TC03296

Appeal number: TC/2008/07098

Customs duties – VAT - call on guarantee – diversion from legitimate route- Article 203 and 233 of Community Customs Code - procedural irregularities- held – Article 233 applicable – procedural irregularities no impact on whether customs debt due - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TXT INTERNATIONAL BV (in bankruptcy) **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
HARVEY ADAMS

Sitting in public at 45 Bedford Sq London on 29 April to 1 May and 4 September 2013

Mr Rietveld and Mr Luinstra for the Appellant

Mr Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against a letter from HMRC of 23 June 2008 refusing re payment of sums claimed from the Appellant's guarantor amounting to £228,174.34 and claiming payment of the balance owing of £98,963.36 from the Appellant. The sums paid under the guarantee represent sums payable in respect of a "comprehensive guarantee" given by Rabobank, (reference number A101124) on behalf of the Appellant in respect of the inter community transport of cigarettes and in particular cigarettes transported under consignment number T1/04NL56827800482793 dated 22 January 2004. The total amount in dispute is £327,137.70, made up of £271,420.00 in excise duty, £5,557.95 in customs duty and £50,159.75 of VAT.

2. At the hearing on 4 September 2013 the Tribunal requested written closing submissions from both parties. The Appellant's written submissions were received late but the Tribunal granted an extension of time for the submission because the late submission was due to an administrative error. Both parties submitted supplemental submissions which have been taken account of to the extent that they respond to specific matters of law which had not previously been raised before the Tribunal.

3. The Appellant, TXT International BV, ("TXT BV") a Dutch company, is now in the Dutch equivalent of liquidation and this appeal was brought through the trustee in bankruptcy, (R. Kuizenga) represented by Mr Rietveld and Mr Luinstra. The Appellant operated as a freight haulage business and has a sister company in the UK, Txt International Logistics Limited. ("TXT International")

4. The cigarettes in question were part of an excise diversion fraud for which criminal investigations have already been successfully brought. This investigation was known as Operation Budget. This appeal relates to the civil liabilities in respect of two million cigarettes which were part of this fraud.

5. TXT BV was not prosecuted as part of this criminal investigation and neither were charges brought against its director Jan Barnett. The individual who was prosecuted Peter Barnett, was not a director of TXT BV. Mr Peter Barnett was a director of the sister UK company TXT International. As a result of this criminal investigation the cigarettes were destroyed by HMRC on or before 29 August 2006

6. The inter community transport in question concerns 2 million Yes branded cigarettes which were imported from the Netherlands to the UK for onward transport to Lome in Tongo, outside the EU. This meant that they could be brought into the UK without any excise duties or VAT being payable under the so called external community transit procedure. This procedure is documented as a T1 external procedure.

7. The relevant legislation is the Common Transit Convention and the Community Customs Code ("The Code"). Council Regulation no 2913/92, in particular:

(1) Article 91(1)(a) allows for the movement of non Community goods between two points within the customs territory of the Community without the payment of duties and other charges provided that certain criteria are met. This was the basis on which the cigarettes were being transported from the Netherlands to the UK.

(2) Article 94 says that the principal for the transit shall provide a guarantee to ensure payment of any custom debt. This is the basis for the comprehensive guarantee provided by Rabobank for TXT BV.

(3) Article 96 says that the principal shall be the holder of the external Community transit procedure and shall be responsible for production of the goods at the office of destination and the other provisions of the Community transit procedure. TXT BV was the principal in respect of the transit procedure for these cigarettes.

(4) Article 203 states, in the context of security given for a customs debt that a customs debt shall be incurred through the unlawful removal from customs supervision of goods liable to import duties and that this debt is incurred at the moment when goods are removed from customs supervision. The debtors shall be; the person removing the goods from customs supervision; any person who participated in this removal and who was aware, or should reasonably have been aware that the goods had been removed from supervision; any persons who acquired or held the goods in question and were aware, or reasonably should have been aware at the time of acquiring or receiving the goods that they had been removed from supervision; the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are in place. This is the basis on which HMRC argue that TXT BV is liable for this customs debt.

(5) Article 233(c) says that, in respect of goods declared for a customs procedure entailing the obligation to pay duties, a customs debt is extinguished if, before their release, the goods are seized and simultaneously or subsequently destroyed on the instructions of the customs authorities. This is the basis on which the Appellant argues that a customs debt did not arise because the cigarettes were destroyed by UK customs before they were released by the customs authorities.

(6) Article 233(d) provides that a customs debt shall be extinguished where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated. This is the basis on which the Appellant argues that no customs debt was incurred and the guarantee should not be called upon.

(7) Article 355 of the Implementing Regulation, Commission Regulation 2454/93 stipulates that goods must be carried to their office of destination along an “economically justified route”. The office of destination in this instance was Felixstowe and the starting point was the UK end of the Channel Tunnel.

(8) For VAT purposes the relevant legislation is at s 16 Value Added Tax Act 1994 and provides that the EU legislation relating to customs duties shall apply

in respect of VAT chargeable on the importation of goods from outside the EU in the same way as they apply to any customs or excise duty.

(9) Reference is made to the legislation as set out in the Code. The Code is derived from the Common Transit Convention and it is assumed that there is no distinction between that Convention and the implementing legislation of the Code.

8. HMRC's argument is that this legislation was contravened because the cigarettes which were the subject of this guarantee were diverted to a non bonded warehouse in Kent, rather than sent to the designated port of destination, which was Felixstowe, therefore triggering both a customs and VAT obligation, which HMRC claimed from the Appellant's guarantor, Rabobank, on 15 September 2004. The debt arose under Article 203 of the Community Customs Code and/or Article 114(1) (a) of the Common Transit Convention. The customs debt arose because of the goods being unlawfully diverted from customs' supervision. The act of diverting and unloading the goods at a place not approved by the Customs authorities is an unlawful removal of goods from customs supervision for these purposes.

9. On the basis of the evidence provided, we have found the following facts;

Facts – The consignment of 22 January 2004.

10. Consignment number T1 04NL56827800482793 was a load of 2 million Yes cigarettes which were picked up from a bonded warehouse in the Netherlands by Mr Kevin Brown on behalf of TXT International. The goods were to be transported under the "external transit procedure" in accordance with Article 91(1)(a) of the Code, referred to as the Customs Intra Community Movement Duty Suspension System.

11. Their export documentation stated that they were to be exported from the UK via Felixstowe. The TAD (Transit Accompanying Document) for this consignment identified the Appellant as the exporter. The T1 was signed by the Appellant, meaning that the Appellant was the principal for the purposes of Article 96 of the Code. The goods were guaranteed by the Appellant under number A101124. The cigarettes were driven to an industrial unit at the West Kent Cold Storage Depot near Sevenoaks ("The West Kent Depot"). This facility was not a bonded warehouse. The delivery lorry was stopped as it tried to leave the depot and was found to contain boxes of photocopier paper, not cigarettes. 2 million Yes cigarettes were found at the industrial unit, with order labels referring to TXT International.

Facts – The communication between UK and Dutch Customs officials.

12. The standard means of communication between EU customs authorities to query the whereabouts of an undischarged T1 is through a TC 20. This is a standard enquiry form in which specific fields can be marked as relevant. These enquiries are handled in the UK by the CCTO – the Central Community Transit Office.

13. A TC 20 enquiry was sent on 18 February 2004 from the Dutch authorities to the UK and a letter was sent to the Appellant on the same date querying the whereabouts of this consignment of cigarettes.

14. A TC 20 received by HMRC from Dutch authorities was returned on 2 March giving "interim response", iv (3). The Appellant responded to their letter, saying that "the container appears to have been seized by UK customs".

15. On 2 March 2004, HMRC wrote to Felixstowe (Langard terminal) requesting confirmation of whether the consignment had reached its port of destination.

16. On 16 March 2004 HMRC wrote to Peter Barnett confirming that the consignment had been seized at the West Kent Depot.

17. On 25 March 2004 – HMRC responded to a TC20 sent from the Dutch Customs with interim response iv (5) "no information can be obtained".

18. A second TC 20 enquiry was sent on 8 July 2004 from the Dutch authorities to the UK, stating that according to the Principal, the goods had been confiscated, to which the UK responded that their investigations were still on going and that the container had presumably been confiscated. (a iv (3) response).

19. On 14 July 2004 CCTO wrote again to Felixstowe stating that the Netherlands authorities had confirmed that there had been no confirmation of the community transit procedure. On 15 July CCTO returned a TC20 giving a iv (3) response. On 30 July CCTO responded to a further TC20 this time with a iv (5) response.

20. On 3 August 2004 CCTO were informed by Customs at Felixstowe that the goods had been seized.

21. On 3 August 2004 Gill Kudela of the CCTO sent a fax to the Netherlands confirming that the goods had been confiscated and that the file should be transferred to the UK. HMRC then notified Dutch customs (Douane Moerdijk) that their enquiry was re activated and that the goods had been seized. HMRC also notified the Dutch authorities on the same date that the goods were in the UK and that the UK would take responsibility for recovering any charges.

22. On 4 August 2004 Notification was sent from Douane Moerdijk to HMRC that the community transit procedure had not been completed, that HMRC had competence to collect the debts and providing details of the guarantor. On that date the Dutch authorities recorded in the NCTS system that the T1 procedure for this consignment had been discharged. (The NCTS system is the Customs authorities' electronic communication system).

23. On 20 August CCTO, HMRC wrote to the Appellant notifying it that as a result of the failure to complete the transit procedure within the proposed time limit, customs and excise duties and VAT totalling £327,137.70 would be imposed.

24. On 26 September 2006 the UK Revenue authorities made an entry in the NCTS system which stated that the T1 for this consignment had been cancelled in transit.

Facts – Payments under the Guarantees from Rabobank.

25. We were not provided with copies of the guarantee documents entered into between Rabobank and the Dutch Customs Authorities. The Guarantee confirmation issued by the Dutch Customs authorities on 11 August 2003 (reference A1101124) refers to a guarantee given by Rabobank reference 118146 for an amount of Euro 205,380 (later increased to 329,420). The Guarantee confirmation refers to a "comprehensive guarantee for the transit of high risk goods" of Euro 105,380 plus Euro 50,000 relating to local import procedures and Euro 50,000 relating to Type C warehouse authorisations. At the time when guarantee amount was increased, the Guarantee confirmation refers to Euro 279,240 as a "comprehensive guarantee for the transit of goods which carry a high risk of fraud" and Euro 50,000 for the Type C warehouse authorisation.

26. Later documentation concerning the increase in the guarantee amount (15 December 2003) refers to a Rabobank guarantee number 118982. When payment was claimed from Rabobank under its guarantees it made payment under guarantee number 118982 of Euro 144,328.00 on 19 October 2004 and Euro 83,857.46 under the same guarantee number, 118982 on 31 March 2005. Correspondence from HMRC of 3 March 2005 refers to payment of Euro 144,322.88 having been made under guarantee number 118146.

The witness evidence:

27. We were provided with witness statements of Simon Brissenden, officer of HM Revenue and Customs, dated 26 September 2009 and 15 February 2011. Witness statements of Bill Hudson, Officer of HMRC, dated 9 November 2009. Witness statements of Julie Rowles Higher Officer of HMRC, dated 28 February 2013. Mr Brissenden, Mrs Rowles and Mr Hudson gave oral evidence before the Tribunal and were cross examined by the Appellant.

Mr Brissenden

28. Mr Brissenden is an officer of HMRC and was the case officer involved in Operation Budget. He confirmed a number of specific details relating to the cigarette shipment of 22 January 2004, including the lodgement of the guarantee, (the T31) the basis on which it was calculated and that it was signed by Jan Barnett. The guarantee was initially set at Euro 205,380.00 in August 2003 to cover movements of up to 1 million cigarettes at a time. This guarantee was increased on a number of occasions to cover increased sizes of cigarette consignments, being set at Euro 329,420.00 on 20 October 2003.

29. Mr Brissenden provided specific details about what occurred at the West Kent Cold Storage depot on the night of 22 January 2004. He explained that a surveillance operation had been undertaken as a result of previous investigations at Southampton of loads of cigarettes which had been imported from Loendersloot in the Netherlands but when searched at Southampton were found to be copier paper rather than cigarettes.

30. He informed the Tribunal that on 22 January that surveillance operation identified that a consignment of 2 million cigarettes seal number 0000059, were removed from container number DVRU 1434220 which had been carried on the vehicle driven by Kevin Brown, an HGV van registration number M727 EBJ from the Euro tunnel to the West Kent depot. These cigarettes had been collected from Loendersloot customs warehouse in the Netherlands by TXT BV on behalf of a company based in the Luxembourg called Eldrige Marketing Inc. Kevin Brown had driven from the M20 taking the A25 to the West Kent Depot. He was arrested on leaving the depot and container number DVRU 1434220 was found to contain photocopy paper. The unit in which his vehicle had been parked at the depot was found to contain 2 million Yes brand cigarettes. Mr Brissenden told us that after his arrest Mr Brown had admitted that he saw the cigarettes being unloaded and replaced with new shrink wrapped pallets.

31. Mr Brissenden said that Dutch customs seals which had been applied to the container at Loendersloot were recovered and on the basis of forensic examination were found to have been severed and glued back together. It was also established that there was a duplicate set of metal company seals in circulation which would be used to replace seals.

32. He also confirmed a number of specific details of bank transfers between TXT International in the UK and TXT BV, including that Peter Barnett received a transfer of £201,000 from Txt BV on 28 January 2004. His evidence also confirmed that Peter Barnett had described himself as a director of TXT BV as part of the criminal prosecution. He also made reference to a specific document found at Peter Barnett's house relating to the sale of TXT BV, suggesting, in Mr Brissenden's view, that TXT BV was a joint operation between father and son.

Mrs Rowles.

33. Mrs Rowles explained the normal procedures for dealing with customs enquiries between customs authorities, being the use of the TC20 form to which standard responses would be given.

34. Mrs Rowles confirmed HMRC's consent to the destruction of the 2 million cigarettes on 16 March 2004.

35. Mrs Rowles explained in detail how the responses to the queries between the customs authorities had been handled; both in March and July 2004 HMRC had responded to the Dutch requests for further information, confirming that they did not know the whereabouts of the goods. It was correct that at this time Customs officers at Dover did know where the goods were, because they had been notified of the seizure of the goods, but this had not been notified to the CCTO. HMRC had responded correctly on the basis of the evidence which they had at the time. HMRC were not informed by the Dover Customs officials until 3 August 2004 that the goods had been diverted and seized. Mrs Rowles stated that in her view HMRC had followed the

correct procedures at all times, there was no question of any conspiracy having been carried out. It was not HMRC's obligation to routinely make enquiries about T1 forms, but they relied on UK ports to inform them of irregularities.

36. Mrs Rowles explained that despite the purported transfer of authority to the Dutch in July 2004 as a result of the TC20 enquiry, as soon as it was established that the goods were located in the UK, authority would automatically transfer back to the UK.

37. In respect of the references to the goods having been released in transit made by the UK authorities on 26 September 2006, she said that this was an error and had arisen from a mistake of the UKCS help desk and the incorrect discharge error being sent.

Mr William Hudson.

38. Mr Hudson's evidence related to a description of the standard form documents used as part of the external transit procedure and the documents which were in place for this consignment. He confirmed the existence and details of the transit documents relating to the 2 million cigarettes and said that, since the goods in question were cigarettes, the standard documentation should have included a prescribed itinerary under Article 355(2) of the Implementing Regulation. Unusually, no specified itinerary had been agreed for this consignment, however there Article 355(1) requires that goods placed under the external transit procedure must be carried to the port of destination on an "economically justified route". In his view travelling from the Channel Tunnel to Felixstowe via the West Kent Depot in Sevenoaks, was not an economically justifiable route.

39. Mr Hudson also said that the unloading of the goods while under the external transit procedure is not permissible other than in circumstances of imminent danger (Article 360(1) (d) of the Implementing Regulation).

40. Neither Jan nor Peter Barnett provided evidence before the Tribunal.

41. The onus of proof is on the Appellant to demonstrate that the customs, excise and VAT debts have not arisen and the amounts claimed under the guarantee should be re-paid and that no further amounts are payable.

The Appellant's Arguments

42. The Appellant's arguments relate to a great extent to the failure to correctly follow procedure by the Dutch and UK Customs authorities and a dispute as to the provision of the Community Transport Code which is relevant to these circumstances. The Appellant contested the relevance of the evidence from the criminal prosecution, and the manner in which that evidence had been made available to the Appellant. The Appellant argued that that Peter Barnett was not an actual or shadow director of the Appellant and there was no proven connection between the UK company of which he

was a director (TXT International) and the Appellant. The Appellant also disputed whether, as part of the surveillance evidence referred to by Mr Brissenden, there was specific proof that the 2 million cigarettes were removed from the lorry and placed in the warehouse and whether the West Kent Depot was a legitimate route for this transportation.

Procedural Issues.

43. According to the Appellant, the T1 document was discharged on 4 August 2004 on the NCTS system by the Dutch authorities and that means that the guarantee should also be released on that date, since there had been an effective discharge on the NCTS system. The fact that this was not made clear by the Dutch officials suggests that there was some collusion between the Dutch and UK authorities to ensure that the guarantee could not be released. Further evidence provided to Mr Rietveld by the Dutch authorities on 19 August 2013 (after the date of the initial hearing) confirmed that the "attending officer awarded at the time, by mistake, unfortunately and unjustly, the document the status of "purified". In the Appellant's view this should nevertheless be treated as a clearance in transit, meaning that the UK authorities no longer had any right to start recovery procedures.

44. The manner in which the competence to deal with the customs debt was passed from the Dutch to the UK authorities was incorrect and HMRC did not have competence to enforce the debt. As a result of the TC 20 on both the 25 March and 30 July which gave a "iv (5)" response, competence for enforcement of the debt should have passed to Dutch Customs. As a result, the UK authorities were not in a position to reactivate their enquiries on 3 August 2004. (While this issue was raised before the Tribunal, later evidence supplied by the Dutch customs authorities in their letter of 19 August 2013 to the Appellant and provided to HMRC and the Tribunal made clear that the Dutch authorities believed that competence had been passed to the UK on 3 August 2004).

45. The Appellant also argued that the conditions of Article 450(c) of the Implementing Regulations were not met by the customs authorities, because the provision, (relating to the authorities' obligation to notify a guarantor that the customs procedure has not been discharged) can only be used when a recovery procedure is on going, which was not the case given the discharge in the NCTS system of 4 August.

46. The Appellant suggested that the slow response of HMRC to the Dutch Customs Authorities' statement of 8 July that the goods had been confiscated indicated the Customs authorities were not proceeding as they should.

47. In addition, the UK authorities knew, and had told the Appellant, that the cigarettes had been seized on 22 January, but they did nothing to start proceedings to recover this debt until August 2004. In the Appellant's view this delay was an intentional attempt by the UK authorities to delay notifying the Appellant of the seizure to ensure that the debt could be collected (rather than extinguished as a result of the seizure). The Appellant also claimed that HMRC knew that the Appellant had

been made bankrupt before 20 August 2004 and that their actions were part of a conspiracy with the Dutch customs to ensure that the guarantee remained in place.

The Guarantee

48. The guarantee covering this shipment of cigarettes was a complex security bond, covering more than just these cigarettes. The maximum which could be called under this guarantee was Euro 105,380, meaning that HMRC had claimed in excess of the amount which they should have done. The guarantee given by Rabobank, reference 118982 NRW was not in respect of this consignment of cigarettes and should not have been called on.

The Customs Code

49. The relevant article of the Customs Code is not article 203, but Article 233 (c) or (d), which means that the customs debt is extinguished because the goods have been destroyed. The Appellant argues that Article 233(c) is the relevant provision in this instance because although no excise duties were payable, a guarantee was required.

50. If Article 233 does apply, the Appellant is not the debtor as regards this customs and VAT debt because the goods were seized by UK customs before they were released, as evidenced by the correspondence from the Dutch customs officials and particularly their letter of 4 August 2004 which refers to the fact that the consignment had been discharged on that date.

51. The Appellant refers to the recent Dutch decision LJN BC1862, Customs Division of the Amsterdam Court of Appeal 05/00927 which concluded that a joint debtor cannot be designated unless there is a conviction for theft or infringement of a customs procedure, which has not been established for TXT BV.

52. The Appellant also contends that if a customs debt has been incurred, the person who is liable for that debt is not the Appellant, but the owner of the warehouse in Kent where the goods were unloaded, on the basis of Article 233(d) and the *Unamar* decision [C- 140/04], *United Antwerp Maritime Agencies nv* [2005] ECR I- 8245.

53. The Appellant argues that no customs debt can arise in this case because the goods were never released for consumption. The fact that they were unloaded at the West Kent Depot does not mean that they were "released" because they were not made available for consumption. The goods were in temporary storage in the West Kent Depot.

54. The Appellant argued that there was no evidence of Dutch seals being attached to this consignment and therefore the suggestion by HMRC that the seals had been broken and replaced when the cigarettes were unloaded cannot be supported. In particular, there was no evidence of a seal number on the T1 (Box D), for this consignment.

55. Finally, the Appellant suggested that the route taken via the West Kent Depot was a legitimate, normal route and that it is acceptable for drivers to take a break and park in a protected area at a suitable location on a journey such as this.

HMRC's arguments

56. HMRC started by asking the Tribunal to consider whether evidence of the criminal convictions of a number of those involved in the activities as West Kent Depot on 22 January 2004 could be taken account of as part of these proceedings. Their conclusion was that this Tribunal is not subject to the strict rules of evidence under the Civil Evidence Act 1968, and the more flexible Tribunal Rules (in particular Rule 15(2) of the Tribunal Procedure (First – tier Tribunal) (Tax Chamber) Rules 2009) should mean that this is admissible evidence to the extent that it is relevant.

57. HMRC contend that the Appellant was responsible for the fulfilment of the relevant customs procedure under Article 96 of the Code. The procedure was not completed because the goods were diverted to the West Kent Depot. There had been an irregularity in the transit procedure under Article 203(1) and 215(1) of the Code and therefore the Appellant is liable for the customs and VAT debt in accordance with Article 203(3) of the Code (or 115(1) (d) of the Common Transit Convention).

58. HMRC's interpretation of the Community Customs Code is that Article 203 is the only relevant article and is binding on the Appellant as the principal holder of the external transit procedure, the T1 because the transit procedure was not completed.

59. In HMRC's view Article 233(c) is not relevant in these circumstances because that only applies when the customs procedure in question entails the payment of duties. That was not the case for this consignment. Similarly, on the basis of the *Dansk Transport* case (Case C – 230/08) which referred in particular to the *Veli Elshani* authority (*Veli Elshani v Hauptzollamt Linz* Case C- 459/07) Article 233(d) (relating to the extinguishing of a debt when goods are destroyed) only applies when Article 202 is in point and so does not apply when goods are diverted from their legitimate route and are seized at a place other than the first customs office inside the territory. The fact that there was not a release for consumption does not mean that the debt did not arise because release in these circumstances includes irregular departure from a customs suspended route, as made clear in the *Greenalls* decision. (*Greenhalls Management Ltd v Customs and Excise Comrs* [2005] WLR 1754)

60. The *Unamar* decision cited by the Appellant is not relevant on these facts; in particular the goods here were stored outside a bonded warehouse, not, as in *Unamar*, unloaded with permission and held in temporary storage.

61. HMRC's alternative arguments rely on the involvement of the Appellant in the activities for which criminal charges were brought as part of Operation Budget, through their related UK entity, their employee/drivers and through their "shadow director", Peter Barnett. In HMRC's view, Peter Barnett was acting as a "de facto director" as that term was defined in *McKillen v Misland(Cyprus) Investments Ltd* ([2012] EWCH 521). Under Article 203 (2) the Appellant is liable either as the person

who removed the goods from Customs' supervision, or as a person who participated in such removal and who was, or should have been aware that the goods were being removed. The relevant perpetrators being in HMRC's view Jan Barnett, director of the Appellant, Peter Barnett, shadow director, Graham Smith, an employee of the TXT International and Mr Kevin Brown, the driver who took the cigarettes to the West Kent Depot.

62. As to the procedural irregularities and in particular the discharge of the debt under the NCTS system in by the Dutch authorities on 4 August 2004, HMRC say that this was an erroneous discharge which was not notified to the authorities in the UK at the time and was made after the Appellant had been notified of its debt obligation and was rectified by the later actions of the customs authorities. The error had no impact in law or in fact on the UK authorities' ability to commence recovery proceedings. Equally, there was no question of competence for the collection of the debt not being with the UK authorities on 4 August 2004, competence automatically passed back to the UK when it was known that the goods had been seized in the UK, and this is supported by the statements of the Dutch Authorities in their letter to the Appellant dated 19 August 2013, where it was accepted that competence had passed to the UK authorities on 3 August.

63. In respect of the extent of the claims under the two guarantees given by Rabobank, HMRC had followed the correct procedures in notifying the guarantor of the total debt due and making a claim under the guarantees which were in place, being both GA 118146 and 118982 NRW.

Discussion.

Admissibility of criminal evidence

64. We agree with HMRC that since the strict rules of evidence do not apply in this Tribunal, evidence of the criminal conviction is admissible to the extent that it is relevant to the matters in dispute. We have taken account of Appellant's objections and in particular have taken the Appellant's points about the lack of prosecution of any individuals who were directors of TXT BV or of TXT BV itself, but nevertheless Mr Brissenden's evidence does establish that the 2 million cigarettes were taken to the West Kent Depot a non bonded warehouse and replaced with photocopy paper on the evening of 22 January 2004.

65. The Appellant raised some questions about whether the containers had been sealed and suggested that there was no evidence that the seals had been broken and replaced as suggested by Mr Brissenden, but no other challenge was made to the evidence provided by Mr Brissenden that the cigarettes were removed from their container and replaced with photocopy paper on 22 January 2004 at the West Kent Depot.

Procedural Irregularities.

66. The Tribunal agrees with the Appellant that there was some miscommunication between the Dover Customs authorities, HMRC and Dutch Customs authorities, including the mistaken discharge of the procedure on 4 August 2004 and 26 September 2006 in the NCTS system. This meant that later communications were technically in contravention of Regulation 450(c) as argued by the Appellant. The Tribunal also accepts that the Customs authorities at Dover did not communicate very effectively with HMRC their knowledge that the goods had actually been seized in January 2004. However, we have not been able to conclude that this was due to any kind of conspiracy on behalf of the authorities, as suggested by the Appellant. We agree with Mrs Rowles that HMRC did correctly follow all procedures and provided evidence to the Dutch authorities on the basis of what they knew at the time. We also consider that any errors made by the Dutch authorities are explained in their letter of 19 August 2013. On that basis we have concluded that competence for enforcement of the debt was with the UK authorities as a result of the seizure of the goods in the UK from 4 August 2004 and that the discharge by the Dutch authorities on 4 August 2004 was as the result of an administrative error which should not be determinative of whether the customs debt was properly claimed.

Liability for Customs debt

67. We can see no real argument that Txt BV is not the person with primary responsibility for the Customs debt, and related VAT, if it is clear that a debt arises, because it is the named person on the T1 which was signed by its director, Jan Barnett.

The Customs Code

68. The Tribunal accepts the Appellant's approach that, on a first reading it is not clear which of Article 202 or 203 should apply in these circumstances, but on the basis of the relevant authorities, agrees with HMRC that Article 203 is the relevant provision here, not Article 202 and 233. Considering the application of Article 233(c), this only applies if there is an obligation to pay duties on import, which is not the case for these goods and 233(d) is only relevant if the debt in question arises under Article 202. Article 202 applies if a customs debt is incurred and the goods are seized at the first customs office in the territory as is made clear in the *Elshani* decision

> "*the seizure of goods which takes place beyond the first customs office situated inside that territory and which occurs practically at random, is not capable of leading to the extinction of the customs debt for the purposes of point (d) of the first paragraph of Article 233"*.

69. A customs debt arises under Article 203 if there has been an unlawful removal of goods from Customs' supervision. We were told that there was no agreed itinerary for this cigarette consignment; nevertheless the Customs Code obliges the transporter to use an "economically justifiable route". We agree with HMRC that it is not

economically justifiable for a goods vehicle moving from the Channel Tunnel port to Felixstowe to divert and unload goods at Sevenoaks and the Appellant has not provided any justifiable rationale for this route.

70. Considering the decision in *Wandel* ([2001] ECR I-873), we agree with HMRC that "removal" for these purposes should be interpreted widely; "*removal must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent authorities from gaining access to goods under customs supervision……. The removal of goods from Customs supervision does not require intent, it is sufficient if certain objective conditions are met, in particular the absence of the goods from the approved place of storage at the time when the customs authorities intend to carry out an examination of them"*. On this basis the Tribunal has concluded that the cigarettes were "removed" for these purposes either when the vehicle carrying them diverted from the direct route to Felixstowe or, at least, when they were unloaded from the vehicle at the West Kent Depot.

71. The time at which the goods were seized is crucial to the Appellant's argument, which rests on the fact that the goods were seized before they were released from the UK Customs procedure. The Tribunal has concluded, on the basis of the evidence provided by Mr Brissenden about the events of the evening of 22 January that seizure of goods happened after they had been diverted, not before. In our view the diversion occurred, if not at the point when Kevin Smith's lorry left the M20 and headed along the A25 to the West Kent Depot, then certainly at the stage when, as Mr Smith admitted seeing, the cigarettes were unloaded from his vehicle and replaced with different shrink wrapped pallets. The cigarettes were released from the Customs' procedure at that time.

72. The goods were released by the Dutch Customs on 22 January 2004 and were seized by UK customs later that day. In this respect the Tribunal agrees with HMRC, particularly by reference to the *Dansk* decision, that the ground for the extinction of a customs (or VAT) debt should be narrowly construed and a debt is only extinguished if goods are seized before they go beyond the first customs office situated inside that territory. This was clearly not the case here; the goods were seized after they had left their port of destination, after they had been unlawfully diverted and after they had been unlawfully unloaded into a non bonded warehouse. The goods were seized after they had left Custom's supervision and therefore Article 233(d) of the Code does not apply.

To what extent was TXT BV involved in the removal of the goods?

73. TXT BV was responsible for the transport of the goods as far as the bonded warehouse in the Netherlands. They were recorded as the principal on the T1. On the evidence presented to the Tribunal, there was no direct involvement by TXT BV in their removal in the UK. No representatives of TXT BV were at the Kent Cold Storage depot on 22 January. There is no evidence for this particular consignment, that they hired the drivers, or of any communication between those acting in the UK and TXT BV. There is no evidence of any involvement of Jan Barnett beyond the

Dutch borders. We do not think it is correct to say, as HMRC suggest, that there was "extensive involvement" of TXT BV in this import transaction.

74. The Tribunal's view is that HMRC have failed to make a clear distinction between the actions of TXT International and TXT BV. HMRC's reference to the involvement of TXT BV with drivers in previous consignments is not strictly relevant to this transportation. While there is some evidence that the two companies were seen as closely linked by those involved, we have concluded that this is not sufficient to suggest that TXT BV should be seen as implicated in all the activities of its sister company in the UK.

To what extent did TXT BV nevertheless "participate" in this removal ?

75. Even if TXT BV cannot be said to have been directly involved in the unlawful removal of the goods in the UK, the Tribunal has concluded that TXT BV did participate in the removal because they were involved in the supply chain which started in the Netherlands. They relied on their UK sister company for on ward shipment to Tongo, and knew that the goods were going via the UK when they could have gone directly to their destination from the Netherlands. They must have known that entry into the UK served no commercial purpose.

Should Peter Barnett be treated as a representative of TXT BV for these purposes – either as a shadow director or as a shareholder?

76. HMRC relied on the evidence referred to by Mr Brissenden given by Jan Barnett himself (on 25 August 2004) as part of Operation Budget to establish the extent of his father's involvement with the Dutch sister company. This interview evidence does make clear that Jan Barnett relied on his father's finance and expertise in setting up and running TXT BV and that his father was involved in some of the strategic decisions relating to TXT BV, including some of the contracts with Eldridge in Luxembourg (the supplier of the cigarettes for export.)

77. However, there is no evidence that Peter Barnett was involved in directing any of the operations of 22 January with TXT BV, though it is clear that he was involved with the UK sister entity. The Tribunal does not consider that the mere fact that he is a shareholder of TXT BV is sufficient to implicate him as a shadow director or directing mind of Appellant. The evidence of Mr Brissenden demonstrates some links between the two entities, including a cash transfer from TXT BV to Peter Barnett on 28 January 2004, soon after the fraud had been discovered. His evidence also demonstrated that on earlier occasions there had been some contact between drivers engaged by TXT International in the UK and TXT BV. However HMRC did not provide any specific evidence of the direct involvement of Peter Barnett in the decisions made by TXT BV in respect of the transaction which was undertaken on 22 January 2004.

78. Neither has HMRC provided any evidence that any of the other participants who were involved in the 22 January operations (the driver Kevin Brown and the fleet manager Graham Smith) were operating under the instructions of anyone other that

TXT International in the UK. The Tribunal disagrees with HMRC that, at least for this consignment, Peter Barnett "assumed overall management and control" of the Appellant's transport operation. The Tribunal does not think that the actions of Peter Barnett should be attributed to TXT BV as far as this consignment of cigarettes is concerned.

79. In conclusion, the Tribunal's view is that Article 203(3) applies to Appellant primarily because it was the principle in charge of ensuring that the goods arrived at their destination, and secondly, as a person participating in the unlawful removal of the goods from their legitimate commercial route and that a customs debt and VAT charge arises under Article 203(3) and s 16 VATA 1994 for those reasons.

Is anyone else liable for the debt?

80. The Appellant argued that in accordance with the decision in *Unamar,* it was the person who had physical custody of the goods when they had been unlawfully removed from Customs supervision who was primarily liable for the debt. We agree with the Appellant that the persons listed under Article 203(3) include the person "required to fulfil the obligations arising for temporary storage of goods". However, we agree with HMRC that this is not applicable to the warehouse owner at the West Kent Depot, who had no obligations as far as these goods were concerned, because the warehouse was not a bonded warehouse. Even if that were incorrect, the Appellant cannot remove his obligations under Article 203(3) by reference to another party since Article 213 makes it clear that in respect of Customs debts the liability arising under Article 203 is joint and several.

The amount of the Guarantee.

81. Mr Rietveld suggested on behalf of the Appellant that, if any amount was payable under the guarantee, that amount was up to a maximum of Euro 105,380, the rest of the guarantee amount did not relate to the transport of cigarettes, but to other issues such as the provision of bonded warehouses. On the basis of the evidence provided the Tribunal cannot agree with this interpretation of how the guarantee amounts were to be applied. It is clear from the confirmations of the Guarantees provided by the Dutch Customs Authorities that TXT BV's requests to increase the guarantee amount from its original Euro 205,380 to Euro 329,420 in October 2003 related to an increase in the comprehensive guarantee for the transport of high risk goods to Euro 279,420, with only the remaining Euro 50,000 relating to the bonded warehouse regime.

82. The Appellant also argued that guarantee number 118982 provided by Rabobank should not have been called upon since it did not relate to this consignment of cigarettes. We did not see evidence of the terms of the guarantees provided by Rabobank, but on the basis of the references in the Dutch Customs Authorities' Guarantee confirmation documents to both guarantee numbers 118982 and 118146 and Rabobank's own reference to payment being made under guarantee number 118982 in respect of this consignment, we cannot see any basis for arguing that this guarantee could not have been called.

83. For these reasons this appeal is dismissed.

84. The Respondents to be awarded costs in their favour on the standard basis, to be assessed by the Tribunal if not agreed.

85. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 30 January 2014