[2016] UKFTT 682 (TC)

TC05411

Appeal number: **TC/2014/06346**
TC/2015/03751

EXCISE DUTY, CUSTOMS DUTY, IMPORT VAT – appellant allowing goods to leave ullage cage – whether there can be a customs debt under both Article 202 and Article 203 of the Customs Code – yes – whether there was a liability to excise duty – no – whether Article 239 or Article 220(2)(b) of the Customs Code applies – no – whether assessments calculated correctly – some corrections made – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

DNATA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN ROBINSON

Sitting in public at The Royal Courts of Justice, Strand, London on 14 and 15 September 2016

Jeremy White, instructed by BDO LLP, for the Appellant

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

DECISION

1. The appellant, Dnata Limited ("Dnata") is appealing against assessments (the "Assessments") made by way of a Post Clearance Demand Note (C18) in the sum of £233,972.88. Of this amount, £53,205.36 is an assessment to customs duty, £129,931.20 is an assessment to excise duty and £50,836.32 is an assessment to import VAT. Dnata is also appealing against HMRC's refusal of its application for remission that was made under Article 239 of Council Regulation (2913/92/EEC) of 12 October 1992 establishing the Community Customs Code (the "Code").

Evidence

2. Dnata relied on witness evidence from:

(1) Alexandra Doisneau who is currently Dnata's Vice President of Cargo and Transport at Gatwick and Heathrow and, at times relevant to the appeal, was Dnata's General Manager of Cargo and Transport at Gatwick and Heathrow;

(2) Peter Whiston, who is currently, and was at times relevant to this appeal, a warehouseman at Dnata; and

(3) Paul Cole who is currently, and was at times relevant to this appeal, Dnata's Chief Financial Officer.[1]

3. Mr Cole's witness statement was admitted as evidence without challenge. Mr Pritchard cross-examined Ms Doisneau and Mr Whiston.

4. HMRC relied on evidence from Sean Butler and Samantha Moss, who are both customs officials with the UK Border Office. Mr White cross-examined both of HMRC's witnesses.

5. We were satisfied that all the witnesses from whom we had evidence were reliable and honest.

6. We also had evidence in the form of a bundle of documents.

Facts

7. The facts set out at [8] to [29] were either not in dispute or were determined by us.

The Goods and Dnata's involvement with them

8. Dnata is a company incorporated in England and Wales. On 1 August 2011, the UK Border Agency approved a temporary storage facility operated by Dnata on Bedfont Road, Stanwell, Middlesex (the "Transit Shed") pursuant to Article 51 of the

[1] Dnata also served a witness statement from Girish Sreedharan. However, he was unwell on the day of the hearing and Mr Pritchard and Mr White agreed that Dnata would not rely on his witness evidence.

Code and s25 and s25A of the Customs and Excise Management Act 1979. That approval was subject to, among others, two conditions:

(1) Dnata agreed that any officer of HMRC or the UK Border Agency could examine goods deposited in the Transit Shed as and when required.

(2) Dnata agreed to the following obligation to provide an "ullage cage" within the Transit Shed:

> You must provide within the Transit Shed a secure cage [Ullage Cage] capable of being locked for the goods detained or seized by the UK Border Agency or HM Revenue and Customs. The goods so deposited and removed must always be recorded in the stock record specific for that cage. This cage must be maintained in a secure and good order at all times.

9. On 6 April 2014, a consignment of goods (the "Goods") was sent on a Cathay Pacific flight from Hong Kong to Heathrow consisting of two pallets both containing 12 boxes. The 24 boxes all had a picture of a yoga mat on the side and the words "yoga mat" printed on them. The air waybill for that consignment, together with accompanying documentation described the goods as "PVC yoga mat[s]" and indicated that the ultimate consignee was Fitness Nation Ltd. That documentation also set out the "gross weight" as 724kg. We accepted Ms Doisneau's evidence that Cathay Pacific would themselves weigh the goods before allowing them to be loaded onto their aeroplane so as to verify the weight independently. We also accepted her evidence, since she has considerable experience in the transportation of goods internationally, that, although not stated specifically on the air waybill, this gross weight would include the weight of the pallets on which the Goods were transported and that the typical weight of a pallet would be 20kg. It therefore follows that we have concluded that the weight of the Goods themselves (together with their packaging) was 684kg (the gross weight less the weight of the two pallets on which they were being transported).

10. On 6 April 2014 (or perhaps early in the morning of 7 April 2014), the Cathay Pacific flight landed at Heathrow and the Goods were unloaded. We have not seen copies of either an "entry summary declaration" for the Goods or an "entry document for temporary storage" (which would have been needed before the Goods could be transferred from Heathrow to the Transit Shed). It is clear that some customs declarations were made since, as noted at [11] below, there is an entry in HMRC's CHIEF system recording the Goods as cleared. However, we have inferred from the description of the Goods on the air waybill, the packaging of the Goods referred to at [9] and the subsequent events set out at [13] which demonstrated that smuggled tobacco was concealed within the Goods, that those customs documents did not disclose the fact that there was tobacco among the Goods. It follows that we have concluded that the customs declarations described the Goods as containing only yoga mats and that while the yoga mats were presented to the UK customs authorities, the tobacco subsequently found among them was not so presented.

11. At 02.07 on 7 April 2014, the Goods arrived at the Transit Shed. HMRC's internal records indicate that the Goods were "cleared" (through its CHIEF system) at

10.57 on 7 April 2014. Dnata's systems interfaced with the CHIEF system with the result that, at that time, Dnata's systems showed the Goods as being customs cleared. The CHIEF system does not provide a function whereby HMRC can reverse a clearance of goods which have already been cleared.

12. At or around 12.15 on 7 April 2014, Officer Moss and Officer Butler were performing a routine visit to the Transit Shed with a detector dog. Officer Moss was handling the detector dog who showed an interest in the two pallets containing the Goods. Officer Butler accordingly performed further investigations on the Goods.

13. There was a dispute as to the extent of Officer Butler's investigation. His evidence was that he opened one of the boxes on the first pallet and found that it contained three yoga mats. Underneath one of the yoga mats were six plastic bags. He opened one of these plastic bags and found that it contained a package sealed in gold foil which contained 5kg of tobacco. His evidence was that he then opened one box on the other pallet and found that it contained three yoga mats and six black packages. On opening one of those black packages, he found a further package wrapped in gold foil which contained tobacco. Officer Butler accepted in cross-examination that only one of the packages of tobacco was weighed. He could not remember whether it was weighed at the time of his inspection or subsequently. He also accepted that nothing else was weighed.

14. Ms Doisneau's evidence was that her examination of CCTV footage after the event indicated that Officer Butler opened only one box on one of the pallets. However, Officer Butler was clear during his cross-examination that he opened two boxes and, since Ms Doisneau was basing her conclusion based on CCTV footage whereas Officer Butler was giving evidence as the person who actually performed the examination of the Goods, we prefer Officer Butler's evidence and have, accordingly, accepted that the position was as set out at [13] above.

15. We have also concluded from the circumstances in which the tobacco was packaged that an attempt had been made to smuggle it into the UK. We will not make findings as to who was responsible for the attempted smuggling but will record our finding, which was also common ground between the parties, that Dnata did not introduce the tobacco into the UK, did not participate in the smuggling attempt and was unaware (and had no reason to be aware) that the Goods contained smuggled tobacco until Officer Butler's examination revealed this.

16. At approximately 12.45 on 7 April 2014, Officer Butler resealed the boxes that he had opened with "one time seals". He then placed the Goods in Dnata's ullage cage. He completed and served a Form C125 notice of detention on Mr Andy Fiander, who was Dnata's duty manager, and made it clear that the Goods were under supervision. We have concluded that this action amounted to a lawful detention of the Goods under, inter alia, the provisions of s139 of the Customs and Excise Management Act 1979 ("CEMA").

17. Dnata has written procedures which are set out in a document entitled "Warehouse Management System Office Import Process" (the "Procedures

Document"). That document required that, when goods were seized or detained by the UK Border Force, those goods must be moved to the ullage cage (unless, the ullage cage was not big enough to hold the goods concerned in which case different procedures would apply) and the ullage cage book updated. The "office procedure" in this case included a requirement that "status 2" be set in Dnata's internal system. Ms Doisneau explained that, by setting "status 2", Dnata's systems were being told that the consignee of the goods in question was not creditworthy which would have the effect that Dnata's systems could not generate a release note unless the consignee paid an amount of cash. However, "status 2" was not set in relation to the Goods even though the UK Border Force had detained them and placed them in the ullage cage.

18. The Procedures Document also states that detained goods are not to be released until notification is received in writing from UK Border Force officers. We have accepted Ms Doisneau's evidence to the effect that UK Border Force officers have said to Dnata that they are not in a position to give written instructions in all cases and that they do, on occasions, issue purely oral instructions to release goods. However, UK Border Force officers did not give any notification (whether in writing or orally) that indicated that the Goods could be released from the ullage cage.

19. At or around 16:40 on 7 April 2014, Mr Whiston picked up an assignment to release the Goods to Heritage International, a freight agent who had arrived at the Transit Shed to collect them. Because "status 2" had not been set, and because the Goods were recorded in Dnata's systems as customs cleared, there was nothing to prevent a release note from being generated. Mr Whiston obtained a release note from the office that showed that the Goods were located in the ullage cage. That release note recorded the Goods as being "HMC [sic] detained". Mr Whiston obtained the key to the ullage cage from office staff, removed the Goods and arranged for them to be loaded onto Heritage International's truck on which they left the Transit Shed. When he was doing this, Mr Whiston was not aware that the Goods contained smuggled tobacco.

Events leading up, and surrounding, the making of the Post Clearance Demand

20. On 8 April 2014, the UK Border Force wrote to Dnata to explain that, owing to what it regarded as a serious breach of the conditions of approval of the Transit Shed, the authorisation of the Transit Shed was temporarily suspended. This suspension was intended to affect only imports of goods, and not exports. However, owing to an administrative oversight on the part of UK Border Force, the suspension actually affected both imports and exports.

21. Following receipt of that letter, Ms Doisneau and her team worked late into the night to prepare a staff briefing so that all 70 of Dnata's staff at the Transit Shed (who had varying shift patterns) could be reminded of procedure relating to goods detained and placed in the ullage cage. They also put in place a new system under which access to the ullage cage was to be restricted to certain individuals. Dnata also conducted an investigation under its disciplinary procedures which resulted in warnings being issued to certain staff. Ms Doisneau wrote a letter to UK Border Force on 8 April

2014 that informed them of the measures that Dnata had taken and offered "sincere apologies" and an assurance that the matter was being treated very seriously at Dnata.

22. On 8 April 2014, the approval of the Transit Shed was reinstated. While the approval was suspended, Dnata suffered financial loss of around £30,000 in lost revenue. The figure could have been higher than this (up to £100,000) if Cathay Pacific had sought to recover from Dnata additional costs that they incurred as a consequence of having to use other transit sheds.

23. On 24 April 2014, Dnata and the UK Border Force had a meeting to discuss the outcome of Dnata's investigation into the incident. Ms Doisneau wrote a letter dated 7 May 2014 that summarised discussions at that meeting which included the following paragraphs:

> After a full and thorough investigation we can confirm that five members of staff involved with this consignment at various stages of the process have been interviewed and in conjunction with our disciplinary process, action has been taken where appropriate.
>
> Through the investigation it has come to light that a breakdown of our internal processes together with a lack of questioning and awareness greatly contributed to the incident.
>
> The above consignment should have been "inhibited" as soon as the detention notice had been received and although remarks were shown in the record this was not done.

24. HMRC initially pursued Fitness Nation Ltd (who, as noted at [9] were recorded as being the ultimate recipient of the Goods) for excise duty, customs duty and import VAT on the tobacco and, on 1 May 2014, issued Fitness Nation Ltd with a Form C18 Post Clearance Demand Note. However, on 27 June 2014, HMRC shifted their focus to Dnata and reissued that Post Clearance Demand Note in identical terms to Dnata. That document demanded payment of the amounts of customs duty, import VAT and excise duty set out at [1] above. There was no suggestion that HMRC had recovered the customs duty, import VAT and excise duty from Fitness Nation Ltd (or indeed anyone else) and were seeking to recover those amounts from Dnata as well.

25. On 3 July 2014, Dnata purported to "appeal" to HMRC against the issue of the Post Clearance Demand Note but, very sensibly, this was treated as a request for a review of that decision. On 23 October 2014, following an agreed extension of time, HMRC communicated the outcome of their review which was that the decision be upheld. HMRC refused a request to perform a further review and, on 21 October 2014, Dnata appealed to the Tribunal against HMRC's decision to issue the Post Clearance Demand Note.

26. Meanwhile, Dnata requested HMRC to repay or remit the amounts that it had assessed under Article 239 of the Code. By letter dated 25 February 2015, HMRC refused this request but indicated that they would consider any further information that Dnata wished them to consider before reaching a final decision. In that letter, HMRC also dealt with the possibility of amounts being repaid under Article 220(2)(b)

of the Code although Dnata had not requested that amounts be repaid under Article 220(2)(b).

27. By letter dated 26 March 2015, Dnata provided further information in relation to its request for repayment, but on 14 May 2015, HMRC wrote to say that this further information did not alter their decision. That letter offered Dnata the opportunity to request a review of the decision but Dnata chose not to request a review and, on 12 June 2015, before expiry of the applicable time limit, Dnata filed an appeal with this Tribunal.

Procedures relating to ullage cages generally

28. In support of its appeal, Dnata makes a number of points as to what it submits is an inconsistent approach by HMRC and the UK Border Force to the maintenance of ullage cages. In those circumstances, we will make some findings on UK Border Force's practice in relation to ullage cages at other transit sheds.

29. The parties were agreed that UK Border Force did not hold keys to ullage cages in the 140 or so transit sheds served by Heathrow airport (including the Transit Shed relevant to this appeal). Rather, the keys to those ullage cages are all held by the relevant transit shed operator. Both Ms Doisneau and Mr Cole gave evidence that the UK Border Force alone held the keys to ullage cages in transit sheds served by Gatwick Airport and therefore UK Border Force officers attend those transit sheds whenever goods need to be removed from their ullage cages. That evidence was not challenged. Nor was it contradicted by Officer Butler (who said only that he was not aware of ullage cage procedures at airports other than Heathrow). We have therefore accepted that there was the difference in practice that Ms Doisneau and Mr Cole referred to.

Provisions of the Code and Implementing Regulation relevant to this appeal

Incurrence of a customs debt on unlawful importation

30. Article 202 of the Code deals with the incurrence of a customs debt on the unlawful introduction of goods as follows:

> **Article 202**
>
> 1. A customs debt on importation shall be incurred through—
>
> (a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, or
>
> …
>
> For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.
>
> 2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be—

— the person who introduced such goods unlawfully,

— any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.

Incurrence of a customs debt on unlawful removal from "customs supervision"

31. Article 203 of the Code deals with the incurrence of a customs debt on the unlawful removal of goods from "customs supervision" as follows:

Article 203

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

— the unlawful removal from customs supervision of goods liable to import duties.

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

3. The debtors shall be—

— the person who removed the goods from customs supervision,

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

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

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

32. The concept of goods being subject to customs supervision is specifically defined in Article 37 of the Code which provides as follows:

Article 37

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

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

warehouse or they are re-exported or destroyed in accordance with Article 182.

33. In addition, Article 4(13) of the Code contains the following definition of the term "supervision by the customs authorities":

> "Supervision by the customs authorities" means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.

34. Article 68 specifically permits customs authorities to take certain actions in order to verify customs declarations that have been accepted, for example requiring further information or examining the goods concerned and taking samples of them.

35. Article 79 of the Code provides that:

> Release for free circulation shall confer on non-Community goods the customs status of Community goods.

Customs debt on release for free circulation

36. Article 201 provides for a customs debt to be incurred when goods are released for free circulation as follows:

> **Article 201**
>
> 1. A customs debt on importation shall be incurred through—
>
> (a) the release for free circulation of goods liable to import duties,
>
> (b) the placing of such goods under the temporary importation procedure with partial relief from import duties.
>
> 2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.
>
> 3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.
>
> Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known that such information was false, may also be considered debtors in accordance with the national provisions in force.

Article 220 and Article 239 of the Code

37. Article 239 provides for duties to be remitted or repaid in certain situations. Insofar as relevant to this appeal, Article 239 provides as follows:

> **Article 239**

1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238—

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

38. Article 220 of the Code contains a restriction on the ability of a customs authority to issue demands and, so far as relevant, provides as follows:

Article 220

Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.

2. Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where—

…

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

Relevant provisions of the Implementing Regulation

39. Commission Regulation (EEC) No 2454/93 (the "Implementing Regulation") sets out certain provisions for the implementation of the Code. Article 865 of the Implementing Regulation provides as follows:

Article 865

The presentation of a customs declaration for the goods in question, or any other act having the same legal effects, and the production of a

> document for endorsement by the competent authorities, shall be considered as removal of goods from customs supervision within the meaning of Article 203(1) of the Code, where these acts have the effect of wrongly conferring on them the customs status of Community goods.

Application of the Code for purposes of import VAT

40. The provisions of the Code set out at [30] to [38] above apply, on their terms to customs duties. However, s16 of the Value Added Tax Act 1994 ("VATA 1994") provides for customs enactments to apply to import VAT as follows:

> **16 Application of customs enactments**
>
> (1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—
>
> (a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and
>
> (b) the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community,
>
> shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, Community customs duties.

41. Regulation 120 of the Value Added Tax Regulations 1995 prevents certain specific provisions of the Code from applying for the purposes of import VAT. However, the provisions set out at [30] to [38] are not specifically disapplied and we have, therefore concluded that they apply equally for VAT purposes.

Excise Duty Provisions

42. Article 7 of Directive 2008/118/EC (the "Excise Duty Directive") provides as follows:

> **Article 7**
>
> 1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;

(c) the production of excise goods, including irregular production, outside a duty suspension arrangement;

(d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

3. The time of release for consumption shall be:

(a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;

(b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;

(c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery.

43. Article 8 of the Excise Duty Directive defines the persons liable for the duty as follows:

Article 8

1. The person liable to pay the excise duty that has become chargeable shall be:

…

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;

(c) in relation to the production of excise goods as referred to in Article 7(2)(c): the person producing the excise goods and, in the case of irregular production, any other person involved in their production;

(d) in relation to the importation of excise goods as referred to in Article 7(2)(d): the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.

2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt.

44. Provisions contained in the Excise Duty Directive have been transposed into UK law in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "Regulations"). Regulation 6 of the Regulations provides as follows:

(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—

(a) leave a duty suspension arrangement;

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;

(c) are produced outside a duty suspension arrangement; or

(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) "importation" means—

(a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

(b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) "EU excise goods" means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.

45. The definition of "customs suspensive procedure or arrangement" (which applies to determine when an "importation" falling within Regulation 6(2) takes place) is that set out in Article 4(6) of the Excise Duty Directive as follows. The parties were agreed that the only potentially relevant "customs suspensive procedure or arrangement" in the circumstances of this appeal is "temporary storage" which is dealt with in Articles 50 to 52 of the Code. Article 50 of the Code, so far as relevant, provides as follows:

Article 50

Until such time as they are assignated a customs-approved treatment or use, goods **presented to customs** shall, following such presentation, have the status of goods in temporary storage. Such goods shall hereinafter be described as "goods in temporary storage. (emphasis added)

We have added the emphasis because, for reasons that we will come onto, we consider that it is important to note that Article 50 envisages that only goods "presented to customs" can have the status of goods in temporary storage.

46. Regulations 12 identifies the person liable to pay excise duty where excise goods are released for consumption under Regulation 6(1)(d) as follows:

(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation.

(2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.

The appellant's grounds of appeal and HMRC's response

47. The appellant appeals against the Assessments on the following four broad grounds:

(1) Dnata was not a customs debtor or excise debtor. (This ground of appeal comprised a number of separate strands. First Dnata argued that Articles 201 to 204 of the Code were mutually exclusive and the fact that there was a customs debt under Article 201 and/or Article 202 (albeit one that HMRC had not collected, or taken steps to collect), in relation to which Dnata was not a customs debtor precluded Dnata from being assessed under Article 203. Mr White argued that, since the charging points for customs duty, excise duty and import VAT were aligned, this conclusion applies for the purposes of all three aspects of the Assessments. In the alternative, Mr White argued that, even if there could be a customs debt under Article 203, the conditions necessary for Dnata to be liable for that customs debt were not met).

(2) Dnata argue that Article 220(2)(b) and Article 239 of the Code apply. Strictly, those were slightly different arguments as Mr White relied on Article 220(2)(b) as a defence to the customs debt arising[2], whereas Article 239 could apply only if there was a customs debt (and this ground of appeal therefore related to HMRC's refusal to waive any debt under Article 239). Mr White submitted that, although not expressly written into either the Excise Duty Directive or the Regulations, both Article 239 and Article 220(2)(b) could apply to excise duty, import VAT and customs duty.

(3) Dnata argue that "procedural failings", particularly the fact that HMRC did not give Dnata a "right to be heard" before making the Assessments meant that the Assessments were all invalid.

(4) Dnata argue that, even if the Assessments were valid, the amount of customs duty, excise duty and import VAT have been calculated incorrectly (broadly since HMRC have assumed, wrongly, that there were 5kg of tobacco in all of the 24 boxes in the consignment).

48. As a general point, HMRC dispute all of the appellant's grounds of appeal. In addition, HMRC made the following specific points:

(1) They do not suggest that Dnata could be liable for a customs debt under Article 202 (very broadly because they accept that Dnata was not involved in, and was ignorant of, the smuggling of the tobacco). However, HMRC argue that Dnata was a customs debtor under Article 203 and there is no reason in principle why there cannot be multiple customs debts (under, for example, both Article 202 and Article 203). The Code makes specific provision to prevent a customs debt arising under both Article 203 and Article 204. The fact that no

[2] Dnata could not argue in this appeal that duty should be repaid under Article 220(2)(b) as Dnata had never claimed a repayment under that Article

similar provision is made in relation to other provisions of the Code is a clear indication that, as a general matter, multiple customs debts are possible.

(2) HMRC did not accept that Article 220(2)(b) or Article 239 apply for the purposes of excise duty. They accept that Article 220(2)(b) applies for the purposes of import VAT but submit that, despite the alignment of import VAT and customs duty for a number of purposes, Article 239 may not apply for the purposes of import VAT.

(3) They do not consider that any procedural failings have made the Assessments invalid.

(4) They consider that the Assessments have been calculated correctly although acknowledge that an element of judgement and estimation was involved in making them. They point out that, had Dnata not allowed the Goods to leave the ullage cage, the Assessments could have been calculated precisely.

49. The parties were agreed that the Tribunal has a general appellate jurisdiction in relation to all aspects of Dnata's appeal. Given the nature of Dnata's arguments and HMRC's response to them (and, in part because HMRC do not agree that the customs duty, excise duty and import VAT positions are necessarily aligned), we will make a decision on 9 separate issues set out at [50] to [104] in order to deal with Dnata's grounds of appeal. In the light of our decision on those issues, we will set out what we consider the position in relation to the Assessments should be.

Issue 1 – Whether the existence of a customs debt under Article 202 of the Code precludes the existence of a customs debt under Article 203 of the Code

50. It was common ground that a customs debt existed by virtue of Article 202 of the Code. The conditions of Article 202 were satisfied because the tobacco concealed among the Goods was not mentioned on any customs declaration or summary declaration provided to the UK authorities. It follows, therefore, from paragraphs 30 to 32 of the decision of the CJEU in *Papismedov* (Case C-195/03) that the introduction of that tobacco into the UK was unlawful even though that tobacco was received into a duly approved transit shed.

51. It was also common ground that Dnata was not a debtor for the purposes of the Article 202 customs debt. The persons who can be debtors under Article 202 are set out in Article 202(2). Given the findings that we have made at [15], Dnata was not one of those persons.

52. Mr White argued that, once it had been established that there was a customs debt under Article 202 (and that Dnata was not a debtor in respect of that customs debt), Dnata could not be a debtor in respect of a customs debt under Article 203. Mr Pritchard disputed this and argued that there was nothing that prevented a customs debt from arising under both Article 202 and Article 203.

The provisions of the Code

53. We did not consider that a fair reading of the Code alone supported Mr White's argument. Articles 201 to 205 all begin with the words "A customs debt on importation shall be incurred through…" and those Articles then specify the circumstances in which the customs debt arises and the persons liable for that debt. The architecture of the Code, therefore, is to set out a variety of different circumstances in which different persons can incur customs debts. There is no express statement that there can only ever be one customs debt.

54. Article 204 contains specific wording that deals specifically with the possibility of an overlap between Article 203 and Article 204 the effect of which is that there can be a customs debt under Article 204 only if there is not a customs debt under Article 203. That also suggests that, in principle, a customs debt can exist under two different Articles but that, in specific cases, the Code will specify that one Article is to take precedence over another. The fact that the Code makes no provision dealing with the overlap between Article 202 and Article 203 is, as Mr Pritchard submitted, an indication that there is nothing to prevent customs debts from arising under both Article 202 and Article 203.

55. Mr White pointed out that Article 212 of the Code referred to "the customs debt referred to in Articles 201 to 205" (which he suggested supported an interpretation that there could be only one such debt). However, we did not consider that inferences such as this, which are based only on the use of a single word, could of themselves demonstrate that the Code truly is intended to mean that the provisions of Article 201 to 205 are mutually exclusive so that there can only ever be one customs debt under those articles. In any event, Article 213 of the Code refers to several persons being liable for payment of "one customs debt" (and not "the customs debt") which, applying Mr White's logic approach, would appear to raise an inference that there could be multiple customs debts. Moreover, Articles 201 to 205 refer to "a customs debt" not "the customs debt" which also suggests that there can be more than one customs debt.

56. That leads to a further point. If, as Mr White submitted, it is implicit in the Code that there could not be a customs debt under both Article 202 and Article 203, some wording would be needed to explain which Article is to take precedence. Mr White assumed that Article 202 should prevail but, viewing the Code purely in isolation, there is no reason why Article 203 should not prevail. It might perhaps be supposed that the Code would wish to penalise persons unlawfully importing goods (under Article 202) rather than transit shed operators (under Article 203). However, the point remains that, if there was some overarching principle to the effect that there could not be more than one customs debt, some express wording would be needed to explain which Article is to prevail in cases of overlap.

The decision in Papismedov

57. Mr White urged that we should not read the provisions of the Code in isolation and relied heavily on the decision of the CJEU in ***Papismedov***[3]**.** In that case, on 10 June 2001, a vessel docked at Antwerp laden with containers. Its cargo was cleared through customs by MSC Belgium NV. From that cargo was unloaded a container which, according to the summary declaration provided to the Belgian customs authorities contained 406 cases of "cookware". On 11 June 2001, the customs authorities examined the container and found, behind two rows of packing cases containing cooking utensils, identical cases containing cartons of cigarettes. None of the documents lodged with the authorities mentioned the presence of those cigarettes. The container was closed, re-sealed, and placed under observation.

58. On the same day, a document for external Community customs transit (which served as a customs declaration) was validated for the consignment in question. The validation of that document permitted the load to be transported to the Eurolog warehouse that was recognised as a "type B" warehouse and able to receive goods that were under customs supervision. On 12 June 2001, a lorry driver, Mr Janssens, collected the load but it was driven, not to the Eurolog warehouse but to a different location that was not recognised as a customs warehouse.

59. Those facts led to criminal proceedings in Belgium and it is clear from paragraph 12 of the reported decision that a number of persons involved were charged with "smuggling, by removing from transit" the cigarettes in question. Those persons were convicted, but appealed to a higher Belgian court which stayed the proceedings and referred four questions to the European Court of Justice which, so far as relevant were as follows:

> (1) The first question referred was whether the cigarettes should be regarded as having been lawfully introduced into Belgium, and accordingly as being under customs supervision, even though, intentionally or not, they had been declared to customs as "cookware" and not as cigarettes?
>
> (2) The second question referred was whether, if the answer to the first question was affirmative (so that the goods were lawfully introduced):
>
> > … that the customs debt arises under Article 203 of the Community Customs Code and must the person liable to comply with the obligations arising out of temporary storage of the goods or from use of the customs procedure under which the goods (even under an incorrect designation) were placed also be regarded as a debtor in respect of the Customs debt?
>
> At first sight it might appear that the Belgian court's second question was addressing a potential overlap between Article 202 and Article 203. However, it was not since, as formulated, the second question arose only if the goods were lawfully introduced. Article 202 has no application to lawfully introduced goods and, accordingly, the Belgian court's second question was concerned only with

[3] We were referred to a number of European authorities in this appeal. We will not distinguish between decisions of the ECJ and decisions of the CJEU and will refer to both courts as the "CJEU".

the applicability or otherwise of Article 203 and not its potential overlap with Article 202.

(3) The third question was not relevant to this appeal. The fourth question referred was whether, if the answer to the first question was negative (so that the goods were to be regarded as unlawfully introduced) whether the result was that

> the customs debt arises under Article 202 of the Community Customs Code and the person making the summary declaration or the declaration for a customs procedure … may be deemed to be the customs debtor only if he may be regarded as a debtor within the meaning of Article 202(3) of the Community Customs Code.

60. The Court preceded its answer to the first question by pointing out, in paragraphs 20 to 22, that the referring court was making an unwarranted assumption, namely that goods could only be under "customs supervision" if they had been lawfully introduced. For reasons that we will come on to, we consider that this unwarranted assumption is central to a proper understanding of the decision. The Court explained that unlawfully introduced goods can still come under customs supervision and, having explained this, the Court's ultimate conclusion on the first question was that, having been wrongly designated in customs documentation, the tobacco had been unlawfully introduced into Belgium.

61. The Court declined to answer the second question (because the terms of the referring court's reference stated that the second question arose only if the goods were regarded as lawfully introduced).

62. In paragraph 34 of the judgment, the Court divided the fourth question into two parts: the first dealing with whether there was a customs debt under Article 202 and the second dealing with the persons who could be liable for such a debt. At paragraph 35 of the judgment, the Court gave its answer to the first part of the question as follows:

> 35 According to the analysis made in connection with the reply to the first question, goods presented to customs … were not lawfully introduced into the Community. If those goods were unlawfully introduced, Article 202 of the Customs Code applies, which lays down the detailed rules on incurrence of the customs debt. It follows that the customs debt in respect of that operation is necessarily based on Article 202.
>
> 36 The answer to the first part of the fourth question must therefore be that the customs debt in respect of goods presented to customs and declared under an incorrect designation is based on Article 202 of the Customs Code.

63. Mr White relied strongly on the decision in *Papismedov*. He submitted that this case was clearly concerned with the question of whether Article 202 or Article 203 applied. He argued that, while the Court had not expressly said that Article 202 applied instead of Article 203, that was the clear effect of their conclusion outlined at [61] and, if the Court had considered that both Article 202 and Article 203 applied, given the nature of the Belgian criminal proceedings at issue, they would have said so.

64. Our initial impression, when we read paragraphs 35 and 36 of the Court's decision was that there was some force in Mr White's submissions. Read in isolation, those paragraphs do suggest that the Court considered that, in the case of unlawful smuggling, there would be a single customs debt under Article 202 of the Code. However, when the whole judgment is read, we do not consider that the Court was expressing any view on whether the only customs debt arose under Article 202. Rather, the Court was simply concluding that the requirements of Article 202 were met (namely that the goods were unlawfully introduced) so that there was a customs debt under Article 202. We regard the actual questions posed by the Belgian national court as central to that conclusion. The Belgian court was not asking the CJEU to determine whether Article 202 and Article 203 were mutually exclusive for the simple reason that the misapprehension referred to at [60] meant that the Belgian court thought it knew the answer to that question. It was under the impression that goods introduced unlawfully never come under customs supervision with the result that they could not be removed from customs supervision for the purposes of Article 203. Therefore, the Belgian court thought that Article 203 could apply only to lawfully introduced goods and Article 202 applied only to unlawfully introduced goods with the result that there could be no overlap between Article 202 and Article 203. For that reason, the Belgian court's first, and primary, question was whether the goods were lawfully introduced with the later questions expressed to be dependent on the answer to the first question.

65. The CJEU's answer to the first question corrected the Belgian court's misapprehension by explaining (at paragraph 22) that unlawfully introduced goods still come under customs supervision. Therefore, far from clarifying that there could be no overlap between Article 202 and Article 203, the CJEU's decision gave rise to the prospect of there being such an overlap as there was nothing to stop Article 203 applying to unlawfully introduced goods (which are also dealt with by Article 202). Given the questions that were put to it, we do not consider that the CJEU should be taken as confirming that no such overlap exists not least because, nowhere in the decision is it stated expressly that there is no overlap. For those reasons, we have not accepted Mr White's submissions based on *Papismedov*.

Other authorities relevant to Issue 1

66. Mr White referred us to other authorities which he submitted were relevant to Issue 1. We did not find the case of *Hamann International GmbH* (Case C-337/01) of great assistance since it was dealing with the question of overlap between Article 203 and Article 204. As noted at [54], the Code makes specific provision dealing with the overlap between those Articles and the decision in *Hamann* involves an analysis of that specific provision and does not contain any discussion on whether both Article 202 and Article 203 can apply in a given situation. Similarly, we did not consider that the case of *Elshani* (Case C-459/07) involved the CJEU, whether expressly, or by implication, determining that Article 202 and Article 203 were mutually exclusive. While the German national court referred a question in that case that might, perhaps, had it been answered, have led to an examination of the interaction between Article 202 and Article 203, the CJEU declined to answer that question noting, at paragraph 44, that Article 203 was not in issue in the domestic proceedings. Mr White also

referred us to passages in *Dansk Transport og Logistik* (Case C-230/08) but we considered that decision was concerned primarily with the extinction of customs debts under Article 233 of the Code and that the CJEU should not, in that case, be taken to be expressing a view on the interaction between Article 202 and Article 203.

67. Mr Pritchard referred us to the case of *United Antwerp Maritime Agencies NV* (Case C-140/04). Paragraph 18 of the reported decision in that case suggests that it involved the Belgian authorities making assessments under both Article 202 and Article 203. No question was referred as to whether both Article 202 and Article 203 could apply, but the CJEU did not express a conclusion to the effect that Article 202 and Article 203 could not both apply.

Overall Conclusion on Issue 1

68. As we have noted, we do not consider that a fair reading of the Code supports the proposition that there can be no overlap between Article 202 and Article 203. The CJEU authorities to which we were referred do not demonstrate to us that no overlap is possible. On the contrary, the decision in *Papismedov* suggests that there is at least the potential for an overlap as both Article 202 and Article 203 are capable of applying to unlawfully introduced goods that are nevertheless under customs supervision. We have therefore concluded that it is possible for a customs debt to arise under both Article 202 and Article 203.

Issue 2 – Whether there was a customs debt under Article 201 so as to prevent Dnata from being liable for a customs debt under Article 203

69. In his skeleton argument (though not in oral argument during the hearing) Mr White argued that there was an earlier customs debt under Article 201 (for which Dnata was not liable) and this precluded Dnata from incurring a customs debt under Article 203.

70. The conclusions we have reached on Issue 1 apply equally to this argument. There is no express provision of the Code that prevents a customs debt arising under both Article 201 and Article 203. For reasons set out in relation to Issue 1, we do not consider that such a provision should be implied. Moreover, we are not satisfied in any event that a customs debt in relation to the tobacco arose under Article 201 of the Code before the Goods left the ullage cage or Transit Shed. Only Article 201(1)(a) is potentially of relevance in this appeal (there being no suggestion that the goods in question were placed under "the temporary importation procedure with partial relief from import duties" which is the province of Article 201(1)(b)). Such a debt could arise only on acceptance of a customs declaration for the tobacco and, as we have found, no such customs declaration was ever submitted. Moreover, as we explain in our discussion of Issue 3, the tobacco had not, prior to its removal from the ullage cage or Transit Shed, been released for free circulation. Therefore, the conditions necessary for a customs debt to arise under Article 201 of the Code were not met prior to the time at which the tobacco left the ullage cage or Transit Shed.

Issue 3 – Whether Article 203 applies

71. Mr White argued that, even if the existence of a customs debt under Article 202 (or Article 201) did not prevent Article 203 from applying, the conditions of Article 203 were nevertheless not satisfied. The essence of Mr White's argument was that, by the time the Goods left Dnata's transit shed, they had already been removed from "customs supervision" as that technical term is properly understood and, accordingly, Dnata's actions cannot have resulted in an unauthorised removal from customs supervision.

72. Mr White referred us to Article 37 of the Code. He submitted that "customs supervision" continued only for so long as necessary to determine the "customs status" of the Goods and that between 12.15 and 12.45 on 7 April 2014, the UK Border Force determined the customs status of the tobacco when their officers discovered that it had been smuggled. Therefore, the departure of the Goods from Dnata's transit shed later on the same day could not amount to a removal from "customs supervision" as defined as customs supervision had ceased by that time.

73. We have not accepted that argument. Rather, we agree with Mr Pritchard that the effect of Article 37(2) is that, in relation to "non-Community goods", it is only when the customs status of those goods changes[4] that customs supervision ends. The tobacco had been imported from Hong Kong (outside the EU). Therefore, applying the definitions of "Community goods" and "non-Community goods" in Article 4(7) and 4(8) of the Code, the tobacco could become "Community goods" only when released for free circulation. We will consider the effect of Regulation 865 of the Implementing Directive in the paragraphs that follow. However, absent Regulation 865, we do not consider the fact that the CHIEF system showed the Goods as "cleared" at 10.57 on 7 April 2014 means that the tobacco was released for free circulation at that time. That is because, as we have found at [10], while the yoga mats were presented to the UK Border Force, the tobacco was not and therefore, the UK customs authorities had at no point accepted any declaration in relation to the tobacco. Moreover, Article 68 of the Code gives the UK customs authorities the power to conduct further tests even after a customs declaration has been accepted which is incompatible with the notion that the acceptance of a false customs declaration leads irrevocably to all goods in the relevant load being released for consumption. We therefore consider that the acceptance of the customs declaration (in relation to the yoga mats) at 10.57 set in place a chain of events which, if unchecked, could perhaps have resulted in the tobacco being released for free circulation. However, the subsequent lawful detention of those goods checked that chain of events and, by the time the tobacco left the ullage cage or Transit Shed, the tobacco had not obtained the status of "Community goods". It follows that the tobacco was still under customs supervision until removed from the Transit Shed.

74. This conclusion is supported by the decision of the CJEU in *Wandel* (Case C-66/99) where it was said at paragraph 36 and 37:

[4] or when they enter a free zone or free warehouse, or are exported or destroyed in accordance with Article 182 (which are not relevant in the context of this appeal)

> …[I]t is apparent that non-Community goods declared for release for free circulation do not obtain the status of Community goods until commercial policy measures have been applied and the other formalities laid down in respect of the importation have been completed and any import duties legally due have been not only charged but paid or secured.
>
> Obviously those formalities include the lodging and immediate acceptance of a customs declaration under Article 59(1) and Article 63 of the Customs Code, but they must also be taken to include application of the measures referred to in Article 68 of the Customs Code, which entitles the customs authorities, when verifying the declarations which they have accepted, to carry out, inter alia, an examination of the goods (which may involve the taking of samples for analysis or detailed examination)

75. Mr White argued that Article 865 of the Implementing Regulation meant that the incorrect customs declaration, describing the Goods as consisting (only) of yoga mats meant that the entirety of the Goods (including the tobacco) left customs supervision at the time of submission of that customs declaration. He argued that this was the time of the relevant removal for the purposes of Article 203 of the Code and, since Dnata was not involved in the making of the relevant customs declaration, it was not a customs debtor for the purposes of Article 203(3).

76. We have not accepted this submission. Article 865 could only have the effect for which Mr White argues if (i) a customs declaration was submitted for the tobacco and (ii) the effect of that customs declaration was that the tobacco was wrongly conferred the status of "Community goods". The first condition was not satisfied because no customs declaration was made in relation to the tobacco.

77. Our overall conclusion, therefore is that the tobacco was removed from customs supervision when it left the Transit Shed at or around 16.41 on 7 April 2014. That removal was unlawful because the UK Border Force had lawfully detained the tobacco under s139 of CEMA. Pending determination as to the forfeiture or disposal of the tobacco, s139(5) of CEMA required Dnata to deal with it as if it had been condemned but, by removing the tobacco from the ullage cage and allowing it to leave the Transit Shed, Dnata failed to do so. Therefore, the conditions of Article 203(1) were satisfied. Dnata was the very person who removed the tobacco from customs supervision. At the very least, it participated in the removal and was aware that it was removing goods from customs supervision. Either of those conclusions is enough to make Dnata a customs debtor under Article 203(3) of the Code.

Issue 4 – When the excise duty point arose and whether Dnata was liable for that excise duty

78. Mr White argued that the excise duty point for the purposes of excise duty necessarily arose at the same time as any customs debt for the purposes of the Code. We do not accept this submission. Excise duty is charged under a completely different set of laws (the Excise Duty Directive and the Regulations) from customs duty (which is charged under the Code). It may be that the effect of the Excise Duty Directive and

Regulations is to produce, in all cases, an excise duty point that coincides with the time at which a customs debt is incurred. However, that conclusion has to be established by reference to the Excise Duty Directive and the Regulations themselves.

79. Mr Pritchard argued that the only relevant excise duty point was that arising under Regulation 6(1)(d) of the Regulations. The essence of his argument was that, on entry into the United Kingdom, the tobacco entered temporary storage (which was an example of a "customs suspensive procedure or arrangement"). Therefore, he argued that, given the definition of "importation" in Regulation 6(2) of the Regulations, there was no excise duty point when the tobacco first came into the UK. Rather, he argued that the "importation" took place under Regulation 6(2)(b) when the tobacco left temporary storage. He submitted that this was an "irregular" importation either because the tobacco was never presented to the UK customs authorities or because the tobacco was unlawfully removed from the ullage cage at the Transit Shed. Accordingly, since he argued that Dnata was involved in that "irregular" importation (by removing the tobacco from the ullage cage), it was liable for the excise duty debt under Regulation 12 of the Regulations.

80. We asked Mr Pritchard whether the Commissioners were seeking to defend the excise duty assessment on the basis that there was an excise duty point under Regulation 6(1)(b) and that Dnata was liable under Regulation 10 of the Regulations by virtue of "holding" the tobacco at that time. Mr Pritchard said that the Commissioners relied in this appeal only on the duty point under Regulation 6(1)(d), that being HMRC's case as advanced in their Statement of Case.

81. We consider that there is a logical flaw in Mr Pritchard's argument to the effect that there was an importation falling within Regulation 6(2)(b). Article 50 of the Code (which is quoted at [45]) has the effect that only goods that have been presented to the customs authorities can enter "temporary storage". As we have noted, the tobacco concealed among the Goods was not presented. That tobacco accordingly did not go into "temporary storage" as defined and, since it did not enter any other "customs suspensive procedure or arrangement" immediately on entering the UK, the "importation" of the tobacco was complete, in accordance with Regulation 6(2)(a) of the Regulations, when the tobacco came into the UK. There was never any importation falling within Regulation 6(2)(b) of the Regulations.

82. Dnata is not made liable for excise duty arising on the importation under Regulation 6(2)(a) by Regulation 12 of the Regulations which is quoted at [46]. Dnata did not declare the tobacco to the UK customs authorities, nor was the tobacco declared on Dnata's behalf. Dnata was not involved in bringing the tobacco into the UK: it simply operated the Transit Shed in which that tobacco was held for a period after its arrival in the UK.

83. Given the way HMRC have put their case on the excise duty assessment, we do not consider that Dnata was liable for excise duty on the tobacco. If HMRC had put their case in a different way, for example if they had argued that an excise duty point arose under Regulation 6(1)(b) of the Regulations (and that Dnata was liable for the resulting excise duty debt) in addition to the excise duty point arising when the

tobacco was unlawfully brought into the UK under Regulation 6(1)(d), we would have invited the parties to make submissions based on the recent decision of the Upper Tribunal in *B&M Retail Limited*. However, both parties were agreed that the decision in *B&M Retail Limited* would not be of assistance in determining this appeal and as a result we have not invited submissions on this decision.

Issue 5– Whether Dnata was liable for import VAT

84. We have concluded at [77] that Dnata was a customs debtor under Article 203 of the Code in respect of customs duty on the tobacco. Section 16 of VATA 1994, referred to at [40] means that, in the circumstances of this appeal, liability to import VAT is aligned with liability to customs duty. (Later in this decision, we will consider the separate question of whether Article 220(2)(b) or Article 239 of the Code apply for the purposes of import VAT as well as customs duty). It follows that, subject to the analysis of Article 220(2)(b) and Article 239 that follows, Dnata was a debtor in respect of import VAT on the tobacco.

Issue 6 – Applicability of Article 220(2)(b)

85. Dnata sought to rely on Article 220(2)(b) as a defence to the assessments that had been made on it. Mr Pritchard submitted that, while Article 220(2)(b) could have this effect insofar as customs duty assessments are concerned, and, because of s16 of VATA 1994 could apply for the purposes of import VAT, it could not apply to excise duty assessments. We do not need to decide this issue since we have concluded for other reasons that Dnata is not liable in respect of the excise duty assessment. In any event, as will be seen, we do not consider that the requirements of Article 220(2)(b) are met.

86. Article 220 needs to be understood in the context of Article 218 of the Code which provides that, where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure, the customs authorities must enter that debt into accounts as soon as it is calculated and, at latest, on the second day following that on which the goods are released. Article 219 permits this time limit to be extended in certain situations. Where the customs debt is not entered in the accounts in accordance with Article 218 or Article 219, Article 220 permits the customs authorities to enter the debt into the accounts subsequently. However, Article 220(2)(b) sets out a restriction on a customs authority's right to effect such a subsequent entry into the accounts. It was common ground between the parties that, in order for Article 220(2)(b) to apply, the failure to enter the customs debt into the accounts in accordance with Article 218 or Article 219 must be as a result of an error made by the UK customs authorities.

87. Mr White categorised the error as being UK Border Force's decision to place the detained goods in Dnata's ullage cage (to which the UK Border Force had no key, although it did have a key to the ullage cage of other temporary storage facilities) and where UK Border Force had not put in place a system to prevent the goods being removed by the importer. Mr White submitted that this was a lack of vigilance by the UK Border Force which put Dnata in a special situation where it was being asked to

assume a risk that went beyond the normal commercial risks relating to its business. In those circumstances, he submitted that Article 220(2)(b) applied. (His submissions regarding what he argued was UK Border Force's failure to monitor also related to his argument that there was a "special situation" for the purposes of Article 239 applying the principle set out in *Transnautica* (Case C-506/09P)).

88. We do not consider that UK Border Force made any error that could be relevant for the purposes of Article 220(2)(b). Article 185 of the Implementing Regulation envisages that customs facilities may require temporary storage facilities to be double locked, with one key being held by the customs authority concerned. However, that is not mandatory and therefore UK Border Force's decision not to hold the keys to ullage cages in transit sheds served by Heathrow airport cannot fairly be described as an error even though the UK Border Force evidently adopts a different practice at Gatwick airport. In any event, the "errors" of which Dnata complains were not the reason why the customs debt was not entered into accounts in accordance with Article 218 or Article 219. The customs debt was not entered in those accounts prior to customs clearance being given through the CHIEF system because the tobacco was smuggled and never presented to the UK Border Force. Whatever procedure the UK Border Force adopted in relation to ullage cages would not have resulted in the customs debt being entered in those accounts because the UK Border Force simply had no means of knowing, until Officer Butler and Officer Moss performed their examination on 7 April 2014 that smuggled tobacco was hidden among the Goods. Moreover, as we conclude when we deal with Dnata's arguments under Article 239, any errors were made by Dnata which failed to follow its own procedures resulting in the tobacco leaving the ullage cage. We do not, therefore, consider that the conditions of Article 220(2)(b) are satisfied.

Issue 7 – Absence of a "right to be heard"

89. Mr White submitted that all of the assessments (to import VAT, customs duty and excise duty) were invalid because they were made without Dnata being given a "right to be heard". While, as noted at [25] and [27], HMRC performed an internal review of their decision to make these assessments (and took into account Dnata's representations when doing so), Mr White argued that this review did not automatically have the effect of suspending Dnata's obligation to pay the duty and import VAT, it did not respect the principle of observing the rights of the defence as set out in the judgment of the CJEU in *Kamino International Logistics BV* (Case C-129/13). This, he argued was a further reason why those assessments should be annulled.

90. Mr Pritchard said that he had been taken by surprise by this argument which had only been raised for the first time in Mr White's skeleton argument. Had this argument been raised earlier, HMRC may have wished to produce evidence to the effect that, in practice, the duty at issue would be suspended while their review was ongoing. We have decided that no evidence on this issue is necessary as there is a clear reason why the absence of a "right to be heard" (if there was one) should not cause these assessments to be set aside. That reason is found in paragraph 82 of the CJEU's decision in *Kamino International Logistics BV:*

> The national court, which is under an obligation to ensure that European law is fully effective, may, when assessing the consequences of an infringement of the rights of the defence, in particular the right to be heard, consider that such an infringement entails the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

91. Even if Dnata had been offered a full right to be heard before the assessments were made and all duty at issue had been suspended while Dnata exercised that right (and we make no finding that Dnata was not offered such a right), it would not have led to the assessments being annulled or reduced. That is demonstrated by the fact that, by the time of the Tribunal hearing, when both parties had been through a lengthy process of exchanging evidence and arguments, they remained implacably opposed with Dnata arguing that it owed nothing and HMRC arguing that it owed the full amount of all assessments. In those circumstances, there was no prospect of exercise of a "right to be heard" causing HMRC to reduce the assessments to any extent.

Issue 8 – Whether Article 239 of the Code applies

92. As we have noted, HMRC did not consider that Article 239 could apply for the purposes of excise duty. Mr Pritchard was more equivocal about the applicability of Article 239 to import VAT (noting that s16 of VATA 1994 could be read as supporting the conclusion that Article 239 did apply) but his overall submission was that Article 239 did not apply to import VAT.

93. We will not make a decision on whether Article 239 was capable of applying to import VAT or excise duty since it is clear to us that, even if it could apply, the conditions necessary for any debt to be waived under Article 239 are not satisfied.

94. The decision of the CJEU in *Covita AVE* (Case C-370/96) makes it clear that, in order for Article 239 to apply, two separate conditions must be satisfied: firstly there must be a "special situation" and secondly there must be an absence of deception or obvious negligence on the part of the trader concerned.

95. We consider that the second condition is not satisfied. Dnata has plainly been negligent. It failed to follow its own internal procedures relating to goods in the ullage cage both by failing to set "status 2" so as to prevent a release note from being generated and by failing to ensure that it had received Border Force confirmation that the goods could be released. A reasonable operator of a transit shed would have realised the importance of ensuring that goods in an ullage cage are not wrongly released from it and would, therefore, have taken more care to ensure that internal procedures were followed. It is no answer for Dnata to argue that the UK Border Force should themselves have held keys to the ullage cage. Firstly, there was no obligation for them to do so (at most the Implementing Regulation permitted the UK Border Force to "double lock" the ullage cage). Secondly, whether or not the UK Border Force could have double-locked the ullage cage the fact remains that they chose not to do so and Dnata could have been in no doubt that maintaining the ullage

cage was its own responsibility as it was a term of the approval of the Transit Shed. Dnata frankly, and fairly, acknowledged its negligence in its letter of 24 April 2014 referred to at [23] referring to a "breakdown of internal processes" and it would not have disciplined staff had it not considered those staff had done something wrong.

96. Nor do we consider that the first condition is satisfied. The essence of Dnata's argument was that there was a "special situation" because the UK Border Force did not hold keys to the ullage cage and were therefore subjecting Dnata to a disproportionate commercial risk in seeking to make it liable for wrongful departures from the ullage cage. However, we agree with Mr Pritchard that, in the case of *De Haan Beheer BV* (C-61/98), the CJEU determined, at paragraph [52], that the question of whether there is a "special situation" needs to be assessed by making a comparison between Dnata and other operators of similar businesses. There are over 100 transit sheds served by Heathrow airport, all of which contain ullage cages the keys to which are held only by the transit shed operator. Dnata's responsibilities in relation to the ullage cage in the Transit Shed are no different from the obligations of the operators of other transit sheds served by Heathrow.

97. For all of those reasons, we conclude that Article 239 could not apply.

Issue 9 – The amount of the assessments

98. Mr White argued that the amounts of duty and import VAT had been incorrectly calculated. He submitted that at most Officer Butler opened two boxes out of 24[5], and found six packages of tobacco in each of those two boxes. One of the black packages in the first box was opened and found to contain 5kg of tobacco. One of the black packages in the second box was opened and found to contain tobacco but that tobacco was not weighed. Mr White accepted, in these circumstances, that it was appropriate for HMRC to assume that all 12 of the black packages that were discovered in this way contained 5kg of tobacco. However, he argued that HMRC were not entitled to assume that the 22 unopened boxes each contained 6 packages of tobacco weighing 5kg. He therefore argued that HMRC had incorrectly assumed that the total number of packages of tobacco smuggled was 144 (24 x 6) and the total weight of tobacco was 720 kg (144 x 5). However, in Mr White's submission, the true position is that there were only 12 packages each containing 5kg of tobacco (a total of 60kg) so that the assessments should be reduced by a factor of 60/720.

99. Mr Pritchard defended the assessments as having been made to HMRC's "best judgement". He submitted that the reason that HMRC could not calculate the duty and VAT due with absolute arithmetic precision was because Dnata had wrongly taken the goods out of the ullage cage.

100. The concept of "best judgment" is relevant to VAT assessments under s73(1) of VATA 1994 and to excise duty assessments under s12 of FA 1994. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 262, the Divisional Court explained the concept of "best judgement" in the following terms:

[5] We have found as a fact that Officer Butler did indeed open two boxes – see [14] above.

> In my view, the use of the words 'best of their judgement' does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations. What the words 'best of their judgement' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.

101. We consider that the assessments were plainly made to the best of the Commissioners' judgement in the sense set out above. The assessments were based on such information as HMRC had before Dnata's actions resulted in the Goods leaving the ullage cage. The assessments were reasonable and not arbitrary. It was not clear to us that the "best judgement" concept applies equally to the customs duty assessments but we consider that the conclusions we have expressed as to the way the Assessments were made apply equally to the customs duty assessments.

102. The burden is on Dnata to establish the correct amount of the assessments. Mr White's argument set out at [98] amounts, in effect, to an argument that none of the boxes apart from the two that Officer Butler opened contained any tobacco. We are by no means satisfied that this was the position. Firstly, it might reasonably be assumed that if smugglers were prepared to go to the trouble of concealing tobacco among a shipment of yoga mats, and run the consequent risk of being caught and penalised, they might reasonably be expected to include tobacco in more than two boxes. Secondly, if there truly were only two boxes on the two pallets that contained tobacco, Officer Butler's examination must, quite by chance, have involved him opening the only two boxes (out of 24) in which tobacco was concealed. That would be unlikely. More fundamentally, Dnata could only establish that there was no tobacco in the 22 unopened boxes if they could establish what was in those boxes. Dnata's own actions, in allowing the Goods to leave the ullage cage, made it impossible for them, or HMRC, to do so.

103. However, we were satisfied that HMRC's calculation was wrong in one respect. On HMRC's calculations, there was 720kg of tobacco among the Goods. However, as we have found at [9] above, once the weight of the pallets is taken into account, the Goods cannot have weighed more than 684kg. Moreover, the Goods did not consist entirely of tobacco: Officer Butler found three yoga mats in each of the two boxes that we opened. We had no evidence as to the weight of a yoga mat, but Ms Doisneau estimated that, from the CCTV evidence she saw, the yoga mats were light and weighed about 500g each. That is nothing more than an estimate, but we will accept it. In addition, it seems right to us that, if it is to be assumed that there was tobacco in all 24 boxes, it should also be assumed that there were 3 yoga mats in each of those boxes. We therefore conclude that there were 72 yoga mats in the consignment (weighing a total of 36kg) and the balance of the weight of the Goods (648kg) was tobacco. We recognise that this calculation makes no allowance for packaging but we simply had no evidence at all as to the weight of the packaging of the Goods.

104. HMRC must, therefore, recalculate the customs duty and import VAT due on the basis that the tobacco weighed 648kg.

Conclusions

105. Our conclusions are therefore as follows:

(1) The appeal against the assessment relating to excise duty is allowed (see Issue 4 above).

(2) Dnata is liable, in accordance with Article 203 of the Code and s16 of VATA 1994 to customs duty and import VAT in relation to the smuggled tobacco (see Issues 1, 2, 3 and 5).

(3) Neither Article 220(2)(b) nor Article 239 of the Code alters the conclusion at [(2)] (see Issue 6 and Issue 8).

(4) No procedural failing caused any of the Assessments to be invalid (see Issue 7).

(5) HMRC must recalculate the customs duty and import VAT assessments on the basis that the tobacco weighed 648kg and not 720 kg (see Issue 9 above).

106. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 14 OCTOBER 2016