamble to the application form said that the appellant would need "details of the guarantee that you hold". The completed form itself gave details of the CCG Team and said that the guarantee was in the sum of £600,000.

70. On 7 February 2017, Officer Wignall of CITEX responded stating that the application had been "accepted on 27 January 2017" and asked for clarification of a number of issues before he could proceed with the application.

71. On 8 February 2017, the appellant emailed the CCG Team stating that the end-use application had been accepted and "we would therefore like to ensure that any required Guarantee is put in place asap."

72. On 10 February 2017, the CCG Team emailed Mrs Riviere enclosing what they described as a decision letter and schedule stating: "You will see from the letter that we require security from a guarantor before the authorisation can be granted." The amount of the security was stated to be £180,000 rather than the £600,000 in the application.

73. The decision letter stated:-

> "I am pleased to inform you that your application for a CCG has been approved subject to the provision of securities….
>
> The level of the security required for this decision is set out in the schedule attached…
>
> Within 3 months of the date of the decision you can either:
>
> Provide the securities to cover the liabilities listed in the schedule using: [link to the GOV.UK website "Send a Customs Comprehensive Guarantee from an approved guarantor to HMRC"]
>
> Or request a review of the decision…
>
> You must be aware that your **authorisation** is not valid until the securities have been received by the CCG Team.
>
> As an authorisation holder you are responsible for maintaining the criteria applicable to the CCG…
>
> The use of this authorisation is subject to the conditions laid down in the UCC…" (emphasis added)

We have set out at paragraph 112 below, the detail of the link we have noted in square brackets.

74. Officer Buckner's evidence was that she had told Mrs Riviere at a meeting, as Mrs Riviere had confirmed in her witness statement and correspondence, that the word "authorisation" that we have highlighted was a reference to the end-use authorisation. By contrast, Officer Halliwell confirmed in his oral evidence that, as we and Mrs Riviere had understood the position to be, the authorisation was the CCG authorisation.

75. On 16 February 2017, CITEX wrote a seven page letter to Mrs Riviere stating that the "application for an end-use authorisation dated 26 January 2017 has been approved". On the first page the letter went on to state in bold that "This authorisation is valid for the period 1 January 2017 to 31 December 2017" and that the letter should be read in conjunction with public Notice 3001.

76. The authorisation was stated as being subject to a long list of specified terms and conditions and that if the appellant did not agree with those conditions then the appellant should contact CITEX and "not use this authorisation".

77. Those terms and conditions included:-

(a) The second which was headed "Guarantee". That was brief and gave the CCG reference number and stated that "You must ensure that your guarantee is adequate to cover your liability at all times". It went on to explain how to change the level of guarantee. There was no mention of securities or of time scales. That can be contrasted with numbered conditions 11 (Period for Discharge) and 18 (Bills of Discharge) which both specify time limits.

(b) The fourth which stated under the heading "Period of Validity":- "Your authorisation is valid from 1 January 2017 to 31 December 2017". That is the same as the narrative on the first page.

78. There are five bullet points on the penultimate page of the authorisation one of which states that the use of the authorisation is subject to the conditions laid down in the UCC, the DR and IR. Another states that a failure to comply with any of the conditions of the authorisation might render the appellant liable to a civil penalty. (There is no civil penalty in this case.)

79. The only area of dispute is whether the appellant has complied with the second condition in relation to the guarantee. It is accepted that there has been compliance with all of the other conditions.

80. The appellant has produced the first page of a redacted end-use authorisation sent to another importer by HMRC on 4 September 2018. It is in very different terms. It also refers to Notice 3001 but immediately after stating the approval and giving the authorisation number it reads:

> "The requirement to hold a 'Customs Comprehensive Guarantee' for a 'Special Procedure' authorisation took effect from 1st May 2016 when 'Regulation (EU) No 952/2013 laying down the Union Customs Code' was implemented. Therefore you MUST NOT use this authorisation until HMRC have confirmed that your 'CCG' is in place and you have put up (if applicable) sufficient security against it.
>
> Please note that use of this authorisation where a CCG is not in place and / or where insufficient security has been provided will constitute a failure to meet the conditions of the relief and may could (sic) result in issue of the debt, issue of a civil penalty or ultimately, revocation of your authorisation."

81. On 1 March 2017, believing that the end-use authorisation was in place the appellant, who had suspended imports other than into bond, began to customs clear the Goods to the end-use regime.

82. On 15 March 2017, the CCG Team sent the appellant an email stating:

> "Further to our email of 10/02/2017 we have not received a CCG2 from your Bank. This is required before the authorisation for your Customs Comprehensive Guarantee can be granted."

83. On 20 April 2017, Barclays Bank PLC submitted the completed form CCG2 which is described as a "Deed of Guarantee" with a "debt limit" of £180,000 and a commencement date of 20 April 2017. It is believed that HMRC received it the following day. (see paragraphs 116 and 117 for more detail).

84. On 26 April 2017, the CCG Team wrote to the appellant. Interestingly, the heading was exactly the same as the letter dated 10 February 2017 (see paragraph 73 above) and read:-

> "Customs Comprehensive Guarantee (CCG) - Granting of a CCG authorisation under Article 95(1) and (2) of Regulation (EU) No 952/2013 – the Union Customs Code"

The only difference in the first paragraph was the deletion of the words "subject to the provision of securities."

85. It went on to repeat the authorisation number but, on this occasion, caveated it by stating that it was effective from 26 April 2017. It stated again that "The level of the security required for this decision is set out in the schedule attached…".

86. On 21 June 2017, Officer Wignall raised an internal referral in HMRC and asked that a compliance visit to the appellant be arranged. That internal form narrated the history to date and stated:-

> "As this is one of the first cases of it's (sic) kind, an initial referral to the Customs Special Procedures Policy team was made, who have recommended C18 …
>
> I ask that the visit is arranged by 21/07/2017 for the benefit of other potentially similar cases to set a precedent."

87. Officer Buckner arranged a compliance visit which took place on 10 October 2017 and on 13 October 2017, she issued the Right to be Heard letter setting out the calculation of the duty that she considered to be a customs debt.

88. On 8 November 2017, Mrs Riviere replied and, whilst not challenging the calculation or the fact that the bank guarantee had not been in place in the Relevant Period, argued that:-

> (a) A retrospective end-use authorisation had been granted on 16 February 2017 stating that it was valid from 1 January 2017.
>
> (b) It quoted the CCG reference number and said that the guarantee had to be adequate to cover liabilities.
>
> (c) It did not mention that its use was dependent on securities being in place.
>
> (d) It did reference Notice 3001 with which the appellant believed that it had been compliant, in that the appellant had applied for and received the CCG approval.
>
> (e) The bank guarantee had been in force from 20 April and not 26 April 2017.
>
> (f) Article 211(2) of the UCC listed the conditions for retrospective authorisation and that did not state that the security for the debt had to be available for the retrospective period.
>
> (g) The duty was punitive in the context of a complex and confusing new procedure.

89. On 15 November 2017, Officer Buckner replied stating that Article 211(2) dealt with retroactive end-use authorisation and that was not applicable as, at the point of importation, the end-use authorisation had already been granted. She argued that "a guarantee as required

by Article 211(3) should have been in place before the authorisation" was used. She said that the customs debt had been incurred under Article 79(1)(a) for non-compliance with the obligation to provide a guarantee in terms of Articles 89 and 195(1).

90. On 7 December 2017, the appellant requested a review and rehearsed the history and arguments previously advanced but added in addition that:-

(a) The appellant did not agree with Officer Buckner when she stated that the word "authorisation" in the first sentence of the second page of the CCG letter of 10 February 2017 referred to the end-use authorisation.

(b) "If we have not properly understood the process and have made a mistake in placing goods under end use (sic) before the bank guarantee was in place, we apologise and accept that Mrs Buckner may wish to penalise this administrative error. However, we trust that you will agree that there is no customs debt due…".

91. On 28 March 2018, the review conclusion letter was issued upholding the decision. It stated that "It is HMRC's policy that the CCG does not come into effect until that letter [dated 26 April 2017] is issued no matter what date the CCG2 was received by HMRC".

92. Both the original decision in regard to liability and the review decision stated that a customs debt had arisen in terms of Article 79 for non-compliance with an obligation to provide a guarantee under Articles 89 and 195(1). However, the original decision specified Article 79(1)(a) which is now admitted to be an incorrect reference. The review conclusion letter pointed out that the legislation about authorisations is to be found in Article 211.

93. On 30 May 2018, the appellant lodged with HMRC an application under Article 120 for remission of the customs duty in respect of the C18 issued by Officer Buckner. Mrs Riviere said that "it appears that we incorrectly interpreted the wording" of the letter of 10 February 2017.

94. Officer Halliwell replied on 22 November 2018 rejecting the application. His basis for refusal was quite simply that:-

(a) a guarantee had to be in place,

(b) the letter of 10 February 2017 had been clear,

(c) there were no exceptional circumstances as other traders were in exactly the same position,

(d) it was not a "mis-step" as argued by the appellant but a compliance error.

He pointed out that under Article 121(2) where repayment or remission was not granted, HMRC is required to look at the other grounds for repayment or remission specified in Article 116. He had done so and could see no basis for remission.

95. On 20 December 2018, the appellant responded again rehearsing the history and the arguments previously advanced. Mrs Riviere pointed out that HMRC had since conceded that the end-use application should not have been returned in December 2016 as it should have been progressed because the CCG application had been acknowledged.

96. She went on to argue:-

(a) In relation to the officer's argument that all other traders were in the same position, so there were no exceptional circumstances she stated:-

"**Analysis**

We have found a number of examples whereby other traders did benefit from End Use Relief which would result in remission under Article 120 of the UCC applying exceptional circumstances do exist:

In November 2016 Our (sic) customer [identified] … was advised by their HMRC contact that under the new regime they would be required to have a bank Guarantee in place for transfers under TORO, The email stated '*Once your approval expires (after 30 November) someone (either you or your suppliers) will need to provide a guarantee for the goods they are transferring to you under TORO, otherwise customs duty relief cannot be claimed. As your guarantee application is currently being processed we are prepared to accept this as [the customer] putting up the Guarantee (even though it is not actually in place yet) but only if your suppliers have requested that you be added to their current approvals as processors under TORO, so you must make sure that they all do this.*

This structure granted traders whose current End Use ended during 2016 an extension to their authorisation to allow them time to complete the lengthened application process. Further these companies had the use of their appointed HMRC contact to address queries whereas we did not have a direct contact."

(b) She went on to reference Military End Use ("MEU") authorisations which were automatically extended without a requirement for a guarantee.

(c) CITEX had refused their request for an extension of their 2016 authorisation which had been on the same basis as other businesses where approval had been granted; that amounted to "an inequity of treatment".

(d) Whilst HMRC was of the opinion that no trader should operate without a guarantee, once the guarantee is in place, traders should be allowed to benefit from the relief as they could apply to claim the relief retrospectively; albeit it appeared that HMRC would not grant retrospective authorisation which could not be correct.

(e) HMRC had not taken into account that, because the parent company was not in the EU, HMRC had required the parent company to underwrite the guarantee. The appellant had been placed at significant disadvantage compared with other traders.

(f) The confusion regarding the new practices certainly represented special circumstances.

(g) Their understanding had been that HMRC would not process the end-use application without the CCG being place. However, in 2017, HMRC's Customs Policy had pointed out that that was incorrect and the process was changed. Therefore the appellant had been misled to its detriment as a result of the error/change in procedure by HMRC. They argued that that constituted an error in terms of Article 119.

(h) Lastly, they pointed out that having spoken to other businesses they had established that it was HMRC's practice not to issue end-use authorisation until a CGG was formally in place. HMRC's decision to issue the authorisation when the guarantee was not in place had led to the appellant being misled to its detriment.

97. On 8 March 2019, Officer Halliwell responded stating that he was unaware of the situations to which Mrs Riviere had referred, such as their customer and MEU, and was unable to comment because of "The General Data Protection Regulation (sic)" ("GDPR").

98. He dismissed the argument about the parent company simply stating that that was a commercial issue around the corporate structure and the appellant should have made appropriate arrangements.

99. He then argued that the end-use authorisation was clear because it stated that the appellant must ensure that the guarantee was adequate to cover the liability at all times. He again reiterated that the end-use authorisation dated 16 February 2017 was clear as was the CCG letter of 10 February 2017.

100. Lastly, he stated that for Customs purposes a guarantee does not come into effect until a letter is issued by HMRC.

101. On 8 April 2019 (the letter is wrongly dated 2018) the appellant responded requesting a review on three grounds, namely:

(a) The appellant was in a special situation compared to other economic operators.

(b) HMRC should amend the date of issue of the end-use authorisation, and

(c) The date of effectiveness of the guarantee was wrong since it was operative from 20 April 2017 not the date HMRC issued an approval.

The Notice of Appeal to the Tribunal stated that this letter summarised the appellant's Grounds of Appeal.

102. On 17 May 2019, in his Right to be Heard Letter, Officer Halliwell responded and his decision was upheld on review on 5 November 2019.

The first ground

103. In regard to special circumstances and Article 120, it was argued that the appellant had a legitimate and reasonable expectation that they were entitled to start using the authorisation "as soon as it had been granted on the basis that it was covered by a guarantee which was valid as long as securities were put in place within a 3 month deadline". The appellant had understood that the guarantee was in place because it had been approved, had a reference number and the end-use relief authorisation had been issued. Therefore all the appellant had to do was to provide the securities within a deadline of three months.

104. Other traders had an authorisation with a very clear warning and that had not been provided to the appellant (see paragraph 80 above).

105. Officer Halliwell stated that HMRC's letter had made it explicit that "you must be aware that your authorisation is not valid until securities have been received by the CCG team". There was "no room for doubt or confusion and therefore there is no special situation".

The second ground

106. The appellant then argued that HMRC should amend the date of issue of the end-use authorisation. That was on the basis that HMRC should not have granted the end-use authorisation until the securities were in place if their position is that there is no valid guarantee before the provision of securities. If HMRC had waited to issue the end-use authorisation until the securities were in place, the problem would not have arisen. Furthermore, the authorisation which was granted applied retrospectively from 1 January 2017 with prospective application from the date when the securities were provided. There is no need for a guarantee to be in place for the period of retrospective authorisation. Therefore pursuant to Article 23(3), HMRC should amend or revoke the end-use authorisation.

107. Officer Halliwell pointed out that Article 23 refers to decisions that are "invalid or have become null and void" and that was not the case. The issue was the guarantee and not the end-use authorisation. Therefore, Article 23 had no application.

The third ground

108. The appellant argued that there was no basis under EU law for HMRC to withhold authorisation of the CCG until the letter was issued by them and to assess for duties even although a guarantee was operational.

109. Officer Halliwell pointed out that Article 89(2) stated that the guarantee must cover the amount of the duty and Article 151(1) of the IR meant that HMRC had to notify approval of the guarantee. That approval was not guaranteed because Article 94(3) meant that HMRC had the right to refuse to approve a guarantee. The letter dated 26 April 2017 was that approval.

110. He referenced section 2.1 of Notice 3001 which he paraphrased but which reads:-

> "You must obtain prior authorisation from HMRC to use any special procedure. The special procedure authorisation holder is ultimately responsible for ensuring that all the conditions of the procedure are met and you are also responsible for the customs duty…".

Key Findings in Fact

111. The letter of 28 December 2016 from HMRC stated that the end-use application could not be processed until a guarantee covering "actual and/or potential debt at risk" and "is in place". Reference was made to section 2.8 of Notice 3001 (see paragraph 57 above). There is no mention of securities.

112. The letter of 10 February 2017 from HMRC relates to the CCG and not to the end-use authorisation as argued by Officer Buckner. That letter does make it explicit that the authorisation is subject to the provision of securities. The appellant was told to provide the securities by using one of the hyperlinks in that letter. The relevant hyperlink is to a page which includes the following wording:

> "Send a Customs Comprehensive Guarantee from an approved guarantor to HMRC
>
> Use form CCG2 to provide a new, or amended Customs Comprehensive Guarantee (CCG) from an approved bank or financial institution.
>
> …
>
> You'll need to provide your financial guarantee once you've been given a CCG authorisation. HMRC will tell you what level of CCG you'll need to cover."

113. The covering email also made it clear that authorisation of the guarantee depended on the provision of securities (see paragraph 72 above).

114. The decision letter included with that email simply indicated that the application to apply for a CCG had been authorised.

115. As we have indicated at paragraphs 75 to 78 above, the end-use authorisation:-

(a) Makes no mention of securities,

(b) States that it is valid from 1 January 2017 to 31 December 2017,

(c) In regard to the guarantee it states that it must be adequate to cover the liability at all times, and

(d) Use of the authorisation is subject to the UCC and the legislation implementing that.

116. The Guarantee that was provided was Form CCG2 v1.1, which is accessed via the HMRC website. It must be completed online by the guarantor, in this case Barclays Bank plc,

and then sent to HMRC which in this case it was on 20 April 2017. The key provisions include:-

> "By this deed the guarantor guarantees to the Commissioners for HMRC that whenever the guarantee holder named below does not pay any of their customs debts and other charges as and when they fall due the guarantor shall make due and punctual payment to the Commissioners for HMRC on demand up to a maximum amount of the total reference amount stated below in the guarantee(s) apportionment section."

117. The "total reference amount" is described as "the total aggregate demands made on the guarantor under this guarantee shall not exceed the sum of £180,000".

118. When the appellant recommenced imports, as is required, it (via its freight agent) made customs declarations (C88s) on HMRC's electronic system, Customs Handling of Import and Export Freight ("CHIEF"). The algorithm in CHIEF then makes a choice as to how the declaration is processed eg route 6 which is automatic clearance if the correct payment is made and there are no errors.

119. The default position is that duty is payable unless, for example, as was the case here the appellant claimed end-use relief by entering the code for that in the relevant box (37). In that instance route 3 is chosen by CHIEF which is automatic clearance followed by post clearance checks if required. Officer Halliwell explained that the role of HMRC is to facilitate trade and accept the declaration where no risk is perceived.

120. The code used has explanatory notes. We have not corrected the punctuation and grammar but the notes for code 40 00 024 (end-use) include:

> **"5. Security required-upon issue of a Union customs code authorisation**
>
> A guarantee for customs duty will be required for the potential and actual customs debt. unless the consignee qualifies for a waiver of the requirement for a guarantee. Release can be on any form of security pending confirmation. Enter MP codes N, P, Q, S, T, U or V as appropriate in box 47.
>
> The amount secured must cover the duty chargeable had the end-use rate of duty not be claimed (potential debt) as well as the duty due under the end use rate (actual debt). When security is by deposit enter DTY as the last 3 characters of the Rate column and the charges on deposit in the amount column of Box 47."

Discussion

121. It is not disputed that the burden of proof lies with the appellant.

122. This is an unfortunate case where a taxpayer whom HMRC has confirmed has an impeccable compliance record and who has acted with integrity throughout is facing a very large customs duty bill. Ms Vicary accepted that the appellant had received the C18 because of what she described as a "one off error" which carried "serious consequences".

123. Those consequences are a customs debt of in excess of £447,000, plus interest, in a context where HMRC accept that there has been no loss of duty and that the appellant has always acted in good faith. By comparison, the total guarantee was a mere £180,000.

124. The appellant accepts that the Tribunal cannot consider whether or not this is fair, although it believes that it is deeply unfair particularly where the best that can be said about HMRC's approach to the matter is that it has not been beyond reproach.

125. That having been said, the evidence from both officers was straightforward and honest. Both readily conceded what they did not know. The problem with their evidence, however, was that not only did they disagree on what the letter of 10 February 2017 authorised but both

demonstrated a lack of understanding as to how the guarantee system introduced by the UCC operated.

126. We have narrated the detail of the correspondence at length because it demonstrates the approach of both parties from the outset.

127. The most striking aspect of this case is both parties had proceeded throughout on the basis that there were what Officer Halliwell confirmed to Ms Sloane to be three components that were required. Those were the authorisation, the guarantee and the security.

128. Officer Buckner frankly admitted that she did not really know how the guarantee and security worked. For that reason, as she said in her witness statement, she had consulted with colleagues in the "End Use unit of Expertise" and the advice was that a guarantee had to be in place before goods are released to end-use procedure and so she said:-

> "In this case the CCG was not valid as it was not supported by a financial security, therefore the goods should not have been released to the End-Use Procedure as no guarantee was in place."

129. Officer Halliwell's oral evidence was that traders would obtain a guarantee and end-use authorisation and then only obtain the requisite level of security at "the last moment" because that cost money.

130. As can be seen (see paragraph 80 above) the form of end-use authorisation which HMRC issued in September 2018 made a distinction between the guarantee and the security. Officer Halliwell confirmed that that letter would have been a template as were the authorisation letters sent to the appellant.

131. We accept the appellant's argument that in issuing this warning to other traders at a later date, HMRC must have come to the view that they needed to make it clear that there had to be a guarantee and there had to be security.

132. After Officer Halliwell had completed his evidence on the last day of the hearing, I put it to him that, having reviewed the law and checked the hyperlink in the letter of 10 February 2017, that was not my understanding. He agreed with my articulation of the position and we therefore find as fact that:-

> (1) If a taxpayer wishes to use the end-use procedure then the first step is to apply to HMRC for authorisation. That is not authorisation of the end-use procedure. It is authorisation to obtain a CCG. When that is issued, and only then, the taxpayer can proceed to obtain a guarantee. The hyperlink in the letter sent by the CCG Team to the taxpayer takes the taxpayer to the online resource for provision of the guarantee.
>
> (2) The taxpayer's banker must then furnish that guarantee which is itself the security. There is not a separate guarantee and security as has been consistently argued.
>
> (3) The terms of the guarantee in this case (see paragraph 116 above) are such that the guarantee covers debts incurred before 20 April 2017 if <u>demanded</u> after that date and those incurred thereafter (up to the £180,000 ceiling). We reject Ms Vicary's argument that the guarantee cannot cover debts incurred before that date because of the use of the words "on demand" in the undertaking.

133. To be blunt, we are surprised by HMRC's varying approaches. Initially in the correspondence leading up to and including the letter of 28 December 2016 they correctly stated that the UCC required a guarantee to be in place before end-use authorisation could be granted. We do not know why HMRC asked the appellant to submit the end-use application in January 2017 not only before the guarantee had been lodged with HMRC but also before

approval authorising the appellant to obtain a CCG and in a specified sum had been granted. Officer Wignall's internal referral dated 21 June 2017 merely states that HMRC's Policy team had issued instructions that end-use authorisations could be issued before "the guarantee confirmation". What that phrase means is not obvious; it could be the authorisation to apply for a CCG or it could be the approval of the CCG2 in terms of Article 151(1) of the IR.

134. The views of HMRC Policy are simply their views and they may be wrong. As far as we are concerned the provisions in the UCC are clear:

(1) Article 211(1) states that authorisation by HMRC is mandatory for the end-use procedure.

(2) Article 211(3) states that that authorisation shall only be granted by HMRC where a trader provides a guarantee in accordance with Article 89.

(3) Article 89 does not specify any time limits but it does state that a guarantee relates to potential or existing customs debt.

(4) Article 92(1)(b) states that a guarantee may be provided in an undertaking given by a guarantor, in this case Barclays Bank.

(5) Article 79(1)(c) states that there will be a customs debt if there is non-compliance with a condition of end-use and the debtor will be the person who is required to comply with the condition, in this case the appellant. Article 79(2)(b) means that when the Goods were declared for end-use the customs debt was incurred because it was subsequently discovered that there had been non-compliance with a condition in the authorisation.

(6) Article 195(1) provides that, where HMRC requires a guarantee, goods shall not be released, in this case for end-use, until the guarantee is provided.

(7) There is no mention of the words "security" or "securities" in any of these Articles.

We have added emphasis because the words that are underlined are particularly relevant to our deliberations.

The first issue – is there a customs debt?

135. The appellant's belief that they could use the end-use relief authorisation because HMRC had approved the guarantee and the appellant had three months within which to provide the security is simply wrong.

136. The guarantee is the security. The second condition of the end-use authorisation is in clear terms and the appellant required a guarantee at all times that was adequate to cover potential liability for customs debt.

137. No guarantee was provided to HMRC until either 20, or more likely 21 April 2017. It is accepted that the date of receipt of the guarantee is not material.

138. Accordingly, in terms of Article 79, since the appellant had breached the second condition in the end-use authorisation, the appellant incurred a customs debt each time a customs declaration was made in respect of the Goods until at least 20 April 2017.

Decision

139. As far as the first issue is concerned we find that it must be answered in the affirmative. The appellant has incurred a customs debt and is liable to import duties of 20% on the Goods pursuant to Article 79 of the UCC because there had been non-compliance with the customs procedure for end-use relief.

The second issue – was further debt incurred after 20 April 2017?

140. We accept, as we must, that Article 151(1) of the IR states that HMRC shall approve the undertaking given by the guarantor and notify, in this case the appellant, that approval. However, the end-use authorisation does not include any condition about HMRC's approval of the CCG.

141. As can be seen from paragraph 80, HMRC did impose such a condition in end-use authorisations in 2018. Why they did not do so in this instance is not known but Article 79 is very clear that customs debts are incurred only where there is non-compliance with a condition, which there is not in this instance, or an obligation.

142. HMRC did have an obligation to approve the guarantee and to notify that approval and that was not met until 26 April 2017. We do not accept that the appellant could reasonably have been aware, which is the wording in Article 79(3)(c), that HMRC had an obligation in terms of Article 151(1).

143. HMRC rely on the requirement for approval to argue that the guarantee can only be "adequate" once it has been approved by HMRC and say that the appellant should have been aware that approval was required. We do not accept that. The guarantee has to be on the prescribed form and HMRC had already approved the use of that form. Furthermore the Schedules enclosed with the email and decision letter of 10 February 2017 specified the amount of the guarantee. It would have been entirely reasonable for the appellant to believe that no further approval was required.

144. That is particularly the case given the wording in the decision letter of 10 February 2017 (see paragraph 73 above) where HMRC explicitly states that the authorisation is valid once the securities have been received.

Decision

145. The last four imports did not incur a customs debt because there was no condition in the end-use authorisation with which there had been non-compliance after 20 April 2017.

146. The appellant could not reasonably have been aware that HMRC were required to approve the guarantee after it was provided and to notify that approval.

The third issue – should the original end-use authorisation be revoked and the matter regularised by a retroactive end-use authorisation?

147. The appellant argues, as can be seen from paragraph 106 above, that HMRC should not have granted the end-use authorisation until the guarantee was in place. However, Ms Vicary argued that as the last sub-paragraph of Article 211(1) makes it clear that end-use authorisations will include conditions, and by including the second condition about the guarantee, it was validly granted.

148. Ms Sloane accurately points out that Article 23(3) provides that HMRC "may at any time annul, amend or revoke" a decision where it does not conform to the legislation. She argues that the end-use authorisation in this case does not conform to the legislation. That is on the basis that there was no guarantee in place in terms of Article 89 so there was non-compliance with Article 211(3). That is correct so it is arguable that the end-use authorisation decision was invalid.

149. The first and obvious point is that Article 23(3) gives HMRC a discretion and it is not mandatory.

150. The next point is that, in our view, it is at least questionable whether the decision was invalid. The decision is certainly confusingly worded since the fourth condition is that the

authorisation is valid from 1 January 2017 but the second condition also states that there must be an adequate guarantee at all times. Both conditions cannot be correct.

151. On balance, we find that the existence of the second condition means that the end-use authorisation is contingent upon an adequate guarantee being provided. It would have been preferable if that had been explicitly stated, as it was in 2018, but the lax wording does not make the authorisation invalid *per se*. The authorisation became effective when the guarantee was provided.

152. Since there is a valid end-use authorisation then revocation would not be appropriate.

153. Ms Vicary argued further that because that end-use authorisation was stated to be valid from 1 January 2017 it had a "slight retroactive" effect. We do not follow that argument. It would be effective from the date of provision of the guarantee.

Decision

154. The decision not to revoke the end-use authorisation is upheld. Since there is an authorisation from an identifiable date being the provision of the guarantee, a new retroactive authorisation cannot be granted.

The fourth issue – is remission justified and, if so, on what basis?

155. HMRC rely on *Heuschend Schrouff Oriëntial Foods Trading BV v Commission* Case C-38/07 where the court stated:

> "60. It must be borne in mind at the outset that repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission must be interpreted strictly. Since a lack of 'obvious negligence' is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited …".

156. The appellant argues that firstly there was no obvious negligence in this case and, secondly, the appellant should fall within the limited number of cases.

157. Both parties agree that Articles 117 and 118 have no application in this instance.

158. Error on the part of HMRC is an independent ground for remission in terms of Article 119 but we agree with both parties that any errors and failings on the part of HMRC can fall within "special circumstances" in Article 120.

159. In the circumstances of this case there is absolutely no question of any deception in terms of Article 120(1).

160. That leaves obvious negligence in the case of Article 120(1) or the argument by HMRC that the appellant should have noticed any errors on the part of HMRC in the case of Article 119(1). In the Skeleton Argument for HMRC it is argued at paragraph 41 that "it was negligent for the Appellant to import goods without the necessary security in place". Of course it was the guarantee that had not been provided but that is the security. It was argued at paragraph 43 that the appellant was an experienced trader "who was simply required to apply the mandatory rules" so "any error could have been easily detected".

161. We raise these points on negligence and detection at the outset of the discussion on remission because, in our view, they are key and inter-related.

162. Although, after much thought we found the provisions of the UCC to be clear, as we have pointed out, right up until the afternoon of the last day of the hearing everyone had

proceeded at all times on the basis that there were three components, namely authorisation, a guarantee and a security.

163. We heard lengthy argument on the three components with Ms Sloane arguing that they were conceptually separate and that it was important to note the separate terminology for a guarantee and securities. Ms Vicary argued that the appellant had been required to provide a valid guarantee backed or underwritten by financial securities and that the guarantee was not "adequate" in terms of the second condition in the end-use authorisation until the securities were provided; the guarantee only became effective once there were securities in place.

164. Shortly put, if that level of confusion could exist we do not accept that there could have been obvious negligence on the part of the appellant in failing to appreciate the intricacies of the UCC or to identify errors, if any, on the part of HMRC.

165. That view is fortified by the fact that

(a) two experienced HMRC officers differed in their analysis as to what the letter of 10 February 2017 related, and

(b) the officers also differed in their understanding as to how authorisations, guarantees and, alleged, securities fitted within the UCC.

166. In relation to Article 119, HMRC simply argue that there had been no error on the part of HMRC but if there had been that could easily have been detected by the appellant. Furthermore, in any event, the appellant's claim at all material points had been advanced on the basis that they had misinterpreted the wording of the letter of 10 February 2017 and that that had been an error on their part. That latter argument was vigorously disputed by the appellant.

167. As we point out in paragraph 102, the Grounds of Appeal for the Remission Decision were set out in the letter to HMRC of 8 April 2019 and reiterated in the Notice of Appeal. There is no such suggestion in either. We accept that the Grounds of Appeal for the Liability Decision do include the words "misinterpreted the wording" but HMRC have not used the whole sentence since that was subject to the caveat that the appellant **"may"** have done so because of the significant changes in the application process coupled with the UCC changes.

168. We do not accept HMRC's argument on this point. We agree with the appellant that it has consistently challenged liability on the basis that they had complied with end-use authorisation conditions. The authorisation had been stated to be valid, the application for the CCG accepted and securities provided within three months.

169. We have already found that any error would not have easily been detected by the appellant.

170. It was argued for the appellant that HMRC erred in releasing the Goods before the guarantee was provided and that that therefore breached Article 195(1). The consequence of that is that HMRC also erred in not complying with Article 198(1)(b)(iii).

171. We do not accept that HMRC erred in that regard. The goods were released because the freight agent, for the appellant, completed the customs declaration using the end-use code.

172. As can be seen, the notes for the customs codes confirm the need for a guarantee, albeit the relevant note is headed "Security". Ms Vicary argues that that alone should have alerted the appellant to the need for the guarantee to be in place before using the code. Given the conflicting uses of the word "security" to which we have referred above, we do not accept that argument. In any event, the appellant believed that end-use authorisation had been

approved and it was not the appellant itself who was using the code but the freight agent who would have had no reason to challenge it.

173. However, Ms Vicary is correct to argue that in terms of Article 15 the appellant is responsible for making accurate declarations. Ms Sloane objected to that argument on the basis that it had not been pleaded. Paragraph 27 of Ms Vicary's Skeleton Argument specifically addressed Article 15 so the appellant had had notice of the point.

174. In any event, HMRC's case has always been that the appellant had no right to rely on the end-use authorisation until an adequate guarantee and or security was in place. It is implicit in that the end-use codes could not be used until then.

175. Customs declarations are a form of self-assessment. The records and returns must be correct. In this instance the customs declarations were not correct until 20 April 2017. That is not actually the point, the point is that the goods were only released because of those erroneous declarations so there was no error on the part of HMRC.

176. It was argued that the issue of the end-use authorisation before the guarantee had been provided was also an error on the part of HMRC. For the reasons that we have given for the decision on the third issue, whilst we find that it was ill-judged to grant the authorisation in the terms that HMRC did, the grant of the contingent end-use authorisation was not *per se* an error.

177. We are not persuaded that the appellant has established a right to remission in terms of Article 119.

178. As far as Article 120 is concerned, we have already confirmed that we find that there was no deception or obvious negligence on the part of the appellant. The question is whether or not there were special circumstances, which is to say an exceptional situation as compared to other operators.

179. Albeit relating to completely different legislation, Lady Justice Arden, as she then was, in *R (oao) Rowe & Others v HMRC* [2017] EWCA Civ 2105 said in relation to the phrase "exceptional circumstances" that "In my judgement, the circumstances which are likely to constitute exceptional will be varied and case specific …". Looking at the case law to which we have been referred, we agree.

180. We also note that The New Shorter Oxford English Dictionary defines "exceptional" as being "Of the nature of or forming an exception; unusual, out of the ordinary; special".

181. Exceptional is not the same as unique.

182. HMRC, correctly in our view, relied on the Court's decision in *Eyckeler & Malt v Commission* Case T-42/96 ("E & M") at paragraphs 132 and 133 which, referencing the predecessor provision, reads:-

> **"**132 … It is intended to apply, *inter alia*, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred …
>
> 133 The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision … Although it enjoys a margin of assessment in that respect … it is required to exercise that power by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk. Consequently, when

examining whether an application for remission is justified, it cannot simply take account of the conduct of importers. It must also assess the impact of its own conduct on the resulting situation even if it is at fault."

183. This was the first time that the appellant had been at fault and it was the first time that it had imported the goods under the new legislation.

184. We have already indicated that HMRC's approach in this matter cannot be said to be beyond reproach. It is surprising that Officer Buckner thought that the letter of 10 February 2017 was an end-use authorisation and, after taking advice, still thought so in evidence but in our view that simply points to the level of confusion.

185. At a bare minimum, HMRC have introduced a considerable element of confusion because of the invitation to apply for end-use procedure before authorising the guarantee. As can be seen that apparent change in policy was not consistent with the terms of their own public Notice 3001 which made it very clear that no application for authorisation could be made unless a guarantee was in place (see paragraph 59 above). It is also not consistent with the end-use authorisation explicitly stating that it should be read "in conjunction with" Notice 3001. Those conflicts are unusual.

186. It is wholly unsurprising that the appellant was less than clear about the situation. In our view that alone could amount to a special circumstance or exceptional situation. What we do not know is whether other operators in the same business faced the same problem.

187. We do know that Officer Wignall wanted to use the appellant to set a precedent. We also know from the letter of 20 December 2018 (see paragraphs 95 and 96) that other operators had been granted extensions of their previous authorisations which would have meant that they would not have had to have engaged in the same application process as the appellant. Since HMRC did not address those issues at the time or since, there is no contrary evidence on that.

188. The appellant also relies on the wording in the 2018 end-use authorisation. We accept the appellant's argument that in issuing this warning to other traders at a later date, HMRC must have come to the view that they needed to make it clear that, in their view, there had to be a guarantee and there had to be security and they had to confirm that the CCG was in place.

189. We also accept Ms Vicary's point that that tells us nothing about the situation in 2017 but HMRC were unable to tell us when the template had changed.

190. HMRC have had this information for a very long time. It is unsatisfactory for them to state in the review conclusion letter dated 5 November 2019 that:- "I appreciate that such a statement in either of the letters issued to you in February 2017 would have made the position regarding use of the End Use (sic) authorisation clearer" but then not to produce evidence about when the template changed. Since the policy on end-use applications appears to have changed without warning in late January 2017 and the February letters were issued a matter of days later, it is possible that the template was changed shortly thereafter when the implications were realised.

191. We noted that the invitation to apply for the end-use authorisation in late January 2017 followed on from email and telephone conversations. We accept that the appellant was very diligent in "chasing" HMRC to get the application process on track. On the balance of probability, it seems unlikely to us that many, or any, other operators would have been so persistent. Many, if not all, would have relied on either the terms of Notice 3001 or, if they had had an application rejected the terms of that rejection letter.

192. Given these factors taken with Officer Wignall's wish for expedition in order to set a precedent, the apparent changes in policy in early 2017 and the extensions of other operators' authorisations in late 2016 we find that, on the balance of probability, in early 2017, the appellant was in an exceptional situation compared with other operators in the UK.

193. The appellant relied on the Irish Tax and Customs instruction manual on end-use procedure. That makes it explicit that in terms of Article 211(3)(c) and Article 89, an authorisation for end-use cannot be issued until an appropriate guarantee is in place because the purpose of the guarantee is to secure duty suspended on goods imported under end-use. The argument, therefore, is that operators in Ireland and other EU countries would not have issued an end-use authorisation before a guarantee was in place.

194. Ms Vicary rightly makes the point that that manual is dated October 2021 so does not inform as to what occurred in 2016/17. However, given that HMRC's starting point had been exactly that in 2016 and the provisions of the UCC are clear on the point, on the balance of probability some countries in the EU, if not all, will not have adopted HMRC's altered position on issuing prospective or contingent authorisations.

195. In *Bolton Alimentari SpA v Agenzia delle Dogane-Ufficio delle Dogane di Alessandria* Case C-49409 the CJEU found that although the appellant in that case was in the same position as other tuna importers established in Italy in that the Italian customs office was closed on a Sunday, nevertheless

> "That fact does not, however, preclude the view from being taken that *Bolton* and other tuna importers established in Italy are in an exceptional situation vis-à-vis tuna importers established in the other Member States, given that the existence of a common customs territory necessarily requires that account be taken of the importers concerned throughout the European Union."

196. On that basis we find that the appellant is in an exceptional situation *vis-s-vis* operators in other Member States.

197. Turning back to *E & M*, we must then weigh in the balance the other factors.

198. We observe that the appellant relied on paragraphs 59 and 60 in *Transnáutica-Transportes e Navegação, SA v European Commission* Case T-385/05, where the Court found that where there was a lack of diligence on the part of the customs authorities when carrying out their monitoring task that undermines the system and such a lack of diligence puts the trader in a special situation that goes beyond the normal commercial risk relating to its business.

199. We did not accept the appellant's arguments about alleged failures by HMRC in monitoring the import of the Goods and their release because of the use of the customs codes. However, we find those paragraphs are applicable in this instance.

200. The facts of that case are completely different to the facts in this case because there is no fraud in this instance and the appellant has acted in good faith. Nevertheless we consider that it is relevant in the sense that the very confused information disseminated by HMRC, which appears to have confused even their own officers, has undermined the system and contributed to the reason that the customs debt was incurred. Therefore the situation for the appellant was certainly beyond the normal commercial risk relating to its business.

201. HMRC concede that the size of the customs debt in this instance is very large and outside the parameters of commercial risk ordinarily encountered by the appellant. However, they argue that whilst the guarantee was not in place there was a risk to the Revenue. The

appellant accepts that there was a period of potential risk but that was mitigated by the terms of the guarantee that was put in place. No demand was ever made in regard thereto.

202. HMRC argue that the appellant's reliance on the *Commission Decision REM 04/2000* where the trader did not hold an authorisation for end-use can be distinguished since that trader in that instance had not failed to comply with a condition of authorisation. Whilst we understand the distinction, we do not agree. In both this instance and in that, to use the words in paragraph 10 in that decision:

> "…it is nonetheless the case that, in practice, the imported products were put to an end-use that entitled them to suspension of import duties and, in view of that fact, the ultimate purpose of granting preferential tariff treatment by virtue of the end-use of the goods was fulfilled. The financial interests of the European communities were not therefore affected in this case".

If the guarantee had been in place at the time of importation the relevant end-use authorisation would have been in place and the Goods would have been eligible for the suspension of import duty.

Decision

203. For all these reasons, in the interests of equity, in the particular circumstances of this case, remission in terms of Article 120 should be granted.

Conclusion

204. The appeal against the Liability Decision is dismissed.

205. The appeal against the decision to refuse retroactive authorisation is dismissed.

206. The appeal against the Remission Decision is allowed and the duty is remitted in the interests of equity in terms of Article 120.

207. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th MARCH 2023

APPENDIX

Excerpts from the Union Customs Code

Article 5

Definitions

For the purposes of the Code, the following definitions shall apply:

(1) "customs authorities" means the **[**Commissioners for Her Majesty's Revenue and Customs**]**;

(2) "customs legislation" means the body of legislation made up of all of the following:

(a) the Code and the provisions supplementing or implementing it ...;

(b) ...

(c) ...

(d) international agreements containing customs provisions, insofar as they are applicable in the **[**United Kingdom**]**;

…

(16) "customs procedure" means any of the following procedures under which goods may be placed in accordance with the **[**Taxation (Cross-border Trade) Act 2018**]**:

(a) release for free circulation;

(b) special procedures;

(c) export;

…

(18) "customs debt" means the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force;

(19) "debtor" means any person liable for a customs debt;

…

(26) "release of goods" means the act whereby the customs authorities make goods available for the purposes specified for the customs procedure under which they are placed;

(27) "customs supervision" means action taken in general by the customs authorities with a view to ensuring that customs legislation and, where appropriate, other provisions applicable to goods subject to such action are observed;

(28) "repayment" means the refunding of an amount of import or export duty that has been paid;

(29) "remission" means the waiving of the obligation to pay an amount of import or export duty which has not been paid;

….

(39) "decision" means any act by the customs authorities pertaining to the customs legislation giving a ruling on a particular case, and having legal effects on the person or persons concerned;

Article 15

2. The lodging of a customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification by a person to the customs authorities, or the submission of an application for an authorisation or any other decision, shall render the person concerned responsible for all of the following;

(a) the accuracy and completeness of the information given in the declaration, notification or application;

(b) the authenticity, accuracy and validity of any document supporting the declaration, notification or application;

(c) where applicable, compliance with all of the obligations relating to the placing of the goods in question under the customs procedure concerned, or to the conduct of the authorised operations.

Article 23

Management of decisions taken upon application

1. The holder of the decision shall comply with the obligations resulting from that decision.

2. The holder of the decision shall inform the customs authorities without delay of any factor arising after the decision was taken, which may influence its continuation or content.

3. Without prejudice to provisions laid down in other fields which specify the cases in which decisions are invalid or become null and void, the customs authorities which took a decision may at any time annul, amend or revoke it where it does not conform to the customs legislation.

4. In specific cases the customs authorities shall carry out the following:

(a) re-assess a decision;

(b) suspend a decision which is not to be annulled, revoked or amended.

5. The customs authorities shall monitor the conditions and criteria to be fulfilled by the holder of a decision. They shall also monitor compliance with the obligations resulting from

that decision. Where the holder of the decision has been established for less than three years, the customs authorities shall closely monitor it during the first year after the decision is taken.

Article 79
Customs debt incurred through non-compliance

1. For goods liable to import duty, a customs debt on import shall be incurred through non-compliance with any of the following:

(a) one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union, their removal from customs supervision, or the movement, processing, storage, temporary storage, temporary admission or disposal of such goods within that territory;

(b) one of the obligations laid down in the customs legislation concerning the end-use of goods within the customs territory of the Union;

(c) a condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of import duty.

2. The time at which the customs debt is incurred shall be either of the following:

(a) the moment when the obligation the non-fulfilment of which gives rise to the customs debt is not met or ceases to be met;

(b) the moment when a customs declaration is accepted for the placing of goods under a customs procedure where it is established subsequently that a condition governing the placing of the goods under that procedure or the granting of a duty exemption or a reduced rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. In cases referred to under points (a) and (b) of paragraph 1, the debtor shall be any of the following:

(a) any person who was required to fulfil the obligations concerned;

(b) any person who was aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who was obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation;

(c) any person who acquired or held the goods in question and who was aware or should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled.

4. In cases referred to under point (c) of paragraph 1, the debtor shall be the person who is required to comply with the conditions governing the placing of the goods under a customs procedure or the customs declaration of the goods placed under that customs procedure or the granting of a duty exemption or reduced rate of import duty by virtue of the end-use of the goods.

Where a customs declaration in respect of one of the customs procedures referred to in point (c) of paragraph 1 is drawn up, and any information required under the customs legislation relating to the conditions governing the placing of the goods under that customs procedure is given to the customs authorities, which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the customs declaration and who knew, or who ought reasonably to have known, that such information was false shall also be a debtor.

Article 89
General provisions

1. This Chapter shall apply to guarantees both for customs debts which have been incurred and for those which may be incurred, unless otherwise specified.

2. Where the customs authorities require a guarantee for a potential or existing customs debt to be provided, that guarantee shall cover the amount of import or export duty and the other charges due in connection with the import or export of the goods…

3. Where the customs authorities require a guarantee to be provided, it shall be required from the debtor or the person who may become the debtor. They may also permit the guarantee to be provided by a person other than the person from whom it is required.

4. …

5. Upon application by the person referred to in paragraph 3 of this Article, the customs authorities may, in accordance with Article 95(1), (2) and (3), authorise the provision of a comprehensive guarantee to cover the amount of import or export duty corresponding to the customs debt in respect of two or more operations, declarations or customs procedures.

6. The customs authorities shall monitor the guarantee.

…
Article 90
Compulsory guarantee

….

2. Without prejudice to Article 95 where a comprehensive guarantee is provided for the amount of import or export duty corresponding to customs debts and other charges which vary in amount over time, the amount of such guarantee shall be set at a level enabling the amount of import or export duty corresponding to customs debts and other charges to be covered at all times.

Article 92
Provision of a guarantee

1. A guarantee may be provided in one of the following forms:

…

(a) by an undertaking given by a guarantor;

Article 94
Guarantor

1. The guarantor referred to in point (b) of Article 92(1) shall be a third person established in the customs territory of the Union. The guarantor shall be approved by the customs authorities requiring the guarantee, unless the guarantor is a credit institution, financial institution or insurance company accredited in the Union in accordance with Union provisions in force.

2. The guarantor shall undertake in writing to pay the secured amount of import or export duty corresponding to a customs debt and other charges.

3. The customs authorities may refuse to approve the guarantor or the type of guarantee proposed where either does not appear certain to ensure payment within the prescribed period of the amount of import or export duty corresponding to the customs debt and of other charges.

Article 95
Comprehensive guarantee

1. The authorisation referred to in Article 89(5) shall be granted only to persons who satisfy all of the following conditions:

(b) they are established in the customs territory of the Union;

(c) they fulfil the criteria laid down in point (a) of Article 39;

(d) they are regular users of the customs procedures involved or operators of temporary storage facilities or they fulfil the criteria laid down in point (d) of Article 39.

Article 116
General provisions

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

(a) overcharged amounts of import or export duty;

(b) defective goods or goods not complying with the terms of the contract;

(c) error by the competent authorities;

(d) equity.

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

Article 119
Error by the competent authorities

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

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

(b) the debtor was acting in good faith.

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

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

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

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

…

Article 120
Equity

1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty.

Article 121
Procedure for repayment and remission

…

1. Where the customs authorities are not in a position, on the basis of the grounds adduced, to grant repayment or remission of an amount of import or export duty, it is required to examine the merits of an application for repayment or remission in the light of the other grounds for repayment or remission referred to in Article 116.

2. Where the customs authorities are not in a position, on the basis of the grounds adduced, to grant repayment or remission of an amount of import or export duty, it is required to examine the merits of an application for repayment or remission in the light of the other grounds for repayment or remission referred to in Article 116.

Article 124
Extinguishment

1. Without prejudice to the provisions in force relating to non-recovery of the amount of import or export duty corresponding to a customs debt in the event of the judicially established insolvency of the debtor, a customs debt on import or export shall be extinguished in any of the following ways:

(a) where the customs debt was incurred pursuant to Article 79 or 82 and where the following conditions are fulfilled:

(i) the failure which led to the incurrence of a customs debt had no significant effect on the correct operation of the customs procedure concerned and did not constitute an attempt at deception;

(ii) all of the formalities necessary to regularise the situation of the goods are subsequently carried out;

Article 195
Release dependent upon payment of the amount of import or export duty corresponding to the customs debt or provision of a guarantee

1. Where the placing of goods under a customs procedure gives rise to a customs debt, the release of the goods shall be conditional upon the payment of the amount of import or export duty corresponding to the customs debt or the provision of a guarantee to cover that debt.

However, without prejudice to the third subparagraph, the first subparagraph shall not apply to temporary admission with partial relief from import duty.

Where, pursuant to the provisions governing the customs procedure for which the goods are declared, the customs authorities require the provision of a guarantee, those goods shall not be released for the customs procedure in question until such guarantee is provided.

2. In specific cases, the release of the goods shall not be conditional upon the provision of a guarantee in respect of goods which are the subject of a drawing request on a tariff quota.

3. Where a simplification as referred to in Articles 166, 182 and 185 is used and a comprehensive guarantee is provided, release of the goods shall not be conditional upon a monitoring of the guarantee by the customs authorities.

Article 198
Measures to be taken by the customs authorities

1. The customs authorities shall take any necessary measures, including confiscation and sale, or destruction, to dispose of goods in the following cases:

(a) …
(b) where the goods cannot be released for any of the following reasons:
…
…
(iii) payments or a guarantee which should have been made or provided in respect of import or export duty, as the case may be, have not been made or provided within the prescribed period;

…

Article 210
Scope

Goods may be placed under any of the following categories of special procedures:

….

(c) specific use, which shall comprise temporary admission and end-use;

…

Article 211

Authorisation

1. An authorisation from the customs authorities shall be required for the following:

(a) the use of the inward or outward processing procedure, the temporary admission procedure or the end-use procedure;

…

The conditions under which the use of one or more of the procedures referred to in the first subparagraph… shall be set out in the authorisation.

2. The customs authorities shall grant an authorisation with retroactive effect, where all of the following conditions are fulfilled:

(a) there is a proven economic need;

(b) the application is not related to attempted deception;

(c) the applicant has proven on the basis of accounts or records that:

(i) all the requirements of the procedure are met;

(ii) where appropriate, the goods can be identified for the period involved;

(iii) such accounts or records allow the procedure to be controlled;

(d) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the customs declarations concerned;

(e) no authorisation with retroactive effect has been granted to the applicant within three years of the date on which the application was accepted;

(f) an examination of the economic conditions is not required, except where an application concerns renewal of an authorisation for the same kind of operation and goods;

(g) the application does not concern the operation of storage facilities for the customs warehousing of goods;

(h) where an application concerns renewal of an authorisation for the same kind of operation and goods, the application is submitted within three years of expiry of the original authorisation.

Customs authorities may grant an authorisation with retroactive effect also where the goods which were placed under a customs procedure are no longer available at the time when the application for such authorisation was accepted.

3. Except where otherwise provided, the authorisation referred to in paragraph 1 shall be granted only to persons who satisfy all of the following conditions:

(a) they are established in the customs territory of the Union;

(b) they provide the necessary assurance of the proper conduct of the operations; an authorised economic operator for customs simplifications shall be deemed to fulfil this condition, insofar as the activity pertaining to the special procedure concerned is taken into account in the authorisation referred to in point (a) of Article 38(2);

(c) where a customs debt or other charges may be incurred for goods placed under a special procedure, they provide a guarantee in accordance with Article 89;

…

Article 254

End-use procedure

1. Under the end-use procedure, goods may be released for free circulation under a duty exemption or at a reduced rate of duty on account of their specific use.

2. Where the goods are at a production stage which would allow economically the prescribed end-use only, the customs authorities may establish in the authorisation the conditions under which the goods shall be deemed to have been used for the purposes laid down for applying the duty exemption or reduced rate of duty.

1. Where goods are suitable for repeated use and the customs authorities consider it appropriate in order to avoid abuse, customs supervision shall continue for a period not exceeding two years after the date of their first use for the purposes laid down for applying the duty exemption or reduced rate of duty.

2. Customs supervision under the end-use procedure shall end in any of the following cases:

(a) where the goods have been used for the purposes laid down for the application of the duty exemption or reduced rate of duty/

(b) where the goods have been taken out of the customs territory of the Union, destroyed or abandoned to the State;

(c) where the goods have been used for purposes other than those laid down for the application of the duty exemption or reduced duty rate and the applicable import duty has been paid.

….