Neutral Citation: [2023] UKFTT 00123 (TC)

Case Number: TC08730

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting at Taylor House, London EC1

Appeal reference: TC/2018/00697
TC/2018/03722
TC/2018/08002

CUSTOMS DUTIES – Union Customs Code – appellant imported seven civil aircraft in 2016-2017 using incorrect customs procedure – appellant's subsequent application for end-use authorisation with retroactive effect was refused by HMRC on grounds that "necessary assurance of the proper conduct of operations" had not been provided – HMRC's decision took into account poor compliance record but not appellant's "proposal" for future conduct – was the decision 'unreasonable' in terms of s16(4) Finance Act 1994? – held: yes – HMRC required to undertake further review – appeals against £3m customs debt and refusal to repay it considered (and dismissed) in case HMRC's further review does not grant retroactive authorisation

Heard on: 21-25 and 28-29 November 2022
Judgment date: 13 February 2023

Before

TRIBUNAL JUDGE ZACHARY CITRON

Between

DHL AIR LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the appellant: Jeremy White and Christopher Leigh of counsel, instructed by KPMG Law

For the Respondents: Mark Fell KC of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. In this decision I refer to certain customs legislation as follows:

(1) "**Article X**" means article X of the Union Customs Code, Regulation (EU) No 952/2013 (the "**UCC**"). The UCC replaced the Community Customs Code, Council Regulation (EEC) No 2913/92 (the "**CCC**") from 1 May 2016;

(2) "**article X DA**" means article X of Regulation (EU) No 2446/2015, the Delegated Act implementing the UCC;

(3) the "**tariff suspension**" means the tariff suspension for aircraft parts imported with airworthiness certificates enacted by Regulation 1147/2002. (This was informally known as the 'airworthiness certificate scheme': see for example, HMRC Notice 770 (as at 25 February 2016) paragraph 8.9);

(4) **"CCC IP"** means Commission Regulation (EEC) No 2454/93, the CCC implementing provisions.

THE CORE BACKGROUND TO THE THREE APPEALS

2. At the core of these three appeals is the fact that, between 14 June 2016 and 21 February 2017, the appellant company – a cargo airline bearing the well-known "DHL" brand and part of the larger Deutsche Post DHL group – imported seven aircraft from the USA using an incorrect customs procedure code (one for civil aircraft *parts* rather than civil aircraft *per se*) that attracted no import duty by reason of the tariff suspension; whereas the conventional rate of duty for aircraft was 2.7%.

3. The first appeal arises from the appellant's efforts to rectify the situation by applying, on 4 April 2017, for authorisation (to have effect from 6 March 2015 i.e. prior to the importation of the seven aircraft) from HMRC to use the "end-use" customs procedure. If the application had been successful, the importation of the seven aircraft would have been free of custom duty. This is because, at the time of the importations, civil aircraft were eligible to be imported by an operator with the appropriate end-use authorisation at a zero rate of duty by reason of their end use as civil aircraft. The seven aircraft were therefore eligible, in principle, for end-use relief. They were also in fact applied to the prescribed end-use. In addition, had the application been successful, the appellant's incorrect customs declarations would have been invalidated (by reason of Article 174.2 and article 148.4(d) DA).

4. However, HMRC refused the application (on 10 July 2017, and subsequently upheld on statutory review), and that decision is the subject of the first of the three appeals before this tribunal (ref: TC/2018/00697).

5. The second appeal (ref: TC/2018/03722) is against HMRC's subsequent decision, on 6 December 2017, to issue a "post-clearance demand note" for a customs debt of £3,010,108.52 (the "**£3m customs debt**") in respect of the importation of the seven aircraft (also upheld on statutory review).

6. Following payment of the £3m customs debt, the appellant on 3 July 2018 wrote to HMRC requesting a refund of the £3m customs debt. That request was made pursuant to Article 120 (entitled "Equity"). On 5 November 2018, HMRC refused that request. The appellant's appeal against that decision (ref: TC/2018/08002) is the third of the three appeals before this tribunal.

EVIDENCE AND SUBMISSIONS BEFORE THE TRIBUNAL

7. The parties helpfully agreed a number of facts and issues– these are set out in Appendix 1 (and I refer to them by the sub-paragraph numbers at [147] and [148] below, respectively).

8. There was a great deal of documentary evidence before the tribunal, much of it contemporaneous to the relevant events: the hearing bundle ran to 3,033 pdf pages, and the index to the hearing bundle alone ran to 32 pages, organised in four "volumes" as follows:

(1) former bundle of the case management hearing on 29-30 April 2021 (1,965 pages), including

(a) "pleadings"

(b) witness statements of Officer Coulsey

(c) witness statement of Chris Dolan (director of indirect taxes UK & Ireland for the appellant's group)

(d) documents from an appeal that was withdrawn by the appellant (see agreed fact 27);

(2) witness statements (in addition to those in volume 1) (45 pages) including

(a) witness statement of Nick Hill (logistics manager of the appellant)

(b) witness statement of Officer Salter;

(3) exhibits to witness statements (282 pages);

(4) other documents (740 pages) including 715 pages of "miscellaneous documents".

9. As can be seen from the above, there was also evidence in the form of witness statements. Four of those who made witness statements attended the hearing and were cross examined: Officers Coulsey and Salter for HMRC, and Mr Dolan and Mr Hill for the appellant. I make the following general observations on the witness evidence in this case:

(1) where the witness evidence conflicted with contemporaneous documentary evidence, I generally gave greater weight to the latter: the witness evidence was produced years after the events in question, and so tarnished by the frailties of human memory;

(2) where a witness was giving his or her opinion on a matter of law, or on a matter of fact of which he or she had no direct knowledge (i.e. whose knowledge stemmed from reading documentation that was itself before the tribunal), I gave little evidential weight to that evidence. Officer Salter's evidence fell into this category, as she did not participate in any of the events relevant to the issues in these appeals. It also true, however, of statements of opinion, or of law, by the other witnesses extracted under cross examination, that could be construed (by opposing counsel) as aiding the other side's case – in my view, such statements carry little evidential weight, whichever side in the dispute they are said to favour.

10. I am grateful to counsel for their very helpful written and oral submissions.

END-USE RELIEF FOR CIVIL AIRCRAFT UNDER THE UCC: THE BASICS

11. At times material to these appeals, import duty was charged on goods imported into the EU under the Combined Nomenclature Regulation (EEC) No 2658/87. The conventional rate of duty for aircraft of unladen weight exceeding 15,000 kg was 2.7% (CN code 8802 40 00).

12. However, relief from customs duty was provided for civil aircraft at the relevant times subject to "conditions laid down in the relevant provisions of the EU with a view to customs control of the use of such goods (see Article 254)" – per articles 1 and 4, Part B, section II (Special Provisions), Part One of the Annex (Combine Nomenclature) to Council Regulation (EEC) No 2658/87. This relief – "end-use relief" – also extended to "certain goods for use in civil aircraft and for incorporation therein in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion" i.e. aircraft parts.

13. Under the end-use procedure, goods could be released for free circulation under a duty exemption (or a reduced rate of duty) on account of their specific use (Article 254.1).

14. Under Article 211.1, use of the end-use procedure required an authorisation from the customs authorities (the UK allowed simplified authorisation by declaration but only for goods of value not exceeding £500,000).

15. Article 211.3 set out four conditions to be satisfied by persons to whom authorisation was to be granted; one of these, at Article 211.3(b), was that "they provide the necessary assurance of the proper conduct of the operations". An authorised economic operator for customs simplifications was deemed to fulfil that condition "insofar as the activity pertaining to the special procedure concerned is taken into account in the authorisation referred to in point (a) of Article 38.2".

16. Article 211.2 provided that the customs authorities "shall grant an authorisation with retrospective effective, where all of the following conditions are fulfilled"; eight conditions followed.

THE FIRST APPEAL

The tribunal's jurisdiction in the first appeal

17. Section 16 Finance Act ("**FA**") 1994 is engaged here as follows

(1) HMRC's 10 July 2017 decision to refuse end-use authorisation was a relevant decision under s13A(2)(j) FA 1994, being of a description specified in Schedule 5 FA 1994 (paragraph 1(f): "any decision, in any particular case, as to whether or not the … use of any procedure is to be, or to continue to be, authorised …")

(2) HMRC were required to review the decision, per s15C FA 1994

(3) the appellant appealed within 30 days of the conclusion date

(4) the decision was a decision as to an ancillary matter as defined in s16(8) – hence, s16(4) is engaged.

18. Under section 16(4) FA 1994, the tribunal's task in the first appeal is to decide whether it is satisfied that HMRC could not reasonably have arrived at their decision not to authorise the appellant to use the end-use procedure, or their decision to uphold that decision on review. If it is so satisfied, the tribunal has certain powers including (most relevantly to this case)

(1) requiring HMRC to conduct, in accordance with the directions of the tribunal, a further review of the original decision of HMRC (to refuse authorisation) (s16(4)(b)); and

(2) (in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review) declaring the decision to have been unreasonable and giving directions to HMRC as to steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future (s16(4)(c)).

19. It is clear from the wording of s16(4) that both decisions by HMRC (the original decision to refuse authorisation, and the upholding of that decision on review), are subject to the tribunal's s16(4) jurisdiction. For convenience, I will refer to both decisions as "**HMRC's decision"**.

20. Rose LJ surveyed the case law on the tribunal's "supervisory jurisdiction" under s16(4) FA 1994 in *HMRC v Smart Price Midlands & anor* [2019] EWCA Civ 841 (an appeal against

HMRC's refusal to approve the taxpayer under a registration regime (the "**AWRS**") for wholesale suppliers of alcohol) at [17-20], as follows:

> [17] Although appeals against refusal of approval under the AWRS are a relatively new jurisdiction for the FTT, there are other statutory provisions which confer a supervisory jurisdiction upon the FTT, or its predecessor the VAT Tribunal, to review the reasonableness of HMRC decisions rather than conduct a full merits appeal of those decisions. The nature of the test to be applied by the FTT in such cases was described by the House of Lords in *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22 and was not in dispute here. The tribunal's supervisory power is to consider whether the appellant has shown that the commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. A similar test was applied in *Lindsay v Customs and Excise Comrs* [2002] 1 WLR 1766 in the context of a decision by the commissioners to seize a car that the appellant had been driving when he was found to be smuggling substantial quantities of cigarettes and tobacco through the Shuttle control zone at Calais. In upholding a decision that the forfeiture of the car was a disproportionate interference with the appellant's rights under the Human Rights Act 1998 to the peaceful enjoyment of his possessions, the Court of Appeal in *Lindsay* held that the commissioners had failed to have regard to all material considerations, namely that the imported items were for the use of family and friends and not for commercial purposes. HMRC also drew our attention to the decision of this court in *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941. That case concerned a requirement imposed by HMRC that the taxpayer company provide security as a condition of continuing to make VAT taxable supplies. Neill LJ, with whom Roch and Hutchison LJJ agreed, held that counsel for the taxpayer had rightly conceded that where it is shown that even if the additional material which had wrongly been discounted had been taken into account, the decision would inevitably have been the same, the tribunal can dismiss the appeal.
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> [18] The nature of the exercise carried out by the FTT in an appeal under section 16(4) of the Finance Act 1994 was considered further in *Gora v Customs and Excise Comrs* [2004] QB 93 ("***Gora***"). The appeals in *Gora* arose from the seizure of alcoholic liquor by customs officers who were not satisfied that duty had been paid correctly. The officers also seized the car in which the alcohol had been transported. One issue before the tribunal had been whether the jurisdiction and powers of the tribunal in hearing an appeal under section 16(4) against a refusal to restore the appellants' property were sufficient to satisfy the requirements of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the right to peaceful enjoyment of possessions conferred by article 1 of the First Protocol to the Convention. The perceived inadequacy of the tribunal's jurisdiction arose where the appellant challenged the factual findings on which the commissioners' decision to refuse to restore goods was based. The commissioners accepted in *Gora* that the tribunal's role would be to satisfy itself that the primary facts upon which the commissioners had based their decision were correct. The tribunal would not be limited to considering only whether there had been sufficient evidence to support the commissioners' findings. The tribunal would then go on to decide whether, in the light of its findings of fact, the decision was reasonable. Counsel for HMRC in *Gora* submitted that the commissioners would then conduct any further review they were directed to undertake in accordance with the findings of the tribunal. Pill LJ accepted that view of the jurisdiction of the tribunal: see para

> 39 of his judgment with which Chadwick and Longmore LJJ agreed. He held that in the light of the commissioners' acceptance that the tribunal would have that role, the tribunal's jurisdiction and powers did satisfy the requirements of article 6.
>
> [19] In the present appeals, although [counsel for the taxpayers] did not assert that the traders' human rights had been infringed by the refusal of approval under the AWRS, HMRC accepted that the *Gora* principle applied. Thus, the role of the FTT in these appeals will be to decide for itself any disputed primary facts on which HMRC's decision was based and then consider whether the refusal to grant approval was one which a reasonable officer could make on the basis of the facts as found.
>
> [20] More recently in *CC & C Ltd v Revenue and Customs Comrs* [2015] 1 WLR 4043, paras 15 and 16 Underhill LJ noted that the fact that the criterion for the tribunal's intervention is formulated in terms of unreasonableness "reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC". In his view, that is because decisions such as whether a registered owner remains a fit and proper person to trade in duty-suspended goods (being the particular scenario in issue in that case) are ones which HMRC:
>
> > "are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective—albeit evidence-based—assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities."
>
> He continued that "this careful calibration of the powers" of the tribunal under section 16(4) "plainly represents a deliberate balance between HMRC's need to take effective management decisions in relation to excise matters and the interests of those affected by such decisions."

21. In *Behzad Fuels Ltd v HMRC* [2019] EWCS Civ 319, Henderson LJ said (at [67]) that the "real reason" that the policy in force at the time of HMRC's original decision (rather than a later policy) should be applied on a further review by HMRC required by the tribunal under s16(4) was "the limited nature" of the s16(4) jurisdiction, "and the general principle that when a decision is reviewed, the review should be conducted by reference to the facts as they existed, and the law as it stood, at the date of the original decision. That is the critical distinction between the review of a previous decision, on the one hand, and the taking of an entirely fresh decision, on the other hand."

22. It was agreed between the parties in this case that the tribunal must carry out a fact-finding exercise to determine the primary facts. The tribunal's fact-finding jurisdiction includes any facts which were in existence at the time of the relevant decision, whether they were known to the decision maker or not.

23. Under section 16(6) FA 1994, the burden of proof in the appeals is on the appellant.

24. The standard of proof is the ordinary civil standard, being the balance of probabilities.

The appellant's 2017 application for end-use authorisation and its refusal - findings

25. On 4 April 2017 the appellant made an application for authorisation to operate the end-use procedure. The application was presented as a renewal of an existing authorisation, to have effect for five years: from 6 March 2015 i.e. the date on which the appellant's last end-use authorisation had expired, to 5 March 2020. The goods to be covered were civil aircraft and goods for use in civil aircraft. Their use was describe as "maintenance and operation of civil aircraft". In answer to the question "Where will the goods be used?", the completed form stated:

"Intra EU, Trans Continental (EU-USA & EU-BAH)". In the box under the instruction "Enter details of the type of accounts", the completed form stated: "Stock recording takes place in TRAX and accounting systems is JD Edwards".

26. I find, in response to agreed issue 2a, that the application was for grant of an authorisation to use the end-use procedure with retrospective effect.

27. On 11 April 2017 HMRC (Officer Graney) wrote to the appellant informing it of their intention to refuse the application (and giving reasons) but giving the appellant the opportunity to submit additional information. The letter

(1) referred to Article 211.3(b) which, it said, "essentially" meant that authorised persons "must have a good history of compliance";

(2) referred, in relation to the appellant's "compliance history", to

(a) the customs debt of £154,280.91 referred to in agreed fact 25 (the **"£154k customs debt**")

(b) the customs debt of £2,269.72 referred to in agreed fact 28 (the **"£2k customs debt**")

(c) the appellant's importation of the seven aircraft "under the Air Worthiness Certificate Scheme … despite having been instructed by HMRC, on 21 May 2015, that the Air Worthiness Scheme did not cover Civil Aircraft, but only parts thereof"; and

(3) then commented that "the debts and in particular the entry of goods contrary to Customs explicit instructions, as described above, constitute evidence of poor compliance with Customs requirements and the applicable legislation and therefore, applying the current legislation, [the appellant does] not qualify for authorisation to operate End Use at this time".

28. On 5 May 2017 the appellant wrote to HMRC in response to that letter. The appellant's letter said this under the heading "Assurance of the proper conduct of operations":

> We appreciate that for our End Use authorisation to be granted it is necessary for [the appellant] to provide HMRC with assurance that the operation of End Use will be carried out correctly.
>
> As you have raised concerns about the adequacy of our systems, we are happy to agree with you an enhanced compliance process to ensure that we meet any necessary requirements to the satisfaction of HMRC (including a process above and beyond our existing systems, should you require us to do so). To this end, we make a proposal below which we suggest should give HMRC sufficient assurance.
>
> Our proposal is that [the appellant] will limit the use of End Use for a period of 12 months to aircraft only (i.e. [the appellant] will not operate End Use in respect of aircraft parts). We will also not rely on the End Use authorisation to cover any imports of aircraft parts covering the retroactive period.
>
> We consider that this should provide HMRC with sufficient assurance of the proper conduct of the operations for the purposes of Article 211.3(b), particularly on the basis that
>
> - the discharge procedure for aircraft, compared to aircraft 'parts', is significantly loss complex;
> - imports of aircraft by [the appellant] in any 12 month period is likely to amount to no more than six entries; and

- the time between import and discharge is a matter of days as opposed to months for aircraft.

As stated above, the discharge requirements for aircraft require significantly less tracking, inventory management and evidence of discharge compared to aircraft parts. In order to discharge aircraft imported to End Use, it is necessary to simply apply the aircraft to the prescribed use which can be evidenced by production of the registration certificate of that aircraft in the appropriate public records.

[The appellant] would be happy to provide HMRC with a full audit trail for each aircraft including evidence of registration for all aircraft for which it intends to rely of End Use.

We consider that HMRC should consider the above proposal in light of the fact that prior to the issue referred to in your letter, [the appellant] had been operating End Use without incident going back to 2002. During this time the various systems and operations in place were subject to numerous HMRC audits without issue.

In terms of the period in question which has given you cause for concern, we would like to point out that we did take *reasonable care* over attempting to ensure that HMRC's conditions concerning End Use were properly observed. We took advice from two experienced agents who directed us that the aircraft could be imported under simplification and entered them accordingly (admittedly incorrectly). We also took advice from a DHL operator in another Member State who regularly imported aircraft who advised us that the aircraft could be imported under simplified procedures. Unknown to us that Member States authority did not operate a value threshold for aircraft and so we believed that the simplification route advised by our agents was the correct one particularly in the light of the introduction of the new UCC and the withdrawal of the End Use Public Notice. Indeed when we sought clarification around the conditions one of your colleagues mentioned that 'HMRC were still trying to get to terms with the new procedures'.

I think it would be fair to say that the issue was NOT that the aircraft were not entered to End Use - they were, but that the wrong procedure and commodity codes were used by our agents thus demonstrating there was no intent to avoid End Use controls per se.

It is of concern that the UK appears to demand a more onerous level of control over aircraft imports than some other Member States but we recognise that that is a separate issue.

You might also appreciate that it was Chris Dolan (our Senior Indirect Tax Manager and Single Point of Contact with HMRC) who actually discovered the errors in interpretation and drew this to our attention and voluntarily disclosed this to HMRC, which I trust demonstrates that we have been proactive and have a diligent approach to Customs compliance.

We would also like you to note that Chris Dolan will provide supervision and support to [the appellant] during the proposed l2 month period. Chris Dolan will also be supported by Hannah Cooper (DHL-Indirect Tax Manager) who will also provide assistance to the business in respect of this matter.

29. In the letter of 10 July 2017 refusing the application, HMRC

(1) referred to Article 211.3(b) and said that it "links holding a special procedure authorisation to the requirements expected of an AEO [authorised economic operator]. When we look at these (Articles 38 and 39) this shows us that the applicant must not only

be capable of meeting the assurance of proper conduct going forward, but must have a good history of compliance with Customs matters";

(2) referred to the £154k and £2k customs debts, and the import of the seven aircraft, in very similar manner to HMRC's letter of 11 April 2017;

(3) commented that "whilst [the appellant] may be able to show the ability to comply with some of the requirements of authorisation for a Special Procedure, the debts and in particular the entry of goods contrary to Customs explicit instructions, as described above, constitute evidence of poor compliance with Customs requirements and the applicable legislation and therefore [the appellant does] not qualify for authorisation to operate End Use at this time."

30. In its letter of 24 July 2017 accepting HMRC's offer of a review of their decision to refuse the application, the appellant

(1) expressed disappointment that HMRC's decision letter was materially the same as their letter of 11 April 2017 and made no reference to the appellant's proposal "to limit End Use to aircraft only for a period of 12 months" in order to alleviate HMRCs concerns regarding proper conduct;

(2) expressed surprise at HMRC's view that any action had been taken in respect of the importation of the seven aircraft against HMRC's explicit instruction;

(3) advanced other arguments as to why HMRC's decision was incorrect.

31. HMRC's letter dated 30 November 2017, notifying the conclusion of the review, included the following:

(1) it said that from 2002 until 2015 [the appellant] held an authorisation to operate end-use for aircraft and aircraft parts. The previous authorisation had lapsed and though an application was made to renew this in 2015 it was not pursued; and the new retroactive application was made for both civil aircraft arid civil aircraft parts;

(2) it summarised the appellant's 5 May 2017 letter, saying that it detailed the appellant's proposals for how it might conduct its business in a manner such that would satisfy HMRC that the appellant could work with them to properly discharge the requirements under an end-use authorisation. It noted that the appellant "proposed limiting the authorisation to a period of 12 months only to cover solely aircraft, leaving aircraft parts out of the equation";

(3) it summarised the appellant's 24 July 2017 letter;

(4) it stated that HMRC considered that the entire premise of Article 211 was that the applicant must have good compliance in the area in which they are applying for an authorisation; and that, effectively, Article 211.3(b) links holding a special procedure authorisation with AEO – and Articles 38 and 39 pertaining to AEO clearly show a link to compliance history;

(5) it stated that the appellant's 5 May 2017 letter appeared to concede that HMRC had cause to raise concerns about the adequacy of the appellant's systems – which was put forward as a reason for making the proposals in regard to limitations for the authorisation;

(6) addressing points made by the appellant about changes made to the end-use procedure, HMRC did not believe the procedures had changed that much, in that the procedure used by the appellant on importation of the seven aircraft would have been incorrect at any time;

(7) it noted that the appellant (Nick Hill, its logistics manager) had been "instructed" by HMRC (Officer Graney) as early as 21 May 2015 (by email) that entire aircraft do not carry Air Worthiness Certificates but Certificates of Airworthiness and that these are different. It was fully explained that entire aircraft cannot be imported using the Air Worthiness Scheme and Officer Graney also set out where guidance could be found from more than one source;

(8) it said that in addition to the reasons already given for refusal, there was another point which ought to be made: according to the letter, Article 211.2(e) "states that an applicant should not have made any late or retrospective applications in the past." HMRC noted that the appellant had made both late and by default, late applications for retrospection.

The appellant's "proposal" to HMRC – findings

32. I find that the appellant's "proposal" to HMRC was, in substance, a suggestion to incorporate into the authorisation a condition that the appellant would not use the end-use procedure for aircraft parts (as opposed to aircraft)

(1) for a period of 12 months starting from date of grant of authorisation by HMRC, and

(2) for the retroactive period of the authorisation i.e. from 5 March 2015 to date of grant of authorisation by HMRC.

The proposal was not, therefore, a "new" application.

33. Given that the application was for authorisation for a 5-year period starting on 6 March 2015, I find that the appellant's proposal indicated that authorisation *would* permit use the end-use procedure in respect of parts in the period from the end of the 12-month period to the end of the authorisation. This is reasonably clear from the language of the appellant's 5 May 2017 letter: "Our proposal is that [the appellant] will limit the use of End Use *for* a period of 12 months *to* aircraft only (i.e. [the appellant] will not operate End Use in respect of aircraft parts)". As the words I have italicised show, the limitation was not "to" 12 months, but "for" 12 months. To the extent that HMRC's review conclusion letter of 30 November 2017 thought otherwise – see [31(2)] above, second sentence – this was a misunderstanding of the appellant's proposal on the part of that HMRC official.

34. I find that the proposal as just described was the only proposal made by the appellant to HMRC with any degree of specificity – I do not regard other statements as rising to the level of identifiable proposals. I find this based on the appellant's letter of 5 May 2017: the letter stated that the appellant was "happy to agree with [HMRC] an enhanced compliance process .." etc, but the next sentence began "To this end" and described the proposal above, which it suggested "should give HMRC sufficient assurance". No other "enhanced compliance process" was described.

HMRC's decision – findings as to what it did, and did not, take into account

35. I find as follows:

(1) HMRC's decision focused on whether the appellant satisfied the requirement of providing the necessary assurance of the proper conduct of the operations (per Article 211.3(b));

(2) HMRC's decision regarded having a good history of compliance with customs matters as a prerequisite for satisfying Article 211.3(b) and, as a result (because HMRC's decision was of the view that the appellant did not have a good compliance history)

HMRC's decision did not, in substance, take into account the appellant's proposal (per [32-34] above);

(3) the reason HMRC's decision regarded having a good history of compliance as a prerequisite to meeting the condition in Article 211.3(b) is that they thought, due to the deeming provision following the semi-colon in Article 211.3(b), the criteria for the granting of the status of AEO (referred to in Article 38 and set out in Article 39) were somehow incorporated into Article 211.3(b). I find this to be a mistaken reading of Article 211.3(b): the fact the persons who meet certain criteria are deemed to fulfil condition X, does not make it a prerequisite for anyone wishing to meet condition X, that they also meet those criteria;

(4) HMRC's decision regarded the fact that the appellant had previously applied for retrospective clearance as meaning that one of the conditions for granting authorisation with retroactive effect, that in Article 211.2(e), was not satisfied;

(5) HMRC's decision took into account the following ,which it considered to constitute evidence of poor compliance with customs legislation:

(a) the appellant's importation of the seven aircraft using an incorrect customs procedure code; and

(b) the appellant's having incurred the £154k and £2k customs debts;

(6) HMRC's decision took into account that HMRC had "instructed" the appellant, by email of 21 May 2015, that the "Air Worthiness Scheme" did not cover aircraft, but only aircraft parts. I find that "Air Worthiness Scheme" here refers to the tariff suspension. I find that the relevant part of the email of 21 May 2015 read: "Please also bear in mind that the Airworthiness Certificate scheme cannot be used to import entire aircraft. See art 1 of the regulation. Entire aircraft do not carry Airworthiness Certificates, they carry Certificates of Airworthiness, which are different";

(7) HMRC's decision did not come up with its own suggestions as to conditions to be incorporated into an authorisation so as to provide the "necessary assurance" per Article 211.3(b).

Article 211 – legal issues as to its construction

36. The appellant advanced the argument that the retrospective element of the appellant's application for end-use authorisation was governed by Article 211.2 only – and so not by Article 211.3. This was because, in essence, Article 211.2 states that the customs authorities *shall* grant an authorisation with retrospective effect, when certain conditions are fulfilled. In the appellant's submission, a "wholly retroactive" authorisation would not be subject to Article 211.3 at all.

37. The appellant also advanced the argument that the condition in Article 211.3(b), that the applicant provide the necessary assurance of the proper conduct of the operations, is "prospective" only, in the sense that only assurances as to future conduct of the operations are relevant (and not the applicant's record of past conduct of operations). In the alternative, the appellant argued that, if compliance history is to be taken into account, it can only be compliance history in the same area of customs procedure as that for which authorisation was sought i.e. in this case, it would be limited to compliance history as to the end-use procedure; and, even more narrowly, compliance history as to the end-use procedure as regards aircraft (and not aircraft parts), given the proposal by the appellant in its letter of 5 May 2017.

38. The appellant further argued that, because the assurance "necessary" depends on the type of special procedure and the type of goods covered by the particular authorisation and

accordingly the particular prescribed use, no assurance could be necessary for any aircraft registered with the Civil Aviation Authority (as such registration comprised completion of end-use).

39. I now set out my approach to these points, based on reading the relevant UCC provisions in context and in line with their evident purpose. I have not been assisted by arguments of the appellant based on legal provisions that predate or postdate the UCC provisions in question (respectively, the CCC and the amendments removing the end-use conditions for certain civil aircraft from 1 January 2018) and so not in force at the relevant times. In this regard, I note that although recital (1) to the UCC refers to itself as the CCC "recast", it also states that this was as a result of a number of *amendments* having to be made to the CCC.

Article 211 and authorisations with retroactive effect

40. Article 211.1 sets down the requirement for "an authorisation" from the customs authorities for use of (amongst other things) the end-use procedure. Article 211.2 sets out conditions for granting "an authorisation" with retrospective effect – as was requested in the appellant's 2017 application in this case. It is not in dispute in this case that the conditions in Article 211.2 were satisfied.

41. The natural reading of these provisions is that Article 211.2 describes a subset of the situations governed by Article 211.1: in the normal course of events, one would expect authorisation to take effect when received by the applicant – that is the effect of Article 22.4; "retroactive" effect means effect prior to that time; the conditions for that are described in Article 211.2; and article 172 DA governs how far back the retroactive effect can go.

42. Thus, the use of the word "shall" in Article 211.2 does not indicate a "retroactive" authorisation distinct from the "non-retroactive" authorisation referred to in Article 211.1, such that no other provisions related to the grant of Article 211.1 authorisation (like Article 211.3, governing the persons to whom the authorisation may be granted) are relevant. Rather, the force of the word "shall" is in saying that, if the conditions in 211.2 are fulfilled, "an authorisation" (i.e. the same phrase as used in Article 211.1) shall, unusually, be granted with retroactive effect.

43. I am fortified in this approach by the decision of the Court of Justice of the European Community (the "**European court**") (made after 31 December 2020, and so a decision to which the tribunal *may* have regard) in Case C-825/19 *Beeren v Hauptzollamt Erfurt* (21 October 2021) at [32]: "Article 211.2(a) to (h) … lists exhaustively the conditions for the issue of an authorisation with retroactive effect required, under paragraph 1 of that article, for recourse to, inter alia, the end-use scheme." This clearly equates the "authorisation" in Article 211.2 with that in Article 211.1.

44. The idea of chopping up an authorisation into its retroactive versus prospectus elements, and applying 211.3 (as regards the persons authorised) to the latter part (only), and Article 211.2 to the former part (only), is inconsistent with the approach outlined above. The correct approach, in my view, is that there is a single authorisation: Article 211.3 governs the conditions to be satisfied by the person to which it is granted; Article 211.2 governs whether (or not) it shall be granted with retroactive effect.

45. The idea of granting an authorisation *only* with retroactive effect does not fit comfortably with this regime. This is underlined by Article 172.1 DA, which provides that, absent exceptional circumstances or the renewal of certain expired authorisations, the "normal" extent of retroactivity is up to the date of receipt of the applicant's application i.e. a relatively limited degree of retroaction. However, in this case, the question of whether Article 172.3 would apply

to an authorisation *only* with retroactive effect is academic, as the appellant did not seek such an authorisation.

46. In sum:

(1) the authorisation referred to in Article 211.1 is mandatory – the authorisation referred to in Article 211.2 is not an alternative to the authorisation referred to in Article 211.1. The latter simply describes supplementary conditions, where that authorisation is granted with retrospective effect; and

(2) the conditions set out in Article 211.3 as to the persons to whom authorisation may be granted are also mandatory, subject to it being "otherwise provided". (Article 211.2 is not a case of it being "otherwise provided" – there is nothing in 211.2 to suggest this and, moreover, 211.2 does not purport to govern the same matter as 211.3 i.e. the *persons* to whom authorisation shall be granted).

The meaning of "the necessary assurance of the proper conduct of the operations"

47. Assurance of the proper conduct of operations means anything provided by the applicant that is reasonably capable of giving (in this case) HMRC confidence that the "operations" (here, the end-use procedure as regards civil aircraft and civil aircraft parts) will be conducted "properly" (from the perspective of the customs legislation) for the term of the authorisation. I thus broadly agree with the appellant that

(1) the primary focus is on the proper conduct of the operations, *looking forward from the date of the application*,

(2) "the operations" means operations connected with the end-use procedure for which authorisation is sought (and that would extend to all aspects of the procedure, including, for example, record-keeping under Article 214), and

(3) there is a correlation between what assurance is *necessary* and what is involved in those *operations*.

48. But I differ from the appellant as follows:

(1) the necessary assurance of the proper conduct of the operations can be provided in whatever manner is relevant in the circumstances: in this case, where the applicant has been operating customs procedures for some time, assurance *can* be provided by the strength of its past record of customs compliance. A strong record would reasonably be seen as indicating systems and controls within the business operations that support proper conduct of the operations going forward;

(2) whilst such assurance can *also* be provided in the form of promises of future conduct and conditions incorporated into any authorisation given (the tailpiece to Article 211.1 expressly envisages conditions to the permission to use the procedure in question being set out in an authorisation), the applicant's past record, in the areas of customs procedures as well as in other areas of compliance, *can* be relevant to the assessment of whether or not such promises or conditions provide the *necessary* assurance. That assessment is a matter for the administrative discretion of HMRC as the body managing the customs system, subject to the supervisory jurisdiction of the tribunal. Clearly, though, a poor past record of compliance, in the area of customs or indeed in another area of compliance, *can* be a relevant circumstance to take into account (and HMRC will have to make a reasonable judgement as to whether promises of better future conduct by an applicant with a poor compliance record provide the necessary assurance); and

(3) the overall assessment of what assurance is *necessary* for proper conduct of the operations in question is, as above, a matter for HMRC's administrative discretion, subject to the supervisory jurisdiction of the tribunal.

49. I have found above that the appellant's proposal included the possibility of its using the end-use procedure for aircraft parts for a period of time (see [32-34] above). I therefore do not accept the appellant's argument that "the operations" here should be construed as limited to operations relevant to use of the end-use procedure *for aircraft only*.

Was HMRC's decision "unreasonable" (in s16(4) terms) by reason of misconstruing Article 211?

50. Based on the legal analysis immediately above, I am in a position to make findings as to whether HMRC's decision was "unreasonable" (in s16(4) FA 1994 terms) by reason of misconstruing Article 211:

(1) It follows from my construction of Article 211 that HMRC's decision, in not substantively taking into account the appellant's proposal (as I have construed it at [32-34] above), failed to take into account a relevant matter. This is because the proposal, if incorporated as a condition in an authorisation, *might have* provided the necessary assurance etc (whether it *would have* provided this I, as the tribunal, cannot say – this is a matter for HMRC's administrative discretion). Moreover, it cannot be said in the circumstances of this case that HMRC's decision would inevitably have been the same, had they taken the appellant's proposal (as I have construed it) into account – it is genuinely unclear what HMRC would have decided had they engaged substantively with the appellant's proposal and considered whether it provided the necessary assurance etc.

(2) HMRC were wrong to regard the condition in Article 211.2(e) as not satisfied on the facts of this case: the condition is that "no authorisation with retroactive effect has been *granted* to the applicant within three years of the date on which the application was accepted" (emphasis added) – I find that the last time an authorisation with retroactive effect was granted to the appellant was in January 2008 (agreed fact 3), and so this condition was bound to be satisfied. HMRC's decision thus took an irrelevant matter into account in considering that one of the conditions for authorisation with retroactive effect was not satisfied. However, in the circumstances of this case I find that HMRC would inevitably have made the same decision, even if they had left this irrelevant matter out of account: it is clear from the circumstances that HMRC regarded the "poor compliance history" point, and Article 211.3(b), as the predominant reason for their decision; their point about Article 211.2(e) was, in effect, an after-thought.

(3) As regards the items at [35(5-6)] above (compliance history), I find, based on my construction of Article 211, that these *were* potentially relevant matters. I consider below the appellant's argument, in the alternative, that even if these matters were relevant, they were not, in context, evidence of poor compliance.

(4) As regards item [35(7] – the fact that HMRC's decision did not come up with its own additional conditions so as to enable grant of authorisation to the appellant – I find that there was no legal obligation on HMRC to do this; neither did it comprise the leaving out of account of any relevant matter. I explain below at [83-86] why this did not render HMRC's decision "disproportionate". It is therefore a point that is outwith the jurisdiction of this tribunal.

The appellant's "poor compliance": further fact-finding to provide context

51. I now make findings about the "evidence of poor compliance" taken into account in HMRC's decision (see [35(5-6)] above), so as to enable me to come to a view as to whether HMRC's decision was unreasonable (in the s16(4) FA 1994 sense) in taking these into account.

The use of the wrong customs procedure code on importation of the seven aircraft

52. The appellant argued that its use of the wrong customs procedure code on the importation of the seven aircraft was

(1) understandable given confusion (including on the part of HMRC) about the operation of the tariff suspension; and

(2) not the fault of the appellant, as it engaged agents to deal with customs matters on its behalf.

53. I find as follows:

(1) The customs declarations for these imports were handled by two customs agents:

(a) DHL Global Forwarding, a sister company of the appellant, in respect of the first, second, fourth, fifth, sixth and seventh of the aircraft that were imported (all imported at East Midlands Airport on, respectively, 14 June, 29 July, 21 October, 11 November and 30 November 2016 and 21 February 2017), and

(b) Regional Freight Services Limited, an unrelated company, in respect of the third aircraft imported (imported at Norwich Airport on 6 October 2016).

Both agents acted in the name of and on behalf of the appellant. They had authorised economic operator status for customs purposes.

(2) the customs value of each of the aircraft ranged from about £13 million to £20 million.

(3) the customs declarations put customs procedure code 40 00 001 in box 37 of the form, which is for "Procedure". This customs procedure code is for aircraft parts. It is the customs procedure code for the tariff suspension procedure.

(4) the customs declarations put "140" in box 36 ("Preference"). This is the code for "Special end-use resulting from the Common Customs Tariff". This was inconsistent with the procedure in box 37 – but also incorrect as the appellant did not have end-use authorisation.

(5) overall, the customs aspects of the imports were managed for the appellant by the appellant's logistics manager, Mr Hill, and his staff (who instructed, and were in regular direct communication with, the customs agents); as logistics manager, Mr Hill was responsible for the importation of aircraft (and aircraft parts) as and when required.

(6) both the appellant as a corporate entity, and Mr Hill individually, knew

(a) that the appellant did not have end-use authorisation at the time; and

(b) that the tariff suspension procedure could not be used for aircraft (as opposed to aircraft parts). I make this finding based on Mr Hill's oral evidence in line with documentary evidence including

(i) Mr Dolan's email to HMRC of 8 March 2017 (saying that the appellant had decided to use tariff suspension for aircraft parts but that "we (the Tax Department)" had advised the appellant of the need for end-use authorisation for aircraft proper); and

(ii) the 21 May 2015 email from Officer Graney to Mr Hill, referring him to HMRC guidance on tariff suspension and saying:

> Please also bear in mind that the Airworthiness Certificate scheme cannot be used to import entire aircraft. See Art 1 of the regulation. Entire aircraft do not carry Airworthiness Certificates, they carry Certificates of Airworthiness, which are different.

(7) Mr Hill made it clear to both customs agents that the appellant did not have end-use authorisation at the time;

(8) Mr Dolan was director of indirect taxes UK & Ireland for the group of which the appellant was part. He acted as the single point of contact with HMRC on strategic issues which impacted on the group's customs and other indirect tax matters. Part of his role included advising and supporting group companies – including the appellant – on indirect tax matters and when a tax/legal issue in this area was brought to his attention either by HMRC or a group company. From July 2015, he had been closely involved in the appellant's dealings with HMRC relating to end-use relief in the 2012-2015 period, culminating in the raising of the £154k customs debt (detailed facts about which are found in Appendix 2);

(9) without consulting or informing Mr Dolan, Mr Hill engaged the two customs agents to handle the importations *on the understanding that no customs duty came due*; I make this italicised finding based on Mr Hill's oral evidence in cross examination (which was that the understanding was specifically that the tariff suspension procedure would be used), in line with the following (more contemporaneous) documentary evidence:

(a) the email of 8 March 2017 to HMRC from Mr Dolan (who by then *had* been informed of the customs declarations made on the appellant's importations) stating that DHL Global Forwarding had "interpreted the relief as allowing simplification without authorisation providing that a certificate of airworthiness is held together with a certificate of registration and 6 aircraft have been imported to date in that manner", together with

(b) the letter of 5 May 2017 from the appellant to HMRC saying that advice was taken from the agents "who directed us that the aircraft could be imported under simplification and entered them accordingly (admittedly incorrectly)";

The italicised finding is also supported by the fact that, in the weeks and months between the importations of each of the aircraft, no questions were asked or surprise expressed by the appellant as to why no customs duty came due on the importation or importations that had already taken place.

(10) Mr Dolan informed HMRC of the incorrect customs declarations in his 8 March 2017 email (i.e. just over two weeks after the importation of the last of the seven aircraft).

54. Mr Hill's witness statement said that "[the appellant] relied on the expertise and experience of both customs brokers to determine the appropriate customs procedure code and to comply with all customs formalities". I find this disingenuous in the light of the findings immediately above: a reasonable person in the appellant's position at the time of the importations would

(1) have informed, and taken advice from, Mr Dolan (given his deep involvement, expertise and experience) prior to making any of these importations, and

(2) not have permitted its agent to make the importations using the customs procedure code for the tariff suspension, given the appellant's knowledge that the tariff suspension did not apply to aircraft.

55. As regards the appellant's allegations of "confusion", I find as follows (with allegedly confusing terminology italicised):

(1) the tariff suspension read as follows (articles 1 and 2.1):

> *Article 1*
>
> The autonomous Common Customs Tariff duties shall be suspended for parts, components and other goods of a kind to be incorporated in or used for civil aircraft and falling within Chapters 25 to 97 of the Common Customs Tariff and in respect of which an *airworthiness certificate* has been issued by a party authorised by aviation authorities within the Community or in a third country.
>
> *Article 2*
>
> 1. The suspension laid down in Article 1 shall be conditional on submission of the original *airworthiness certificate* to the customs authorities when the goods are declared for release into free circulation.
>
> Where the original *airworthiness certificate* cannot be submitted at the time when the goods are released for free circulation, suspension shall be conditional on the inclusion of a declaration, signed by the seller of the goods in question, on the commercial invoice or a document annexed thereto. A model of the required declaration is set out in Section A of the Annex.

(2) HMRC Notice 770 (as at 25 February 2016) said this at 8.9 (under heading, "Goods imported with *airworthiness certificates* Council Regulation 1147/2002"):

> Parts, components and other goods used for the manufacture, repair, maintenance, rebuilding or modification of aircraft to be imported free of duty provided they are imported with a *certificate of airworthiness* issued by a civil aviation authority.

(3) HMRC Notice 3001 ("Customs special procedures for the UCC") at Annex C (updated 6 December 2016) said this in the section on end-use at paragraph 4.7 (special procedures for aircraft and aircraft parts):

> As with other EnU [end-use] Reliefs the person using relief for aircraft and aircraft parts must be established in the EU. If you cannot fulfil this criterion you may wish to look at *airworthiness certificates*.

(4) CPC 40 00 001 and 002 (codes for various "parts") said this at 9.1 (as part of "notes"):

> Only goods/parts which hold an *airworthiness certificate* identified in the Tariff as eligible for end use relief may be entered to this CPC

(5) As I have found above, there was no confusion on the part of Mr Dolan or Mr Hill as to the non-applicability of the tariff suspension to aircraft (notwithstanding any possible confusion arising from the extracts above). As for the two customs agents, there was no direct evidence before the tribunal as to confusion on their part about the operation of the tariff suspension caused by the italicised terminology above; however, DHL Global Forwarding (in relation to six of the importations, including the first two) could have contacted Mr Dolan for clarification if it had wished to do so.

The £154k and £2k customs debts

56. The appellant argued that HMRC's decision was flawed in taking the £154k and £2k customs debts into account but omitting to take into account the evidence that (as stated in a letter from DHL's UK head of tax to HMRC dated 17 February 2017) the appellant's decision to withdraw its appeal against the £154k customs debt (much the larger of the two) was made very reluctantly as it remained of the view that its technical position was correct; it did not, however, consider the costs and time involved in continuing the appeal were justified given the amount at stake.

57. The parties were in agreement that, notwithstanding that the two customs debts were legal debts due, it was within the tribunal's jurisdiction to make findings as to whether, on the facts as found by the tribunal and the law at relevant times, the two customs debts were validly raised.

58. Unless otherwise indicated, the findings that follow are based on the facts found and evidence cited in Appendix 2, which has more detailed evidence and fact-finding in relation to the appellant's 2015 application for end-use authorisation and the ensuing dispute with HMRC (as well as on the agreed facts).

The £154k customs debt

59. I find as follows as regards the £154k customs debt:

(1) it was in respect of the import of approximately 1,660 aircraft parts by the appellant between 9 September 2012 and 6 March 2015. The appellant had treated the imported parts as falling within its 2010-15 end-use authorisation.

(2) it was raised

(a) as a result of enquiries made by HMRC upon the appellant's 30 March 2015 application for renewal of its 2010-15 end-use authorisation;

(b) on the basis that those imports fell outwith the appellant's 2010-15 end-use authorisation on one or both of the following grounds:

(i) the appellant had not used the aircraft part in question for maintenance of an aircraft at East Midlands Airport, but had, rather, moved the part from East Midlands Airport to Leipzig in Germany or to another site in the EU or in the UK (ostensibly for it to be put into use there) – and that this took the imported aircraft part outside the scope of the appellant's 2010-15 end-use authorisation;

(ii) the appellant had not provided records in respect of the part showing, to HMRC's satisfaction, that the part had been used for maintenance of an aircraft at East Midlands Airport;

(c) under CCC articles 203.1 ("a customs debt on importation shall be incurred through … the unlawful removal from customs supervision of goods liable to import duties") and/or 204.1 (which stated:

> A customs debt on importation shall be incurred through:
>
> (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from … the use of the customs procedure under which they are placed, or
>
> (b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

> in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the … customs procedure in question); and

(3) an appeal to the tribunal against it by the appellant was withdrawn about 11 months after the appeal was notified.

60. The appellant's case in the present appeal was that, even if, contrary to its primary arguments, past customs compliance *was* a relevant matter to be taken into account in HMRC's decision, the £154k customs debt was nonetheless not a relevant matter in that regard because:

(1) contrary to the first basis on which it was raised, the movements of aircraft parts from East Midland Airport, prior to their use in maintenance of aircraft, to other sites in the EU or in the UK by the appellant in the 2012-2015 period, *did not* take those parts outwith the appellant's 2010-15 end-use authorisation; and

(2) as to the second basis on which it was raised, it was wrong and/or unreasonable of HMRC not to have accepted the appellant's records as adequate to show that the aircraft parts had been put to the end-use required in the appellant's 2010-15 end-use authorisation.

Findings in relation to the first basis on which the £154k customs debt was raised (appellant's moving of imported aircraft parts from East Midlands Airport in the 2012-2015 period)

61. The commercial background to the appellant's practice of moving some imported aircraft parts from East Midland Airport prior to their use in maintenance, is as follows (unless otherwise indicated, these facts apply to the 2012-2015 period (in respect of which the £154k customs debt was raised), and also to times after 6 March 2015 relevant to this appeal):

(1) the appellant's main base was at East Midlands Airport. Its fleet, as at August 2015, consisted of 22 Boeing 757 aircraft and four Boeing 767 aircraft which were operated by the appellant on intercontinental routes (transatlantic and to Bahrain and Lagos). The four Boeing 767 aircraft were operated directly by the appellant. The 22 Boeing 757 aircraft were leased to European Air Transport GmbH ("**EAT**"), a sister company, under a "wet lease" arrangement i.e. the appellant provided aircraft, crew, maintenance and insurance;

(2) the appellant's aircraft needed regular maintenance and this involved the fitting of replacement aircraft parts as and when required, either because existing parts were faulty or because they needed to be swapped out for independent maintenance. As a result, the appellant regularly needed to import aircraft parts from outside the EU;

(3) the appellant arranged fitting of the imported aircraft parts where it was practical and necessary to do so. This could be at either East Midlands Airport or at other sites within the EU (e.g. Leipzig);

(4) parts were moved from East Midlands Airport for either planned maintenance or as needed in "aircraft on ground" (due to faulty part) situations.

62. I find as follows as regards the appellant's 2010-15 end-use authorisation (following the terms of the appellant's 2008-10 end-use authorisation, of which it was a renewal):

(1) it authorised the import of civil aircraft and parts for civil aircraft;

(2) it required that processing operations (i.e. maintenance and operation of company civil aircraft (freighter aircraft) – which was also the prescribed end-use) be carried out "at premises stated in box 1(b) of the [application form for end-use relief]";

(3) item 1(b), which called for "processors name and address" was left blank in the form as completed by the appellant; item 1(b) was immediately under, and in the same

rectangular box as, item 1(a). which called for "applicant's name and address (including postcode)" and had been completed with the appellant's East Midlands Airport address;

(4) it required that the goods received under the authorisation (i.e. civil aircraft and parts for civil aircraft) be put to the prescribed end-use (i.e. maintenance and operation of company civil aircraft (freighter aircraft)) within the period specified on box 12 of the application form. This (as completed by the appellant) said: "date of delivery to up to 12 months from removal from bonded warehouse for parts". The authorisation also stated that end-use was completed when the goods had been used for the prescribed end-use purpose;

(5) it was not a "single" authorisation i.e. it did not involve customs administrations in more than one member state.

63. Relevant customs law included:

(1) CCC article 82.1, which stated:

> Where goods are released for free circulation at a reduced or zero rate of duty on account of their end-use, they shall remain under customs supervision. Customs supervision shall end when the conditions laid down for granting such a reduced or zero rate of duty cease to apply, where the goods are exported or destroyed or where the use of the goods for purposes other than those laid down for the application of the reduced or zero rate of duty is permitted subject to payment of the duties due;

(2) CCC IP article 293.3(f), which required that end-use authorisation include "the places where the goods have to be assigned to the prescribed end-use", unless such information is "deemed unnecessary";

(3) CCC IP article 300.1, which stated:

> The goods referred to in Article 291.1 [i.e. goods eligible to end-use relief subject to end-use customs supervision] shall remain under customs supervision and liable to import duties until they are:
>
> (a) first assigned to the prescribed end-use;
>
> (b) exported, destroyed or used otherwise in accordance with Articles [not relevant here].
>
> …

(4) CCC IP article 297 had a procedure in respect of transfer of materials for maintenance or repair of aircraft; but this was not followed on the facts of this case;

(5) the UCC had not come into force and so was not relevant customs law during the 2012-2015 period: as noted above, whilst recital (1) to the UCC refers to itself as the CCC "recast", it also states that this was as a result of a number of amendments having to be made to the CCC.

64. The appellant's skeleton argument for this appeal said the appellant's moving of imported aircraft parts from East Midlands Airport "may well have been" lawful. It said that the appellant's case is consistent with Case C-248/07 *Trespa International BV v Nova Haven- en Vervoerbedrijf NV* (6 November 2008); and "some support" can be found in that case for the appellant's position. The skeleton said: "Even if there was a breach, the behaviour was honestly believed to be lawful and the breach was a technical error".

65. I find that the appellant's 2010-15 end-use authorisation was restricted to the maintenance and operation of civil aircraft and civil aircraft parts *at East Midlands Airport*. It

was clearly the intent of HMRC, in granting the authorisation, to limit it to end-use at certain premises, and it is clear enough from the context that the premises intended were those of the appellant at East Midlands Airport. I do not accept the appellant's argument that the reference in the authorisation to premises stated in the (blank) item 1(b) of the appellant's application form meant that the authorisation was for the carrying out of operations "anywhere": it is clear from the context that HMRC

(1) intended to limit where processing operations/prescribed end-use under the authorisation could be carried out; and

(2) did not deem information about where the goods were to be assigned to their end-use, "unnecessary" in the language of CCC IP article 293.3(f) (as the authorisation indicated that there was to be a place where processing operations would be carried out).

66. This construction of the appellant's 2010-15 end-use authorisation is consistent with the relevant provisions of the CCC, which

(1) establish that customs supervision is to continue up to the point of prescribed end-use; and

(2) expressly envisage authorisation specifying the places where the goods have to be assigned to the prescribed end-use.

67. The appellant was right to be tentative in its submissions as regards the relevance of *Trespa* to the question of the whether the £154k customs debt was validly raised: as can be seen from the dispositions at the end of the case, the focus of the judgment was on matters that do not arise here.

68. I therefore find that the movements of imported aircraft parts from East Midland Airport, prior to their use in maintenance of aircraft, to other sites in the EU or in the UK by the appellant in the 2012-2015 period, was outwith the appellant's 2010-15 end-use authorisation.

69. The appellant invites me to find that it "reasonably" and "honestly" believed that its parts-movements in the 2012-2015 period were lawful under the terms of its 2010-15 end-use authorisation. It was not alleged that the appellant held this belief other than "honestly"; however, given my finding above as to the scope of the 2010-15 end-use authorisation, I decline to make a finding that the belief was "reasonable".

Findings in relation to the second basis on which the £154k customs debt was raised (insufficient records to show that the imported parts were put to the prescribed end-use in the 2012-2015 period)

70. The appellant's 2010-15 end-use authorisation (following the terms of its 2008-10 end-use authorisation, of which it was a renewal) stated as follows under the heading "Arrangements for supervision":

> "(a) It is your responsibility to ensure that records are kept detailing all *the processing operations carried out under this authorisation*, even if you do not carry out the processing yourself
>
> Goods remain under Customs supervision from the acceptance of the Customs declaration until such time as goods are put to *the prescribed end-use*.
>
> (b) Records are to be kept to the satisfaction of the supervising office for all end-use goods received and for the period specified in paragraph 2.8 in *Notice 770*. The type of records and means of identification are those stated in *boxes 3 and 11 of the [application form for end-use relief]*."

71. To assist in understanding the italicised phrasing in the above (added by me),

(1) the authorisation itself provided as follows:

(a) the *processing operations* approved were maintenance and operation of company civil aircraft (freighter aircraft);

(b) goods received under the authorisation (being civil aircraft and parts for civil aircraft) were to be put to the *prescribed end-use* (being, again, maintenance and operation of company civil aircraft (freighter aircraft)). End-use was completed when the goods had been used for that purpose;

(2) the appellant's completed application form for the 2008 authorisation (renewed in 2010) stated in box 3 ("Records and accounts"): "main accounts" c/o EAT at an address in Brussels; "all systems computerised"; "accounting system: JD Edwards"; "stock: parts – Trax". In response to item 11 ("means of identification"), it stated: "by reference to serial numbers";

(3) the hearing bundle contained a copy of HMRC Notice 770 as at 25 February 2016, with no paragraph 2.8. The Notice did, however, state at paragraph 3.13 ("What records must I keep?"):

> You will need to provide the following information when requested by us. These must show:
>
> • what the goods are including the commercial and/or technical description necessary to identify the goods
>
> • when you imported or received them from another trader including details of the declaration to end-use relief and the date and reference particulars of any customs documents and any other documents relating to their entry and assignment to end-use if appropriate
>
> • that the goods have been put to the prescribed end-use including the nature of any processing operations including the rate of yield or its method of calculation
>
> • information enabling the goods to be monitored including the location(s) of the goods and particulars of any transfers
>
> • details of any by-products resulting from any processing that has taken place
>
> You can normally use your commercial records, however, you may be asked to adapt them, if necessary, to provide the information needed to claim relief. You should make sure you provide full details of the customs records you propose to keep.
>
> If you intend to keep computerised records you must contact us first to make sure that these records meet the requirements of end-use relief. You will be required to provide any technical information and assistance that we may need in order to check them.
>
> You must keep your records for four years after the goods have been put to the prescribed end-use. All Customs documentation should be retained for 4 years and cross-referenced to import invoices and sales invoices.

72. CCC IP defined "records" as: the data containing all the necessary information and technical details on whatever medium, enabling the customs authorities to supervise and control operations (article 291.2(c)); a condition of granting an end-use authorisation was that adequate records are kept and retained (article 293.1(d)).

73. I find as follows as regards the appellant's relevant record-keeping for the 2012-2015 period

(1) Trax was a commercial system for tracking inventory held by the appellant; all imported aircraft parts were recorded on Trax; Trax did not, however, identify imported pieces of inventory by reference to their customs entry number;

(2) JD Edwards was an accounting system. It contained information that included the customs entry number for an imported aircraft part;

(3) Trax and JD Edwards did not link to one another;

(4) given this disconnect between the Trax and JD Edwards systems, one way in which the appellant was able to show how a particular imported part, identified by way of customs entry number, was used (as shown in its inventory tracking system, Trax), was via that part's "airway bill number". This is because the airway bill number

(a) was normally on the customs documentation for the import (which showed the customs entry number), and

(b) was identified on Trax;

(5) overall, the process of showing how a particular imported part had been used was manual (as opposed to automated), time-consuming, and laborious for the appellant – and therefore costly in terms of management time and resources. I make this finding based on evidence including the explanation in Mr Hill's second witness statements as to why the appellant could not provide HMRC, in 2015, with a "full audit trail" for "each and every" aircraft part it said it had put to end-use (and why the appellant instead proposed to HMRC that a "sample exercise" be undertaken), as follows:

(a) the Trax and JD Edwards systems were not linked and so staff had to "interrogate" the accounting system (JD Edwards) using purchase order number and airway bill number, and then cross-reference this information against Trax;

(b) this was a costly process that took time; as Mr Hill put it, doing this for each and every part "would have resulted in a greater cost than we were looking to save in customs duty through end-use".

74. As a result of the difficulties just described, as regards the 1,664 aircraft parts imported by the appellant during the 2012-15 period,

(1) the appellant provided no end-use information to HMRC for about 1,260;

(2) the appellant provided very basic information to HMRC (one line on a spreadsheet about each, with no specific information as to the end-use to which the part was put) for about 424 (generally those of higher value);

(3) of those 424,

(a) the appellant initially (on 20 August 2015) provided more detailed information (intended to show the end-use to which the part had been put) for 4 out of the 424 (one in each calendar year in question: 9 October 2012, 6 November 2013, 12 March 2014 and 6 March 2015): and

(b) the appellant later (on 27 November 2015) provided more detailed information about a further 45 of the 424 (generally those of higher value).

(4) HMRC was not satisfied with the information as to end-use as regards all but 9 of the 49 imports for which (as per the above) the appellant provided more detailed information in regard to their use.

75. I find that, reading the terms of the appellant's 2010-15 end-use authorisation in the context of the record-keeping condition for the grant of such authorisation in CCC IP, the appellant was required by that authorisation to keep records to show, to HMRC's satisfaction, that all goods imported to end-use were in fact used for the prescribed end-use.

76. I find that what happened in this case, as regards aircraft parts imported by the appellant in the 2012-2015 period, is that, due to the difficulties with the appellant's record-keeping as described above, the appellant decided that, for all but 49 of the imports, it was not, from a commercial perspective, worth its devoting the time and resource to prove to HMRC's satisfaction that those aircraft parts were put to the prescribed end-use. I find that this, essentially commercial, decision amounted to non-compliance with the terms of the appellant's 2010-15 end-use authorisation: whilst the appellant asserted that it "could have" proved that these parts were put to the prescribed end-use if it devoted sufficient time and resource, that does not equate to compliance with the requirement as I have found it at [75] above. In other words, a "record" that can only be produced to a satisfactory standard by such expenditure of time and resources that the operator deems excessive for the purpose (and so does not expend), cannot be said, realistically, to exist as a record.

77. As for the 40-odd imports where the appellant provided information intended to show application to the prescribed end-use, but HMRC were not satisfied that the records showed this – I find it unproven that HMRC acted unreasonably in this regard. I find that the anomalies in the information provided by the appellant about the four imports (see [74(3)(a) above]) were such that it was reasonable of HMRC not to be satisfied that application to the prescribed end-use had been shown; and as regards the further information in respect of the 45 further imports (see [74(3)(b) above]), the evidence before the tribunal did not include the "report" and "package of documentation" attached to the letter of 27 November 2015 from KPMG – and so I find it not to be proven that HMRC acted unreasonably in failing to be satisfied (for all but nine of the imports) that application of the goods to the prescribed end-use had been shown.

The £2k customs debt

78. There was little evidence or argument adduced about this customs debt over and above what is said in agreed fact 28 (which states that this debt related to incorrect entry of goods to end-use.)

Conclusion on "evidence of poor compliance" as taken into account in HMRC's decision

79. It follows from my findings above that I find the £154k and £2k customs debts to have been validly raised and that HMRC's decision rightly treated them, and the appellant's use of the wrong customs procedure code on importation of the seven aircraft, as relevant matters to be taken into account. Furthermore, I find that it was not perverse, nor outside the bounds of a decision by any reasonable panel of commissioners, for HMRC's decision to have concluded that the two customs debts and, "in particular" (as HMRC's decision put it) the importation of the seven aircraft using the wrong customs procedure code, evidenced poor compliance with customs legislation on the appellant's part.

Other arguments as to the "unreasonableness" (in s16(4) terms) of HMRC's decision

Was HMRC's decision unreasonable in light of the relative simplicity of the end-use procedure with regard to civil aircraft?

80. Given my construction of Article 211.3(b) – in particular, that there is a correlation between what assurance is *necessary* and what is involved in the *operations* (here, the operation of the end-use procedure for aircraft and aircraft parts) – I now consider the appellant's argument that because the end-use procedure for aircraft at the time of the 2017 application was relatively simple – end-use was discharged in the case of civil aircraft by the importation itself, provided that the aircraft was registered with the Civil Aviation Authority and delivered

to the operator – the threshold for *necessary assurance* was (very) low – and so HMRC's decision was perverse to find that the necessary assurance for the proper conducted of the operations had not been provided.

81. I reject this argument for two reasons:

(1) the 2017 application for end-use authorisation was for aircraft parts as well as for aircraft; and, as I have found at [32-34] above, even if the appellant's proposal had been accepted and incorporated into an authorisation, it would have included a period when aircraft parts would have been in scope; and

(2) given my conclusion at [79] above that it was not unreasonable for HMRC's decision to have found that the customs debts and in particular, the importation of the seven aircraft wee evidence of poor compliance, it follows that it was not unreasonable to require some assurance as "necessary" in the circumstances; and, per [48] above, the question of exactly what assurance was necessary was one for HMRC in its administrative discretion, subject to the supervisory jurisdiction of the tribunal.

Was HMRC's decision disproportionate because it did not tell the appellant what the "necessary assurance" was?

82. The appellant argued that HMRC's decision was disproportionate because it decided that the appellant had not provided the necessary assurance of the proper conduct of the operations, without having first told the appellant what assurance it had to provide.

83. As to the meaning of proportionality, the appellant took me to article 5.4 of the Treaty on European Union: "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

84. The appellant did not appear to be arguing that Article 211.3(b) was itself disproportionate; and Article 211.3(b) does not require the customs authority to tell the applicant what necessary assurance it must provide. Rather, it is for the applicant to satisfy the condition of providing such assurance.

85. Putting the onus on the applicant in this way makes administrative common-sense – and does not exceed what is necessary to ensure that the end-use procedure is properly administered – given

(1) it is the applicant that best knows what kind of assurance (by way of promises or conditions) it can realistically provide; and

(2) the "right to be heard" letter (mandated by Article 22.6) fairly gives the appellant notice of the customs authority's concerns.

86. In my view, if HMRC had taken the appellant's proposal into account (which, as I have decided above, they should have done) and then explained in their decision, why, taking both the proposal and the past record into account, the necessary provision was (or was not) provided, that would have satisfied the requirements of proportionality. It is not therefore necessary, in my view, for a decision on Article 211.3(b) to be proportionate, for a customs authority to have spelled out in advance what the "necessary assurance" was.

Would HMRC's decision inevitably have been the same due to the broad geographical scope of the appellant's 2017 application?

87. HMRC's skeleton made the point that the appellant's 2017 application indicated an EU-wide scope (in terms of use of the goods), but did not complete the (separate) application form for multi-state authorisation. In the context of the tribunal's s16(4) FA 1994 jurisdiction, I considered whether, by reason of this point, HMRC on a further review would inevitably reach

the same conclusion (i.e. that authorisation was not to be granted). However, I was not persuaded of this, as HMRC could, on such a further review, either treat the use of the wrong form as a clerical error and consider whether to grant authorisation in more than one state or, alternatively, make the authorisation conditional on use only within the UK. It was not therefore inevitable that, because of this point, HMRC would reach the same conclusion on a further review.

Conclusions on agreed issues 2b, 1a and 1b

88. In response to agreed issue 2b, I find that that HMRC's decision, in determining that the condition in Article 211.3(b) was not satisfied, was "unreasonable" (in s16(4) FA 1994 terms) by reason of the point made at [50(1)] above. Due to that some point, in response to agreed issues 1a and 1b, I find that HMRC's decision was "unreasonable" (in s16(4) FA 1994 terms), and would not inevitably have been the same. This means that the first appeal is allowed in part.

89. I now turn to agreed issues 2c and 2d.

Could end-use authorisation have been granted with retroactive effect (prior to the date when the 2017 application was received)?

90. Agreed issues 2c and 2d concern whether, if the appellant's 2017 application for end-use authorisation had been granted, it could have been granted with retroactive effect (prior to the date when the application was received). These "issues" around retroactive effect were not raised by Article 211.2 – it was agreed between the parties that the conditions there were fulfilled – but rather by Article 172 DA. The legislative context is as follows:

(1) article 172 DA, headed "Retroactive effect", cross refers to Article 22.4, which (in the context of decisions relating to the application of the customs legislation taken upon application) states:

> Except where otherwise specified in the decision or in the customs legislation, the decision shall take effect from the date on which the applicant receives it, or is deemed to have received it …

(2) article 172.1-3 DA reads as follows:

> 1. Where the customs authorities grant an authorisation with retroactive effect in accordance with Article 211.2 of the Code, the authorisation shall take effect at the earliest on the date of acceptance of the application.
>
> 2. In exceptional circumstances, the customs authorities may allow an authorisation referred to in paragraph 1 to take effect at the earliest one year, … before the date of acceptance of the application.
>
> 3. If an application concerns renewal of an authorisation for the same kind of operation and goods, an authorisation may be granted with retroactive effect from the date on which the original authorisation expired.
>
> …

91. Given that these provisions do not affect the core of HMRC's decision – being a decision to refuse authorisation – but, rather, affect the question of whether authorisation, if granted, would have retroactive effect, I should explain how, in my view, agreed issues 2c and 2d fit within the framework of the tribunal's s16(4) FA 1994 jurisdiction:

(1) the important background point is that the appellant did not import any aircraft (or aircraft parts) subsequent, and relying on a favourable response from HMRC, to its 2017 application for end-use authorisation. This means that the seven aircraft are the only imports for which the outcome of the first appeal could make any practical difference;

(2) this in turn means that if the first appeal were allowed, with the tribunal requiring a further review of HMRC's decision and, on further review, authorisation were granted, but on the basis that it could not be granted with retroactive effect going back at least to the importation of the last of the seven aircraft (i.e. 21 February 2017), that would be an entirely "academic" outcome;

(3) thus, the question of whether authorisation could have been granted with retroactive effect, at least to 21 February 2017, is one that might validly affect the tribunal's decision as to which, if any, of its s16(4) FA 1994, it should exercise, were it to find that HMRC's decision was "unreasonable" (in the terms of that sub-section): the tribunal might well decline to require a further review by HMRC under s16(4)(b), if it knew that the outcome would be entirely academic, due to the impossibility of either article 172.2 or 172.3 DA applying.

Could article 172.3 DA apply?

92. HMRC argued that article 172.3 DA does not apply here because:

(1) the previous authorisation (that appellant's 2010-15 end-use authorisation, granted on 16 February 2010 – to which I will refer in this section as the "old" authorisation) was granted under the CCC, not the UCC. HMRC prayed in aid certain non-legally binding European Commission guidance (dated 28 October 2022) on special procedures;

(2) there were important differences between the "old" authorisation and that sought in the 2017 application, being

(a) the appellant's proposal in its 5 May 2017 letter; and

(b) the 2017 application was stated to be for intra-EU use, whereas the previous authorisation was limited to UK processing;

and so the 2017 application therefore cannot be said to concern renewal of an authorisation for the same kind of operation and goods.

93. The appellant counter-argued as follows:

(1) it argued that HMRC's approach depends on a special interpretation of the word "authorisation" in Article 211.2(h), namely that "authorisation" in Article 211.2(h) must mean a UCC authorisation (and not a CCC authorisation); and that such a special interpretation was problematic for several reasons, including that the special interpretation should logically apply to Article 211.1, so requiring replacement of all CCC authorisations from the bringing into force of the UCC (1 May 2016); and

(2) to the extent the argument had any merit, it was unlawful for HMRC to treat the appellant differently from taxpayers in materially similar circumstances without objective justification: see *R oao Gallaher Group Ltd v Competition and Markets Authority* [2018] UKSC 25 per Lord Carnwath.

94. (Article 211.2(h), to which the appellant referred, was not itself in contention, but contains phraseology similar to article 172.3 DA; it reads (as one of the conditions for authorisation with retroactive effect):

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

95. In my view the "UCC authorisation vs CCC authorisation" point turns on the meaning of the phrase, "renewal of an authorisation." I understand HMRC's essential argument to be – to *renew* an authorisation means to grant a new authorisation *of the same kind* as the old one; and

UCC authorisations are different from CCC authorisations. In my view, this is the correct reading of this phrase: the requirements for end-use authorisation under the CCC were similar in many ways to, but materially different from, the requirements for end-use authorisation under the UCC. Consistent with this (and as mentioned previously), although recital (1) to the UCC refers to itself as the CCC "recast", it also states that this was as a result of a number of amendments having to be made to the CCC.

96. The proposition that an authorisation under the UCC is different from an authorisation under the CCC is reinforced by

(1) recital 56 to the DA, which states (emphasis added): "In order to safeguard the legitimate interests of economic operators *and ensure the continued validity of* decisions taken and *authorisations granted by customs authorities* on the basis of the provisions of the Code and *or on the basis of [the CCC] …, it is necessary* to establish transitional provisions in order *to allow for the adaptation of those* decisions and *authorisations to the new legal rules*." This indicates that the UCC comprises "new legal rules" and that, without transitional provisions, authorisations granted under the CCC would become invalid on the bringing into force of the UCC; and, consequent on this

(2) article 251.1(a) DA, which states: "Authorisations granted on the basis of [the CCC] … which are valid on 1 May 2016 shall remain valid as follows: (a) for authorisations having a limited period of validity, until the end of that period or 1 May 2019, whichever is the earlier".

97. The above provisions answer the appellant's point that, were HMRC's interpretation correct, all CCC authorisations would have become invalid on the coming into force of the UCC (for completeness, I note that article 250 DA deals with authorisations valid on 1 May 2016 *which do not have a limited period of validity*, and provides that, with some exceptions, these are to be re-assessed,).

98. These provisions are also very much consistent with the notion that Article 211.2(h) does not operate to roll-over (to use a more neutral term than "renew") a "CCC authorisation" post-1 May 2016: CCC authorisations, even if their validity was extended for a period of time after 1 May 2016 per article 251.1(a) DA, became due for re-assessment under the UCC regime, once they expired.

99. No "special" interpretation of the word "authorisation" in Article 211.2(h) is therefore called for, contrary to the appellant's argument: in all contexts in the UCC (unless otherwise expressly provided), "an authorisation" means an authorisation under the UCC (only).

100. *Gallaher Group*, cited by the appellant, was a judicial review case in which Lord Carnwath, giving the lead judgement,

(1) emphasised "the ordinary principles of judicial review", notably in that case irrationality and legitimate expectation (see at [41]),

(2) found that it made no difference to the result in the case whether one applied a test of objective justification or of rationality (see at [43]), and

(3) concluded at [45] that "if objective justification were needed" for the public body in the case taking a different approach to one of the claimants than it had to a third party, then, on the facts, sufficient such justification was present; "nor was it irrational" for the public body to do so.

101. Leaving to one side the point that the immediate issue here is the interpretation of customs legislation, rather than the susceptibility of an administrative act to judicial review, it has not been shown here that HMRC have treated the appellant differently to other operators

in their application of the customs legislation at issue; indeed, on the interpretation of "renewal of an authorisation" which I prefer for the reasons above, no such different treatment would seem likely, given that there was a coherent regime for transitioning from CCC authorisations to UCC authorisations.

102. Having concluded that the appellant's application did not fall within article 172.3, as it did not concern "renewal of an authorisation", it is strictly unnecessary to consider whether the 2017 application concerned the "same kind of operation and goods" as the appellant's "old" authorisation. However, as the point was argued at the hearing, my view, in brief, is that whilst the 2017 application and the "old" authorisation concerned the same kind of *goods*, they did not concern the same kind of *operations*: the geographical scope of end-use operations in the former ("Intra EU, Trans Continental (EU-USA & EU-BAH)") was materially different to that of the latter (East Midlands Airport – see [65] above).

103. It follows that, in response to agreed issue 2c, the appellant's 2017 application for end-use authorisation did not qualify as a renewal application under article 172.3 DA.

Could article 172.2 DA apply?

104. HMRC argued as follows as to why it cannot be said that there were exceptional circumstances:

(1) this case is analogous to *Unipack v Direktor et al* (Case C-391/19) (9 July 2020), where the European court stated at [30] "[t]he failure to comply with obligations under the [UCC] and the measures resulting from it cannot justify more favourable treatment of the economic operator responsible for that failure";

(2) this is not a case where an application has been made shortly after importation or expiry of an authorisation: the previous authorisation expired on 6 March 2015, more than two years before the application was made;

(3) the events surrounding the importation of the seven aircraft are not suggestive of exceptional circumstances.

105. In *Unipack*, an operator had carried out imports under incorrect tariff codes in the following circumstances:

(1) a customs code that had been used by the operator earlier had been deleted (leading the early expiry of a binding tariff information decision issued to the operator);

(2) the customs authorities had not objected to the imports being made under an incorrect customs code;

(3) the customs authorities imposed additional customs duties, as they were now subject to an anti-dumping duty.

Subsequently, the customs authorities granted end-use authorisation to the operator, but with retroactive effect only to the date on which the operator submitted its application (and so did not include the imports mentioned above).

106. The question for the court was, in essence, whether matters such as the following constitute "exceptional circumstances" within the meaning of article 172.2 DA:

(1) the early expiry of the validity of a binding tariff information due to an amendment to the combined nomenclature;

(2) a failure by the customs authorities to take action in relation to imports bearing an incorrect code;

(3) the fact that the goods had been used for a purpose exempted from anti-dumping duty.

107. The court held that none of these was capable of constituting exceptional circumstances within the meaning of article 172.2 DA:

(1) an economic operator cannot rely on failure to comply with the amended combined nomenclature to submit inaccurate declarations or to avoid the duty to make a prior declaration;

(2) a careful operator, who has acquainted itself with a published classification regulation, cannot simply continue to import goods under an incorrect code on the sole ground that the classification has been accepted by the customs authorities;

(3) though the use of the goods is a ground for exemption from anti-dumping duty, it cannot justify the importer's failure to comply with the established procedure for applying for an exemption.

108. The court then made the statement at [30] cited above.

109. The appellant submitted that the circumstances of its 2017 application for end-use authorisation were "exceptional" because of:

(1) the nature of the relief for aircraft;

(2) the changes of law in relation to the relief for aircraft;

(3) the different application of the law by different member states;

(4) the end-use authorisation application made by the appellant on 30 March 2015;

(5) HMRC's failure to make a decision on that application;

(6) the proposal made by the appellant (in its 5 May 2017 letter); and

(7) proposals made by the appellant subsequent to HMRC's decision.

110. The starting point for this analysis is that article 172.2 DA comes into play only where the customs authority has decided to grant an authorisation – in this case, the authorisation sought by the appellant on 4 April 2017 – with retroactive effect. Hence, when analysing article 172.2 DA, that has to be taken as a "given". The question is whether the retroactive effect must be granted from (no earlier than) 4 April 2017 (per article 172.1 DA), or whether it may be granted from as far back as 4 April 2016 (per article 172.2 DA). This depends on whether there are exceptional circumstances or not.

111. Items (1), (2), (3) of the appellant's list above are, like the circumstances discussed in *Unipack*, descriptions of customs legislation with which the appellant (like everyone else in its circumstances) was required to comply: although *Unipack* is not binding on me, I have had regard to it and consider it correct in finding that such things are not "exceptional circumstances" in the context of allowing a further one year of retroactive effect. As the European court said, such an interpretation would set non-compliant operators at an advantage over compliant ones.

112. I cannot see that items (4) and (6) of the appellant's list answer to the expression, "exceptional circumstance"; and item (7), even if it did, post-dates HMRC's decision.

113. Item (5) of the appellant's list is the only one capable of answering to the expression, "exceptional circumstances".

114. However, in my view, it is outside the scope of the tribunal's s16(4) FA 1994 jurisdiction for me to make a findings as to whether or not this circumstance is "exceptional" – that is a

matter for HMRC's administrative discretion, subject to the tribunal's supervisory jurisdiction, if, upon a further reviewed ordered by the tribunal, HMRC were to decide to grant authorisation (and so come to consider whether it should have retroactive effect). The most I can do is decide, having made full findings of fact, whether no reasonable panel of commissioners could conclude that item (5) of the appellant's list comprises exceptional circumstances.

115. I accordingly make findings of fact as follows with regard to the circumstance that HMRC never made a decision on the appellant's 2015 application for renewal of its end-use authorisation:

(1) CCC article 6 required that HMRC take a decision on the applications and notify the applicant "at the earliest opportunity";

(2) CCC IP article 292.7 (within the chapter on end-use) required that the applicant be informed of the decision to issue an authorisation, or of the reasons why the application was rejected, within thirty days of the date on which the application was lodged or of the date on which any outstanding information requested was received by the customs authorities; however that period did not apply in the case of a "single" authorisation (which it appeared, from the appellant's application form, that the 2015 authorisation was – see [150] in Appendix 2 below);

(3) based on my findings of fact in Appendix 2, it was clear from the circumstances that HMRC were not going to grant the authorisation sought by the applicant in 2015:

(a) HMRC, from Officer Graney's first letter (in response to the application) of 14 April 2015, and thereafter in her 11 May and 22 July 2015 correspondence with the appellant, linked grant of renewed end-use authorisation to satisfactory outcome of their enquiries into the applicant's compliance with end-use procedures in the 2012-2015 period;

(b) this is why correspondence related to the renewal application rapidly turned into correspondence leading to the raising of the £154k customs debt in respect of the 2012-2015 period;

(c) it is true that when, in his email of 23 July 2015, Mr Dolan first became involved in the correspondence, he reminded HMRC that the appellant still wanted its application for end-use authorisation to be considered;

(d) however, by the time the £154k customs debt (or what became the £154k customs debt) was first raised (4 September 2015) and then confirmed on statutory review (26 February 2016), I find (from inference from all the facts as found) that it was fully evident to the appellant that HMRC were not going to grant the renewed end-use authorisation as applied for in 2015; this is why

(i) the appellant did not "chase" HMRC for a decision after Mr Dolan's 23 July 2015 email, and indeed why there was no mention of "reviving" the 2015 application in the correspondence surrounding appellant's 2017 application for end-use authorisation; and

(ii) the appellant started using the tariff suspension for aircraft parts (see Mr Dolan's email to HMRC of 8 March 2017, which makes this point).

116. In sum, although it is quite clear, as a practical matter, why HMRC never made a decision on the appellant's 2015 application to renew its end-use authorisation – both sides knew what the answer would be – HMRC's failure to do so appears to be at odds with CCC article 6. I do not therefore consider that no reasonable panel of commissioners could conclude that the circumstances were exceptional, or that such a conclusion would be "perverse". But the

opposite conclusion would also be within the scope of "reasonableness". This is my response to agreed issue 2d.

Exercise of tribunal's powers under s16(4) FA 1994

117. In response to agreed issue 1c, I find that the appropriate remedy, given my findings at [88], [103] and [116] above, is to require HMRC to conduct, in accordance with directions of the tribunal, a further review of their original decision. Because it is possible that HMRC will decide that exceptional circumstances are present, this is not an 'academic' exercise.

Tribunal's directions on required further review

118. In general the tribunal's directions under s16(4)(b) will be that HMRC shall have regard to the analysis of the relevant law, and the relevant findings of fact, in this decision.

119. I now comment on the appellant's proposed directions (presented in italics below, with my comments in ordinary type), by way of explanation as to why I do not incorporate directions in the form proposed:

> *(1) The appellant's application was an application for authorisation with retroactive and prospective effect. The appellant's proposals that end-use will only be used in respect of aircraft (not aircraft parts) and for a limited period (now entirely in the past) are assurance of the proper conduct of the operations. They do not constitute a new application for end-use authorisation.* As to the first sentence here, I refer to my finding at [26] above. With regard to the second sentence, I also refer to my findings at [32-34] above as respect the appellant's proposal (these findings also address the third sentence here) and at [47-48] above as regards the meaning of the "assurance" etc.
>
> *(2) The appellant's compliance with end-use (whether in respect of aircraft or aircraft and aircraft parts) does not justify refusal of authorisation*. I refer to my findings at [47-48] above.
>
> *(3) When considering the necessary assurance of the proper conduct of the operations, HMRC cannot reasonably take into account the manner of the importation of the seven aircraft*. I do not agree: see [79] above.
>
> *(4) There can be no necessary assurance of the proper conduct of the operations with respect to any civil aircraft registered with the Civil Aviation Authority before importation which is delivered to the operator at the time of importation. The appellant provided sufficient assurance of the proper conduct of the operations which took place. Therefore DHL's end-use authorisation may reasonably be granted. It would be unreasonable for HMRC to refuse to grant DHL's application for end-use authorisation.* I do not agree with the first sentence: see [80-81] above. The following sentences are beyond the scope of the tribunal's s16(4) FA 1994 jurisdiction.
>
> *(5) It is unnecessary for the appellant to hold a guarantee under Article 86.* I deal with this further below.
>
> *(6) In light of (1) above, the appellant's 2017 end-use authorisation application was a renewal application under article 172.3 DA. It was therefore unnecessary for the appellant to show exceptional circumstances. Alternatively, if exceptional circumstances are required, those circumstances exist in this case.* I disagree with the first two sentences: see [103] above. The third sentence is beyond the scope of the tribunal's s16(4) FA 1994 jurisdiction: see [114] above.

120. As to the appellant's proposed direction 5: I decline to make a direction in these terms because

(1) Article 211.3(c) provides that one of the conditions for granting authorisation to a person is that "where a customs debt or other charges may be incurred for goods placed under a special procedure, they provide a guarantee in accordance with Article 89"; and

(2) the appellant, in its application, as well as in the covering letter to it dated 31 March 2017, stated that a guarantee was required (and completed an application form for customs comprehensive guarantee).

121. In these proceedings, HMRC declined to take non-compliance with Article 211.3(c) as a point against the appellant, because the reason the appellant's guarantee application was refused, was because its application for authorisation was refused.

122. In the circumstances, it is appropriate that I find that

(1) the appellant offered to provide a guarantee as set out in its application for customs comprehensive guarantee (form CCG1) dated 31 March 2017; and

(2) the reason that HMRC declined that application was that they refused the appellant's application for authorisation.

THE SECOND APPEAL

123. Given that I have allowed the first appeal in part, and required HMRC to conduct a further review of their decision, there is a possibility that HMRC, on that further review, will vary their decision so as to

(1) grant authorisation; and

(2) decide that exceptional circumstances are present, such that the authorisation can take effect from 4 March 2016.

This would mean that the seven aircraft would qualify for end-use relief: see [4] above.

124. However, in case HMRC do not make such a decision on further review, and as the issues were argued at the hearing, I proceed to decide the second appeal.

125. This issue in the second appeal is whether the £3m customs debt was (i) extinguished under Article 124 or (ii) subject to end-use relief under Article 86.6.

126. Customs debt is defined in the UCC as the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force. Although the appellant stopped short of conceding that the £3m customs debt had been validly incurred on importation of the seven aircraft, its arguments concentrated heavily not on that question, but on the question (assuming the £3m customs debt *had* been incurred) of – pursuant to what article of the UCC had the £3m customs debt been incurred?

127. The appellant argued that the £3m customs debt was incurred pursuant to Article 79.1 i.e. through non-compliance with one of the obligations laid down in customs legislation concerning

(1) the introduction of non-Union goods (here, the seven aircraft) into the customs territory of the Union, their removal from customs supervision, or the movement, processing, storage, etc of such goods within that territory; or

(2) the end-use of goods within the customs territory of the Union.

128. HMRC argued that the customs debt had been incurred pursuant to Article 77.1 i.e. through the placing of the seven aircraft under the 'release for free circulation' customs procedure.

129. The reason the appellant argued for incurrence under Article 79 is that

(1) a customs debt incurred pursuant to article 79 is extinguished where the following conditions are fulfilled:

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

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

(per Article 124.1(h)); and

(2) certain reliefs also apply in cases where a customs debt is incurred pursuant to Article 79, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception (per Article 86.6). The relevant relief, the appellant argued, was end-use relief, as end-use relief was either an *autonomous measure providing for a reduction in, or exemption from, customs duty on certain goods* or *favourable treatment specified for certain goods by reason of their end-use* (see Article 56.2(f) and (g), as referred to in Article 86.6)

130. In my view, the £3m customs debt was incurred on importation of the seven aircraft pursuant to Article 79 because an incorrect customs procedure was used – and this was non-compliance with one of the obligations laid down in customs legislation concerning the introduction of non-Union goods into the customs territory of the Union. I am reinforced in this conclusion by, for example, article 79.2(b), which provides that the time at which the customs debt is incurred shall be the moment when a customs declaration is accepted for the placing of goods under a customs procedure where it is subsequently established that a condition governing the placing of the goods under that procedure … was not in fact fulfilled". It seems to that is what happened in relation to the seven aircraft.

131. I am also fortified in my view by the decision of the European court in *Terex Equipment Ltd & Ors v HMRC* (C-430/08, C-431/08) of 14 January 2010, which held that the use of an incorrect customs code should be regarded as unlawful removal of the goods from customs supervision and, accordingly, as incurring a customs debt pursuant to CCC article 203(1).

132. My response to agreed issue 3a is accordingly that the £3m customs debt was incurred pursuant to Article 79.1.

133. As for the provisions (outlined above) that can apply when a customs debt is incurred pursuant to Article 79:

(1) It was not in dispute that the appellant's use of an incorrect procedure on importation of the aircraft was not at attempt at deception.

(2) Also, the first requirement of Article 124.1(h) is satisfied, since article 103(e) DA deems that to be the case where the person concerned informs the competent customs authorities about the non-compliance before either the customs debt has been notified or the customs authorities have informed the person that they intend to perform a control (which was the case here – see the email of 8 March 2017 from Mr Dolan to HMRC).

(3) However,

(a) the second requirement of Article 124.1(h) is not satisfied: the formalities necessary to regularise the situation of the seven aircraft were not subsequently carried out (if one disregards the payment of £3m customs debt itself), given that (i) the aircraft did not qualify for the customs procedure code used on the importation; and (ii) the application for end-use authorisation, with retrospective

effect, was refused; my response to agreed issue 3b ii is therefore: "no", unless HMRC, on further review, were to make a decision of the kind described at [123] above; and

(b) Article 86.6 does not assist the appellant because, the fact that end-use relief "applies", does not mean that the requirements of end-use relief – including, crucially here, the requirement of authorisation from the customs authority (see Article 211.1(a)) – are somehow deemed to be satisfied; my response to agreed issue 3b i is therefore again "no", unless HMRC, on further review, were to make a decision of the kind described at [123] above.

134. It follows that unless HMRC, on further review, were to make a decision of the kind described at [123] above, the second appeal falls to be dismissed.

THE THIRD APPEAL

135. I decide the third appeal on the same basis as the second appeal i.e. in case HMRC does not make a decision of the kind described at [123] above on the further review required by the tribunal, and because the issues were argued at the hearing.

136. Per agreed issue 5, the question here is: does Article 120.1 apply on the basis that the £3m customs debt was incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor (here, the appellant)?

137. In Case 58/86 *Réunion* (26 March 1987) the European court said this (at [22]) about a provision stating that import duties may be repaid or remitted in situations resulting from "special circumstances in which no negligence or deception may be attributed to the person concerned":

> "… [the provision] is 'a general equitable provision designed to cover situations other than those which had most often arisen in practice and for which special provision could be made when the regulation was adopted' … [it] is intended to apply where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred. As the Commission rightly observes, the geographical and economic situation of Réunion is of an objective nature and affects an indefinite number of traders, and hence the circumstances in which maize is imported into that territory cannot be regarded as 'special circumstances' within the meaning of [the provision]."

138. European court case law on the meaning of "obvious negligence" by a person says that this "must be assessed taking account in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader" (see *Skatteministeriet v DSV Road A/S* Case C-187/14 (25 June 2015) at [46]).

139. Based on my findings at [53(5)-(9)] and [54] above, obvious negligence should be attributed to the appellant because, despite knowing that the tariff suspension did not apply to aircraft and that the appellant was not authorised to use the end-use procedure, and without consulting the senior customs expert in the group of companies of which it was part (Mr Dolan), the appellant came to an understanding with its customs agents that the aircraft would be imported duty-free. In my view,

(1) the customs law – certainly as regards the points that the tariff suspension procedure did not apply to aircraft, and that authorisation was required to use the end-use procedure – was not especially complex,

(2) the appellant had professional experience that was directly on-point (through which it had gained the knowledge just referred to), and

(3) the appellant clearly took inadequate care around the correct customs procedure on importation of the seven aircraft.

140. Obvious negligence is sufficient to rule out Article 120.1 applying (and this is my response to agreed issue 5).

141. However, as the question of "special circumstances" was argued at the hearing, I will deal with that point briefly. Per Article 120.2, "special circumstances" are deemed to exist where it is clear from the circumstances of the case that the debtor (here, the appellant) is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, it would not have suffered disadvantage by the collection of the amount of import duty.

142. The appellant argued that the same list of items put forward as "exceptional circumstances" for the purposes of Article 172.2 DA – see [109] above – also constituted "special circumstances" under the meaning just given. My analysis, similar to that in the context of Article 172.2 DA, is as follows:

(1) items (1), (2), (3) of the appellant's list above are descriptions of customs legislation with which the appellant was required to comply, and so cannot be described as an exceptional situation as compared with other operators in the same business;

(2) I cannot see that items (4) and (6) of the appellant's list answer to the expression, "exceptional situation"; and item (7), even if it did, post-dates the incurring of the £3m customs debt;

(3) As regards item (5) of the appellant's list: as the tribunal has "full" (rather than "supervisory", per the first appeal) jurisdiction in the third appeal, it is appropriate that I make a finding as to whether this comprises an exceptional situation per Article 120.2. Given my findings at [115(3)], it is quite clear as a practical matter, as I say at [116], why HMRC never made a decision on the 2015 renewal application: both parties knew what the decision would have been (to refuse the application). I find for that reason that item (5) of the appellant's list does not comprise an exceptional situation as compared with other operators engaged in the same business as the appellant.

143. Given my response to agreed issue 5, there is no need for me to respond to agreed issue 6.

ORDER OF THE TRIBUNAL PURSUANT TO S16(4)(B) FINANCE ACT 1994

144. HMRC are required to conduct, in accordance with the following directions, a further review of their decision on the appellant's 4 April 2017 application for end-use authorisation.

145. HMRC are directed, when conducting their further review, to have regard to relevant findings of fact and analysis of law in this decision, being:

(1) as regards findings of fact: [25-34], [35(6)], [53-55], [58-59], [61-66], [68], [70-79], [115] and [122] above; the agreed facts; and Appendix 2 below; and

(2) as regards analysis of law: [35(3)], [40-50], [80-87], [92-103] and [105-113] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

146. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 13th FEBRUARY 2023

APPENDIX 1: AGREED FACTS AND ISSUES

Agreed facts

147. The agreed facts were as follows:

(1) The appellant is a cargo airline based at East Midlands Airport. The appellant is part of the Deutsche Post DHL Group.

(2) The appellant's first end-use authorisation was granted on 8 March 2002. It expired on 7 March 2007.

(3) The appellant applied for renewal of the end-use authorisation on 15 January 2008. This was granted by HMRC on the same day (i.e. 15 January 2008) with retroactive effect from the date of expiry of the previous authorisation. The authorisation was valid until 6 March 2010.

(4) A further application was made on 12 February 2010. This was granted on 16 February 2010. It authorised the appellant for the period 7 March 2010 to 6 March 2015.

(5) On 5 February 2013, Officer Andrew Coulsey of HMRC contacted the appellant about an assurance exercise on end-use in relation to the appellant. Officer Coulsey requested details of goods the appellant had entered to end-use in 2012. The appellant agreed to send details of one week's imports for week 49 in 2012. This data was received by Officer Coulsey as a spreadsheet on 11 April 2013.

(6) On 15 April 2013, Officer Coulsey emailed the appellant about an additional six entries which were not shown on the appellant's spreadsheet. Officer Coulsey also requested a meeting to review the appellant's records and procedures.

(7) On 19 April 2013, the appellant responded with the following details on the six entries: (a) it had found details of four of them; (b) it confirmed that one was not in fact for the appellant; and (c) it had been unable to find a record of the sixth.

(8) On 13 May 2013, Officer Coulsey provided the appellant with a copy of the entry the appellant had no record of. On 20 May 2013, the appellant came back with details in relation to that entry. The appellant confirmed that it was for appropriate goods and stated which plane those goods had been fitted to.

(9) On 3 June 2013, Officer Coulsey emailed the appellant to request a visit to see the appellant's records and procedures.

(10) On 25 July 2013, a visit was carried out by Officer Coulsey to the appellant at its premises at East Midlands Airport.

(11) The appellant's end-use authorisation again expired on 6 March 2015. On 30 March 2015 an application was made to renew that authorisation retroactively. That application was never decided by HMRC.

(12) Following the appellant's application in March 2015, Officer Jackie Graney of HMRC commenced another review of the appellant's operation of end-use.

(13) On 14 April 2015, Officer Graney emailed the appellant with a list of questions. Attached to the email were two spreadsheets. The appellant replied on the same day and further correspondence was exchanged between the appellant and Officer Graney throughout April.

(14) An email from Officer Graney on 15 April 2015 was replied to by the appellant on 17 April 2015.

(15) A further request for information from Officer Graney on 22 April 2015 was replied to by the appellant on 28 April 2015.

(16) On 1 May 2015, Officer Graney emailed the appellant to indicate that she had concerns with the way in which the appellant had been operating end-use. The appellant arranged a call with Officer Graney on 7 May 2015 to discuss these concerns. Officer Graney subsequently emailed the appellant again on 11 May 2015.

(17) On 19 May 2015, Officer Graney had a further call with the appellant. This was followed by an email from Officer Graney to Mr Nick Hill of the appellant on 21 May 2015.

(18) On 7 July 2015, after an agreed extension of time, the appellant responded to Officer Graney's email of 11 May 2015. Officer Graney replied on 10 July 2015.

(19) On 22 July 2015, Officer Graney sent a Right to be Heard (RTBH) letter to the appellant. In that letter, Officer Graney said that she had made the decision to raise a demand for £4,850,838.62 of customs duty and £36,898,259.85 of import VAT. £4,670,889.20 of the customs duty and £35,533,357.14 of the import VAT in the demand related to four aircraft.

(20) On 27 July 2015, the appellant provided evidence of the proper discharge of end-use in respect of those four aircraft. This extinguished £4,670,889.20 of the potential customs duty and £35,533,357.14 of the potential import VAT referred to by Officer Graney in her letter on 22 July 2015.

(21) Further correspondence followed and on 4 September 2015, HMRC formally notified the appellant of what it considered to be a remaining customs debt relating to goods declared to end-use. This comprised £165,684.68 in Duty and £1,265,722.41 in Import VAT.

(22) On 10 September 2015 the appellant provided a declaration that all aircraft operated by it are qualifying aircraft within the meaning of the Value Added Tax Act 1994, Schedule 8, Group 8. As a result, the goods imported by the appellant were properly zero-rated for import VAT. This resulted in a further reduction in the total alleged debt and the removal of all liability to import VAT.

(23) The claim for zero rating was accepted by Officer Graney in a letter dated 18 September 2015. However, Officer Graney maintained that the customs debt remained.

(24) The appellant asked for a review of Officer Graney's decision. Further evidence was provided by the appellant which showed that some of the goods which were subject to the demand for customs duty had been put to the prescribed use.

(25) The review was completed on 26 February 2016. The review upheld the original decision but accepted that it needed to be varied so as to reduce the amount of duty owed. Subsequently, on 4 March 2016, HMRC formally confirmed a reduction in the alleged debt. The reduced debt alleged by HMRC was £154,280.91 in customs duty.

(26) In 2016, the appellant appealed the debt of customs duty to the First-tier Tribunal. The appeal proceeded up to the service of witness evidence by HMRC. This included a witness statement from Officer Graney.

(27) On 16 February 2017, the appeal was withdrawn by the appellant .

(28) Separately, the appellant was also the subject of a demand by HMRC for £2,269.72 of customs duty in November 2015. That demand related to the incorrect entry of goods to end-use and the appellant promptly paid it.

(29) Between 14 June 2016 and 21 February 2017, the appellant made the following importations of seven civil aircraft from the United States of America.

(a) a Boeing 757-200PCF G-DHKA, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 14 June 2016, customs value £13,680,826.32. The declaration was handled by DHL Global Forwarding (also a member of the Deutsche Post DHL group) acting in the name and on behalf of the appellant

(b) a Boeing 757-200PCF G-DHKB, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 29 July 2016, customs value £13,631,406.76. The declaration was handled by DHL Global Forwarding acting in the name and on behalf of the appellant.

(c) a Boeing 757-23N G-DHKE, consigned by Haeco Americas of Greensboro in the USA to the appellant, entry date 6 October 2016, customs value £20,000,000. The declaration was handled by Regional Freight Services Limited acting in the name and on behalf of the appellant.

(d) a Boeing 757-200PCF G-DHKF, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 21 October 2016, customs value £15,430,908. The declaration was handled by DHL Global Forwarding acting in the name and on behalf of the appellant.

(e) a Boeing 757-200PCF G-DHKC, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 11 November 2016, customs value £16,269,421.62. The declaration was handled by DHL Global Forwarding acting in the name and on behalf of the appellant.

(f) a Boeing 757-200PCF G-DHKG, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 30 November 2016, customs value £16,269,421.62. The declaration was handled by DHL Global Forwarding acting in the name and on behalf of the appellant.

(g) a Boeing 757-200PCF G-DHKD, consigned by Flightstar Aircraft Services of Jacksonville in the USA to the appellant, entry date 21 February 2017, customs value £16,203,516.16. The declaration was handled by DHL Global Forwarding acting in the name and on behalf of the appellant.

(30) At the time of the importations, civil aircraft were eligible to be imported by a trader with the appropriate end-use authorisation at a zero rate of duty by reason of their end use as civil aircraft. The seven aircraft were therefore eligible, in principle, for end-use. They were also in fact applied to the prescribed end-use.

(31) The declarations for all seven aircraft showed that the aircraft had been put to CPC (or customs procedure code) 40 00 001. CPC 40 00 001 is for parts, components and other goods falling within specified chapters of the Tariff and of a kind to be incorporated or used in the manufacture, repair, maintenance, rebuilding, modification or conversion of aircraft. It is the CPC for duty suspended importation of aircraft parts under Regulation 1147/2002. It does not apply to importations of entire aircraft. The use of CPC 40 00 001 was therefore incorrect.

(32) On 8 March 2017 Mr Chris Dolan emailed Officer Coulsey of HMRC. Mr Dolan is employed by the Deutsche Post DHL group and acts as a single point of contact with HMRC with respect to customs matters. He also provides advice and support to individual group companies, including the appellant.

(33) Further correspondence followed between Mr Dolan and HMRC.

(34) On 10 March 2017, Officer Coulsey clarified via email that end-use can only be used by authorised importers. He also clarified that CPC 40 00 001 is for use with aircraft parts "with airworthiness certificates", not aircraft.

(35) The appellant made a retrospective application for end-use authorisation on 4 April 2017.

(36) Officer Graney subsequently issued a Right to be Heard Letter on 11 April 2017. This indicated that she was minded to refuse the end-use authorisation application.

(37) The appellant responded to Officer Graney by letter dated 5 May 2017.

(38) On 10 July 2017 Officer Graney refused the end-use authorisation application. The appellant requested a statutory review by a letter dated 24 July 2017.

(39) The end-use authorisation decision was upheld on review on 30 November 2017. The appellant then appealed the end-use authorisation decision on 22 December 2017.

(40) On 6 December 2017 HMRC issued a post-clearance demand notice (or C18) for a customs debt of £3,010,108.52 on the importation of the aircraft between June 2016 and February 2017. The appellant requested a statutory review and the customs debt demand was upheld by HMRC on 26 April 2018. The appellant then appealed the customs debt demand on 24 May 2018.

(41) On 3 July 2018, the appellant wrote to HMRC requesting a refund of the customs debt of £3,010,108.52. That request was made pursuant to Article 120. On 5 November 2018, HMRC refused to grant that request. The appellant then appealed the repayment decision on 5 December 2018.

(42) On 30 November 2020, HMRC made an application for directions permitting the admission of additional evidence and amendments to their statement of case. On 25 January 2021 the appellant opposed that application and applied to strike out parts of HMRC's case. Both applications were heard by the First-tier Tribunal at a two-day hearing on 29 and 30 April 2021 before Judge Popplewell. In a decision dated 11 June 2021, the First-tier Tribunal allowed HMRC's application and refused the appellant's.

Agreed issues

148. The agreed issues were as follows:

The first appeal

(1) There are four overarching issues for the tribunal to consider in relation to the first appeal:

(a) Whether HMRC could not reasonably have arrived at HMRC's decision.

(b) If HMRC's decision could not reasonably have been arrived at, would the decision nonetheless inevitably have been the same?

(c) If HMRC's decision was not inevitable, what remedy should the tribunal grant under section 16(4) FA 1994?

(d) If the tribunal decides under section 16(4)(b) FA 1994 to require HMRC to conduct, in accordance with the directions of the tribunal, a further review of HMRC's decision, what directions should the tribunal give?

(2) When determining these overarching issues, the tribunal will need to consider the following specific issues:

(a) Was the appellant's end-use authorisation application, or does it properly fall to be treated as:

(i) an application for an authorisation with purely retroactive effect; or

(ii) an application for an authorisation with retroactive and prospective effect; or

(iii) some other form of application?

(b) Could HMRC not have reasonably arrived at the conclusion that the appellant had not provided the necessary assurance of the proper conduct of the operations?

(c) If the appellant's end-use authorisation application was or falls to be treated as for an authorisation with retroactive effect, did it qualify as a renewal application under article 172.3 DA or was it necessary for the appellant to show exceptional circumstances under article 172.2 DA?

(d) Insofar as it was necessary for the appellant to show exceptional circumstances under article 172.2 DA, did it or it could it do so?

The second appeal

(3) To the extent that the first appeal is refused:

(a) Did any customs debt arise under Article 77.1 on the basis the goods were released for free circulation or under Article 79.1 on the basis of non-compliance with an obligation laid down in customs legislation?

(b) If any customs debt arose under Article 79.1:

(i) Is the appellant entitled to relief under Article 86.6 (read with Article 56.2(g)) on the basis that customs legislation provided for favourable tariff treatment of the goods by reason of their end use?

(ii) Is the appellant entitled to relief under Article 124.1(h)(read with article 103 DA) on the basis that the failure which led to incurrence of the customs debt had no significant effect on the correct operation of the customs procedure and all of the formalities necessary to regularise the situation of the goods have been carried out?

(4) To the extent the first appeal is allowed, does that entail that the second appeal should be allowed in any event?

The third appeal

(5) To the extent that the first appeal and the second appeal both fail, does Article 120.1 apply on the basis that the customs debt was incurred in special circumstances in which no deception or negligence may be attributed to the appellant?

(6) If so, what remedy should the tribunal grant under section 16(4) or (5) FA 1994 in the light of Article 116.3?

APPENDIX 2: FACT-FINDING AS TO THE 2015 APPLICATION FOR END-USE AUTHORISATION, THE ENSUING DISPUTE, AND WHY HMRC NEVER MADE A DECISION ON THE APPLICATION (SUPPLEMENTING AGREED FACTS 11-28)

150. Agreed fact 11 refers to the making of this application. On the application form, it was described as a "single" as opposed to a "first" application, and as a "renewal of an existing EU authorisation". It was for the period from 6 March 2015 to 6 March 2020. The goods were described as "Civil aircraft and parts for civil aircraft"; under "details of planned activities" (box 9), in answer to "How will the goods be used?", the completed application said "Maintenance and operation of company civil aircraft (freighter aircraft)"; and in answer to "Where will the goods be used?", the completed application said: "As stock at East Midlands Airport".

151. Officer Graney's letter of 14 April 2015 (agreed facts 12 and 13) included the following:

(1) Officer Graney would be dealing with the appellant's end-use authorisation application

(2) As she was aware that there had been "some problems in the past with the operation of" the appellant's end-use authorisation "and in particular with the records that have been kept", Officer Graney would be carrying out a "desk audit" of the appellant's imports, "initially over the past twelve months", "prior to granting a renewal of the authorisation"

(3) She accordingly attached two excel spreadsheets, one showing "all the entries [the appellant had] made to end-use" during that period, and one listing the entries that she wanted a "full documentary audit trail" for. She asked for

(a) confirmation that all the entries on the first spreadsheet had been entered into the appellant's end-use records; and

(b) for the second spreadsheet, invoices, worksheets, fitment details etc for parts, and extract from the end-use record to substantiate completion or otherwise of end-use, whichever was applicable.

152. Mr Hill's same day response (agreed fact 13) confirmed that the entries on the first spreadsheet had been entered into the appellant's records.

153. Officer Graney's email of 1 May 2015 (agreed fact 16) stated that, from the answers provided by the appellant in the previous correspondence, "it would appear that there may be some problems with the way in which [the appellant had] been operating [its] end-use authorisation." The email focused on the appellant's having transferred imported aircraft parts to Germany. She raised the potential that such parts had been removed from customs supervision, rendering them liable to duty and possibly import VAT. She asserted that movement of parts to other sites in the UK would have been removal from the scope of the 2010-15 end-use authorisation and so, unlawful removal of goods from customs supervision. The officer said she needed details of any other goods imported under the appellant's end-use authorisation which had, in the past three years, been delivered to another company or site not listed on the appellant's authorisation. Once she had this information, she said, she would be able to inform the appellant of the "debt liability" on such goods.

154. The email was thus the start of the dispute between HMRC and the appellant that led to the raising of the £154k customs debt.

155. In her email of 11 May 2015 to Mr Hill (agreed fact 16), Officer Graney stated her conclusion that all the end-use goods that the appellant had sent to its German sister company during the course of the 2010-15 end-use authorisation had been removed from the scope of

that end-use authorisation without correct transfer into anybody else's authorisation and therefore the goods were deemed to have been removed from customs authorisation and that had created a customs debt. She said that the appellant needed to provide her with certain information in order that she could come to a decision on how to proceed: the information was, essentially, all transfers of goods in the last three years to other EU states or within the UK. The email ended as follows:

> Additionally, in the light of the problems which have been identified in relation to the way in which you have been operating End Use and the fact that your previous authorisation expired on 6 March 2015, I must advise you to cease importing to End Use until we have been able to ascertain *whether it will be possible to allow a new authorisation to be issued*. Please note that from a legal perspective, as of 7 March 2015 [the appellant] no longer held an End Use Authorisation.
>
> I understand that this is not good news from your perspective, however I look forward to receiving the above information at your earliest convenience, in order that we can hopefully move the situation forward *and consider whether a new authorisation can be issued*.

156. I find that this email to Mr Hill (in particular the wording italicised (by me) in the extract immediately above) cast material doubt on whether the 2015 application for authorisation would be granted.

157. An internal HMRC email of 11 May 2015 (from Officer Graney) referred to there being serious doubt as to whether a new end-use authorisation would be issued "considering the problems found during the desk audit". Another internal HMRC of 1 July 2015 from Officer Graney states that the appellant had decided not to renew the end-use authorisation.

158. Mr Hill's email of 7 July 2015 to Officer Graney (agreed fact 18) said that, as agreed, the appellant had complied the list of custom import entries for the period 21 May 2012 to 21 May 2015 for the parts brought in under the appellant's end-use authorisation. He asked the officer to note certain "important" information including:

(1) All the customs records were provided by the customs team in DHL Aviation UK Ltd (a sister company to the appellant)

(2) One particular column showed parts that had been transferred out of the appellant to other sites

(3) "blanks" meant the appellant was prepared to pay import duties on those parts; "0" meant parts that had not been transferred out to other sites; and "1" meant parts that had been transferred to other sites.

159. The column headings on the accompanying spreadsheet included the following:

(1) Date

(2) Airway bill number

(3) CPC

(4) Nature of parts (EXP or ROT)

(5) Whether there was a certificate of airworthiness

(6) Quantify transferred out of appellant to other sites (for a number of entries "0" was indicated, but in many entries this was blank)

(7) Country of destination

160. In her response of 10 July 2015 (referred to in agreed fact 18), Officer Graney said that

(1) she did not think that Mr Hill's spreadsheet had picked up all the imports that the appellant had made to end-use (she had compared the number of entries in Mr Hill's spreadsheet to that on HMRC's systems, and found considerable difference: 1,276 as against 1,627 for the period from 10 July 2012 (i.e. three years before the date of Officer Graney's email)); in particular, there were four aircraft on the report from HMRC's systems, as against only two on Mr Hill's spreadsheet;

(2) because of this, and because of the time it had taken the appellant to produce the data so far, she had decided she needed to take steps to secure the potential duty due: and therefore would be calculating the potential duty due on all imports to end-use by the appellant during the last three years, but curtailed at 6 March 2015; she would issue a "right to be heard" letter which would give the appellant a further 30 days to complete the work on its end-use records;

(3) the customs entry number, which she described as one of a few "crucial" pieces of information, was missing from Mr Hill's spreadsheet;

(4) the information on the HMRC systems indicated that the appellant had continued to import under end-use until at least 1 July 2015. She then said:

> In my e-mail of 11 May 2015 I instructed you to cease importing goods under End Use, as you no longer held an authorisation for this. It appears that this Instruction has not been complied with. All goods imported to End Use by [the appellant] on or after 7 March 2015 are now liable to payment of Import Duty and I will be issuing a separate RTBH letter advising you of the amount due at the earliest possible opportunity.

161. This last sentence in the extract above is further indication of the material doubt that, by this time, attached to question of whether the 2015 application would be granted.

162. The heading to Officer Graney's "right to be heard" letter of 22 July 2015 (agreed fact 19) cited the appellant's 2010-15 end-use authorisation, and the letter started as follows:

> Further to your application to renew the above authorisation it has become apparent from basic audit checks that you have failed to maintain a record of the goods which you have imported under this authorisation, or the End Use to which you have put them. This is in direct breach of the conditions of that authorisation.

163. This extract illustrates the connection, from HMRC's perspective at the time, between the appellant's 2015 application and the dispute that led ultimately to the £154k customs debt.

164. Agreed fact 19 sets out the customs duty and import VAT said to be due in the letter, and how much of it related to four aircraft. It is worth noting that:

(1) The figures were said to reflect the duty and import VAT on all imports made by the appellant to end-use in the period 23 July 2012 to 6 March 2015; and

(2) Officer Graney expressly said that she was aware that the majority of this debt related to four import duties that appeared to be for aircraft, two of which may have been identified (in Mr Hill's spreadsheet).

165. The letter encouraged the appellant to provide certain additional information, including details of the entry numbers; it said that once the appellant provided "sufficient information to enable [Officer Graney] to calculate the outstanding duty due", she would then "adjust the debt accordingly".

166. Mr Dolan responded to Officer Graney by email the next day (23 July 2015) saying (amongst other things) (and quoting his headings in the email):

(1) "Importation of civil aircraft": Mr Dolan would very soon be sending her records of proper discharge under end-use for the four aircraft (and this would reduce the debt considerably) (as was indeed the case – see agreed fact 20);

(2) "Rotables": Mr Dolan said a significant number of items qualified for the tariff suspension relief if accompanied by certificates of airworthiness; he said "some are in stock whilst others have been fitted to qualifying aircraft and we have a full audit trail for these"; he asked to be permitted exceptionally to make substitute entries for these goods;

(3) "Expendables": Mr Dolan said that there were a lot of transactions, which he would have to review in more detail, and the appellant might be able to "reconstruct control accounts"; but "it might prove more cost effective to consider the items as being diverted to home use and pay the duty and VAT reckonable". But, he said, he would revert to Officer Graney on this;

(4) "End-use – moving forward": Mr Dolan said that "the end-use relief for aircraft and aircraft parts needs to be restored effective from the date of lapsing and I would be grateful if you could please consider this accordingly as discussed as we will certainly be importing aircraft in the very near future".

167. Officer Graney sent an email to Mr Dolan on 18 August 2015, reminding him that the 30 day RTBH period would expire on 24 August, and also saying: "I also note that I have not received an application for End Use in relation to Aircraft (only), as discussed".

168. Mr Dolan's response to the RTBH letter, dated 20 August 2015, included the following:

(1) The main issue appeared to be the weakness in the appellant's linking import entries with its Trax inventory system. Mr Dolan said he believed that once goods were recorded on Trax, there was clear evidence that actual items imported for end-use had either been fitted to civil aircraft or exported from the EU;

(2) Items (i.e. aircraft parts) moving between sites were not moved "between End-Users" but "within the End-Use authorisation";

(3) When parts were moved from one site to another, to service the 757 aircraft, there was no supply for end-use purposes as EAT already owned the parts – the appellant saw this as simply moving goods within inventory;

(4) The letter said as follows:

> Any part can be tracked into and through TRAX and to removal from inventory and items being put to the prescribed end-use. Issues over traceability of parts for customs purposes are therefore solely issues about providing a link between the import customs declaration and the TRAX system. [The appellant] acknowledges that in retrospect, this linkage has historically not been direct, automatic or as strong as [the appellant] would have desired. However, [the appellant] is very confident that each aircraft part it receives is traceable and can be tracked through to end-use in the TRAX system. Evidence will exist that each of the parts concerned was put to the prescribed end-use or exported. It is just that it in the absence of a direct link between the import customs declaration and the TRAX system, it can take a significant amount of time and effort to provide that evidence for each and every consignment.

(5) To demonstrate that the aircraft parts (as well as the aircraft) imported in the 2012-2015 period highlighted by HMRC had been put to an eligible use, the DHL indirect tax team had taken a sample of consignments and successfully traced them to end-use. Some examples of the results found were attached. Four entries (one for each year, 2012-2015) were chosen at random. As regards "rotables" (high value engine parts), 424 of the 1,468 import entries were traced to end-use

169. HMRC's letter of 4 September 2015 (see agreed fact 21) referred in the heading to "End Use Audit" and described itself in the first sentence as a decision in relation to the appellant's 2010-15 end-use authorisation "and the debt associated to the goods imported under that authorisation". In the second paragraph, it referred to the 2015 renewal application and said that "as part of potential re-authorisation process", HMRC had asked the appellant that it had correctly completed end-use on all goods imported in the previous three years or to advise that it still held them in stock.

170. The letter said that the information supplied by the appellant showed that it had failed to comply with both the requirements of end use and conditions of its authorisation:

(1) It had failed to retain records for goods imported by it to end use.

(2) It had removed goods from the one authorised site, and therefore from customs supervision, by sending them to other UK sites and entities and other EU sites and entities without any formal procedure having been followed.

171. In the letter, Officer Graney said that she had not been satisfied by the evidence in Mr Dolan's letter of 20 August 2015 that the items (apart from the four aircraft) imported in the highlighted period (2012-2015) had been put to the prescribed end-use. This was because

(1) Mr Dolan's letter and attached schedule had provided information only about 424 of the 1,664 entries (for aircraft parts) made to end-use in the period (i.e. no information was provided about 1,240 entries for aircraft parts entries made to end-use); and

(2) Even with regard to the 424 entries in Mr Dolan's schedule,

(a) 32% had been removed from customs supervision (by which Officer Graney meant that they were shown in Mr Dolan's schedule as having been transferred out of the appellant (i.e. East Midlands Airport) to other sites); and

(b) Detailed information had been provided only with regard to four entries (of the 424); and owing to anomalies identified by Officer Graney in the letter between Mr Dolan's schedule and the audit provided on those four sample entries, she had concluded, at this stage, that the information on the schedule could not be relied upon.

172. The customs debt referred to in the letter was in respect of duty on all goods imported to end-use by the appellant in the period 9 September 2012 to 6 March 2015 inclusive, where the appellant had failed to prove to HMRC's satisfaction that those goods had been put to their prescribed end-use. A copy of the spreadsheet attached to the letter detailed the entries on which customs duty was due.

173. A letter from KPMG on the appellant's behalf to HMRC dated 27 November 2015 with "further evidence" (alluded to in agreed fact 24) selected all entries which represented about 50% of the total duty liability (which meant the top 45 import entries by duty). It stated that KPMG had been successful in fully evidencing a compliant audit trail from import through to end-use completion for all but four of those import entries (three were not actually for the appellant, upon investigation; the fourth should not have been imported to end-use). The letter said that a "full report" of the 45 import entries was appended "together with a comprehensive

package of documentary evidence for each entry from import through to end-use completion" – however, the hearing bundle for these appeals did not contain that report or that package of evidence.

174. The letter said that whilst it was possible for the appellant to undertake a full documentation gathering exercise for the remaining entries, to do would cost the business a greater sum – in lost time, business disruption and advisers' costs – than the duty at stake.

175. HMRC's review conclusion letter of 26 February 2016 (agreed fact 25) identified nine import entries where, following the information provided by KPMG in the 27 November 2015 letter, HMRC had concluded that the goods had been put to prescribed use. The customs debt was accordingly reduced to £154,280.91.

176. The appellant's notice of appeal was dated 24 March 2016. The appellant's position included:

(1) it had suitable record keeping [for the relevant period i.e. September 2012 - March 2015] to meet the requirements for end-use relief

(2) it had demonstrated to HMRC that end-use relief was adequately discharged in respect of the entries that gave rise to the customs duty in question

(3) for the 1,668 import entries (entered to end-use) giving rise to the "original" customs duty alleged, the appellant had provided evidence in relation to 428 entries; it was unreasonable, the appellant said, to expect evidence for each of the entries

(4) it was inconsistent with the purpose and spirit of CCC to operate the regime in an unnecessarily onerous way. It argued, in the alternative, (i) airworthiness certificates justified relief from customs duty on certain entries (ii) reliance on CCC IP article 544(c) to provide relief from customs duty; (iii) the 4 March 2016 demand for customs duty was out of time.

177. HMRC's statement of case dated 3 June 2016 included:

(1) the appellant had not met all the requirements of its 2010-15 end-use authorisation; it did not maintain full records for end-use, as required under the terms of its authorisation

(2) the appellant failed to provide all of the records requested by Officer Graney

(3) the appellant cannot rely on certificates of airworthiness to claim relief, as any claim must be made at the time of import

(4) since HMRC were unable to verify a significant proportion of the total number of entries, they had to conclude, on balance, that the appellant could not show that these goods were put to the prescribed use and that they were therefore removed from customs supervision. Consequently a customs debt fell due

(5) the records supplied by the appellant demonstrate that proper procedures had not been followed as far as the transfer of goods was concerned. The appellant had imported goods to a third party's site when that third party was not on the appellant's 2010-15 end-use authorisation and later sent to another entity (often in another EU member state) without the proper transfer procedure taking place. Those other entities may have been end-use-authorised in their own right, but as the transfer process was not followed, the goods were removed from customs supervision

(6) goods imported under end-use should remain under customs supervision in accordance with CCC article 82. The appellant did not put all the goods imported to the prescribed end-use. The appellant removed from customs supervision, goods imported

under end-use relief (for instance by transferring end-use goods to an unauthorised site) and consequently, a debt was incurred under CCC article 203

(7) The appellant had not produced records to show that certain goods imported under end-use were put to prescribed use; as a result it has breached the conditions of its end-use authorisation and a debt has been incurred under CCC article 204.