[2016] UKUT 166 (TCC)
UT/2014/0067

Customs duty – Customs Community Code, Arts. 5, 221 - import of garlic declared to be of Indian origin – HMRC contended that garlic was of Chinese origin resulting in higher duty payable – post clearance demand for import duty – whether communicated to importer – whether posting letter sufficient communication if letter not received – whether communication to customs clearance agent sufficient – whether time limit for communication of 3 years pursuant to Art. 221(3) - whether arguable that HMRC could rely on Art. 221(4) of Community Customs Code to override time limit where alleged criminal act – permission to HMRC to amend pleading

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellants

- AND -

A.G. VILLODRE SL **Respondent**

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 4 March 2016

Mr Simon Pritchard (instructed by **General Counsel and Solicitor for HM Revenue and Customs**) for the **Appellants**
Mr David Yates (instructed by **The Khan Partnership LLP**) for the **Respondent**

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DECISION

RELEASE DATE: 7 APRIL 2016

Tribunal Judge: Mr Justice Morgan:

Introduction

1. This case concerns import duties on garlic imported into the United Kingdom by A G Villodre SL ("Villodre") in February 2005. On 22 July 2014, the First-tier Tribunal (Tax Chamber) (Judge Geraint Jones QC and Mr J L Coles) ("the FtT") heard three preliminary issues in this matter and also considered two applications, one by each party. In its decision released on 21 August 2014, the FtT decided all three preliminary issues and both applications in favour of Villodre.

2. The Commissioners for Her Majesty's Revenue & Customs ("HMRC") sought permission to appeal to the Upper Tribunal in relation to the decision of the FtT in respect of two of the preliminary issues and in respect of the FtT's dismissal of HMRC's application. On 29 October 2014, The FtT granted HMRC permission to appeal in respect of one of the preliminary issues but otherwise refused permission to appeal. On 3 December 2014, the Upper Tribunal granted HMRC permission to appeal in relation to their other grounds of appeal also.

3. Before the FtT, Mr Pritchard appeared on behalf of HMRC and Mr Yates appeared on behalf of Villodre. The same counsel appeared on this appeal to the Upper Tribunal.

The facts

4. Perhaps because the hearing before the FtT concerned preliminary issues, the findings of fact as to the relevant events are not very detailed. Some important facts appear to have been assumed or conceded but without the assumption or concession being fully defined. There is also a lack of clarity as to whether facts were being assumed or conceded for the sake of the preliminary issues or more generally. In this decision, I will proceed on the basis of the following facts which I understand are not in dispute.

5. Villodre is a Spanish company. Amongst other activities, it trades in garlic which is grown outside Spain and it exports such garlic to the United Kingdom and elsewhere.

6. In February 2005, it bought garlic from a supplier in Bahrain and exported it to the United Kingdom. The garlic arrived in two consignments, on 14 and 18 February 2005. On the arrival of the consignments in the United Kingdom, customs declaration forms were signed by a customs clearance agent, W S Logistics Ltd ("WSL") of Felixstowe. The declarant as importer of the goods was stated to be Villodre. Import duty was calculated and paid on the basis that the country of origin of the goods was India. If the true country of origin

of the goods had been China, then substantially higher sums would have been payable as import duties.

7. The FtT was told that prior to July 2007, the European Anti-Fraud Office ("OLAF") conducted an investigation, in cooperation with the Bahraini authorities, into exportations from Bahrain of garlic which was said to be of Indian origin. The FtT was told that OLAF had concluded that the garlic was in truth of Chinese origin. The FtT was also told that the managing director of the company in Bahrain which supplied the relevant garlic to Villodre admitted that the garlic was of Chinese origin. The FtT was not shown a copy of the report prepared by OLAF. In July 2007, OLAF informed HMRC of the results of its investigation.

8. On or about 7 August 2007, HMRC prepared a post clearance demand note, described as a "C18". This document was addressed to Villodre (although its name was spelt with only one "l") at its correct address in Spain and to WSL in Felixstowe. The C18 referred to Villodre as "the consignee" and to WSL as "the declarant/representative". The FtT did not make detailed findings as to what documents accompanied the C18 but nothing seems to turn on the form of the documents. The C18, and a covering letter, stated that the origin of the relevant consignments had been misdescribed as being Indian and although £7,529.12 had been charged and paid as import duty, the correct figure for import duty should have been £291,255.43 so that a further sum of £283,726.31 was due and payable.

9. I will proceed on the basis that the C18 was sent by post to Villodre in Spain and to WSL in Felixstowe. The copy sent to Villodre was not received by it. The copy sent to WSL appears to have been received by it.

10. It seems that the C18 addressed to Villodre and WSL was one of 5 somewhat similar C18s sent at the same time. By an undated letter which seems to have been sent on or before 22 August 2007, a firm of solicitors, Hassan Khan & Co, wrote to HMRC referring to these C18s. The heading to the solicitors' letter referred to 5 companies, one of which was Villodre. The letter stated that the solicitors acted for these 5 named companies and asked for further information to be provided. There were further written communications between HMRC and Hassan Khan & Co on 22 August 2007 when further information was provided by HMRC. The FtT held that Villodre had not in fact instructed Hassan Khan & Co to act for it.

11. The FtT found that, on 19 February 2008, HMRC wrote to Villodre at its address in Spain and that the letter stated that it enclosed a copy of "the original paperwork" and the FtT was told that the letter enclosed the original C18 with a date stamp of 9 August 2007. The FtT proceeded on the basis that this letter was not received by Villodre.

12. In May 2008, HMRC asked the Spanish tax authorities for mutual assistance in recovering the debt which HMRC said was due from Villodre. Villodre's evidence to the FtT was that it was notified of the alleged debt by the Spanish authorities on 1 October 2010. On 19 October 2010, Villodre wrote to HMRC challenging its liability to pay the alleged debt on the ground that it had not

been notified earlier of HMRC's claim. On 18 March 2011, The Khan Partnership (as Hassan Khan & Co had now become) wrote to HMRC stating that as Villodre had not been notified of the claim until 1 October 2010, the alleged debt was not enforceable against Villodre.

The procedural history

13. HMRC considered the letter dated 18 March 2011 as a request for a review of the position and on 6 May 2011, HMRC stated that a review had been undertaken and the original decision would be upheld.

14. On 6 June 2011, Villodre appealed to the FtT against the decision made on 6 May 2011. The appeal was in time as the time for appealing (30 days from 6 May 2011) expired on 5 June 2011, which was a Sunday, and the appeal was lodged on the next working day. Villodre's grounds of appeal relied upon what it said was a lack of notification of the customs debt within 3 years of the date on which it was incurred. The grounds of appeal also stated that the garlic was of Indian origin and if it should be found that it was not of Indian origin, then Villodre sought waiver of the customs duty on the ground that it had acted in good faith and it had not been "deceptive or obviously negligent".

15. On 28 February 2013, HMRC served their response to Villodre's appeal. HMRC contended that the appeal was out of time and that the decision of 6 May 2011 was not a decision which could be appealed but was a restatement of the original decision of August 2007. HMRC pleaded that the garlic was not of Indian origin and that Villodre had produced no evidence to support the assertion that the garlic was of Indian origin. As to the claim to waiver of the customs duty, it was pleaded that Villodre was not entitled to a waiver and, in that context, it was pleaded that the error in the customs declaration of origin could have been detected by Villodre if it had taken due care.

16. On 16 July 2013, the FtT directed a hearing of three preliminary issues which I will describe later in this decision. On 20 August 2013, Villodre applied for an extension of time within which to appeal, seemingly against HMRC's original decision in August 2007.

17. On 8 July 2014, HMRC applied for permission to amend their response to the appeal to rely on article 221(4) of the Community Customs Code, to which I will refer later in this decision.

The decision of the FtT

18. The first preliminary issue was whether the FtT had jurisdiction to entertain the appeal. The FtT held that it did have jurisdiction. It went on to hold that if it did not have jurisdiction to entertain an appeal against the review decision of 6 May 2011, it would have extended time to allow it to entertain an appeal against the original decision in August 2007 on the grounds that in all the circumstances it would be just to extend the time for an appeal.

19. The second preliminary issue was whether HMRC had communicated the amount of the customs duty to Villodre within 3 years from the date on which

the customs duty was incurred. The FtT held that the customs duty had not been communicated to Villodre within the relevant 3 year period.

20. The third preliminary issue was expressed by reference to the authority of WSL to act as the direct representative of Villodre. The FtT did not make findings as to the scope of the instructions to, or the scope of the authority of, WSL in February 2005 or August 2007 but instead held that a communication to a direct representative (if that is what WSL had been) was not a communication to Villodre.

21. Finally, the FtT considered HMRC's application for permission to amend its response to the appeal. The FtT refused to grant permission to amend.

The appeal

22. HMRC put forward three grounds of appeal, which can be summarised as follows:

(1) HMRC communicated the amount of the duty to Villodre by sending the C18 to it at its address in Spain in August 2007 even though that document was not received by Villodre; I will refer to this point as "the communication point";

(2) HMRC communicated the amount of the duty to Villodre by sending the C18 to WSL; I will refer to this point as "the WSL point";

(3) The FtT was wrong to refuse to grant HMRC permission to amend their response to Villodre's appeal.

The Community Customs Code

23. The legislative provisions which were in force at the relevant time and which govern this case are contained in Council Regulation (EEC) No 2913/92 establishing the Community Customs Code ("the Code"). Save where otherwise stated, references in this decision to Articles are references to the Articles of the Code.

24. Article 4 contains definitions. "Debtor" is defined to mean "any person liable for payment of a customs debt". "Declarant" is defined to mean "the person making the customs declaration in his own name or the person in whose name a customs declaration is made".

25. Article 5 is under the heading "Right of representation" and provides:

"**Right of representation**

Article 5

1. Under the conditions set out in Article 64 (2) and subject to the provisions adopted within the framework of Article 243 (2) (b), any person may appoint a representative in his dealings

with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representation may be:

- direct, in which case the representative shall act in the name of and on behalf of another person, or

- indirect, in which case the representatives shall act in his own name but on behalf of another person.

A Member State may restrict the right to make customs declarations:

- by direct representation, or

- by indirect representation,

so that the representative must be a customs agent carrying on his business in that country's territory.

3. Save in the cases referred to in Article 64 (2) (b) and (3), a representative must be established within the Community.

4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.

A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.

5. The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative."

27. Articles 217 to 221 provide for the amount of import duty to be entered in accounts and for the communication of the amount of the duty to the debtor. The amount originally entered as the amount of import duty can subsequently be increased in accordance with Article 220.

28. Article 221 provides:

"*Article 221*

1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

> 2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.
>
> Without prejudice to the application of the second subparagraph of Article 218 (1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.
>
> 3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.
>
> 4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3."

29. Article 222 provides that an amount of duty communicated in accordance with Article 221 shall be paid by the debtor within a specified period following communication to the debtor. Although this provision was not specifically relied upon by HMRC in support of its argument as to the meaning of "communication", I note that Article 222(1) provides;

> "An extension shall be granted automatically where it is established that the person concerned received the communication too late to enable him to make payment within the period prescribed."

I refer to this specific reference to the communication being "received" as it might have been relied on to support an argument that the Code proceeds on the basis that, in general, there can be a communication for the purposes of the Code even where the communication is not received.

30. Article 239(2) provides for an application for repayment or remission of duty to be made within 12 months from the date on which the amount of the duties was communicated to the debtor.

31. Article 243 provides that any person is to have a right of appeal against a decision made by a customs authority. The Code does not itself specify a time limit for such an appeal but Article 245 provides that the appeals procedure is to be determined by a Member State. It is to be expected that a Member State would provide for there to be a time limit on such appeals.

The communication point

32. The factual basis for the assessment of this point is that the letter of 7 August 2007 enclosing the C18 was not received by Villodre. Further, it is not said that either WSL or Hassan Khan & Co sent a copy of the letter or the C18 to Villodre around that time so that Villodre would have received the documents by that route. Instead, the facts are that Villodre did not receive the relevant C18 until 1 October 2010.

33. HMRC contend that the requirement of communication to the debtor does not require that the relevant document is actually received by the debtor and it is sufficient if the customs authority sends the document to the debtor in the post. As to that, I do not see that HMRC actually proved that they had sent the document to Villodre in the post, much less that they sent it in a correctly addressed pre-paid letter. HMRC do not appear to have given evidence as to precisely what they did in these respects and the FtT referred to HMRC "writing" a letter to Villodre whereas they referred to HMRC "sending" a letter to WSL. It may be that the FtT did not intend to distinguish between a letter which was sent and one which was not. It may also be the case that Villodre did not intend to dispute that the letter of 7 August 2007 and the C18 was sent to it in the post. However, I draw attention to these deficiencies in the evidence called by HMRC. It is not a very promising start for a submission that it communicated the amount of the customs duty to Villodre even when there is a finding of fact that Villodre did not receive what might have been sent to it. Nonetheless, I will proceed in this decision on the basis that the letter of 7 August 2007 and the C18 were posted to Villodre in a correctly addressed pre-paid envelope but they never arrived.

34. "Communication" is not defined in the Code. However, Article 221(1) refers to communication "in accordance with appropriate procedures". That indicates that a Member State could adopt and define procedures to be followed for the purpose of effecting a communication for the purposes of Article 221 provided that the procedures are judged to be "appropriate" for the purposes of the Code.

35. It was common ground that the United Kingdom has not adopted or defined procedures for effecting a communication for the purposes of the Code. The operation of Article 221(1) was considered by the Court of Justice in Belgische Staat v Molenbergnatie NV Case C-201/04. It was held that a Member State is not, in general, required to adopt specific procedural rules as to the manner in which a communication is to be made for the purposes of Article 221. In particular, a Member State is not so required where the general procedural rules of the Member State can be applied to that communication and those general rules ensure that the debtor receives adequate information so as to enable him, with full knowledge of the facts, to defend his rights. These statements of principle were repeated by the Court of Justice in Belgische Staat v Direct Parcel Distribution Belgium NV Case C-264/08.

36. Accordingly, I need to identify the general principles of English law as to what is involved in a communication to a debtor. If those principles satisfy the requirement that the debtor receives adequate information so as to enable him,

with full knowledge of the facts, to defend his rights, then I will be able to apply those principles to the facts of this case to decide whether the C18 in this case was, or was not, communicated to Villodre in or around August 2007.

37. I was not referred to any English law provision or decided case which identifies what is required to effect a communication to a debtor. The starting point is therefore to identify what is involved in the ordinary concept of communication. In my judgment, a document which is sent in the post to a debtor but which is lost in the post and never received by the debtor is not communicated to the debtor. The concept of communication requires the relevant message to get through to the debtor.

38. If I have correctly identified the general principle of English law as to what is involved in a communication then I consider that that principle does meet the further requirement that it would enable the debtor, with full knowledge of the facts, to defend his rights.

39. Applying that general principle of English law to this case, it is clear that the C18 was not communicated to Villodre in or around August 2007 or at any time before 1 October 2010.

40. HMRC put forward a number of arguments to the contrary which I need to consider. Their first argument was that the decision of the FtT was contrary to the earlier decision of Sir Stephen Oliver QC in the VAT and Duties Tribunal in Terex Equipment Ltd v HMRC (23 January 2008). At paragraph 47 of the decision in that case there is a brief reference to what is required as regards the contents of a "communication". There is no discussion as to what is needed as regards the manner of communication and whether the communication has to get through to the debtor; that point did not arise on the facts of that case. Accordingly, there is nothing in Terex which throws light on the present case.

41. HMRC then argued that the decision of the FtT was contrary to section 7 of the Interpretation Act 1978. Section 7 of the 1978 Act applies: "[w]here an Act authorises or requires any document to be served by post …". Section 7 of the 1978 Act does not apply to a communication under Article 221 because the Code is not "an Act": see the definition of "an Act" in sections 21 and 22 of, and schedule 1 to, the 1978 Act. In any event, even if section 7 of the 1978 Act applied, it would not produce the result that the C18 of August 2007 was served on Villodre. The operation of section 7 of the 1978 Act was explained by Parker LJ in R v London County Quarter Sessions ex p Rossi [1956] 1 QB 682 at 700 and later authorities were considered in Calladine-Smith v Saveorder Ltd [2011] EWHC 2501(Ch). In a case like the present, where it is relevant to know the time at which the C18 was served on Villodre (if it ever was served) it is open to Villodre to prove that the C18 never was served on it. The FtT held that the C18 had not been received by Villodre before 1 October 2010 and section 7 of the 1978 Act does not enable HMRC to contend for any different position.

42. HMRC next argued that the decision of the FtT was contrary to a recital in the Code which stated that customs formalities and controls should be abolished

or at least kept to a minimum. I cannot see that this recital has any part to play in this case. Article 221 expressly requires that the amount of duty must be communicated to the debtor. That Article must be given effect. Further, the decision in Belgische Staat v Molenbergnatie NV assists in determining what the Code requires by way of communication. It is not possible to disregard that assistance by relying on the general aspirations in the recital.

43. Finally, HMRC argued that the decision of the FtT produced an impractical result. It was argued that it would be difficult for HMRC to contradict evidence from an importer that it had not received a particular communication. I do not regard the result of the FtT's decision as impractical. It is often the case in many different legal contexts that there is an issue of fact which has to be tried as to whether a person received a particular document. Even where that person denies receipt of the document, there may be circumstantial evidence which points to a contrary conclusion or the evidence of non-receipt, when it is tested, by cross-examination of witnesses if appropriate, is found to be unreliable. Ultimately, the tribunal of fact has to decide the issue on the balance of probabilities. The position in the present context is not different from the generality of cases. In particular, the fact that the importer may be abroad may present difficulties for the importer in adducing evidence before a tribunal in the United Kingdom that a document was not received but that ought not to make the position of HMRC more difficult.

44. I drew attention earlier to Article 222(1) which might be said to distinguish between the date of a communication and a possible later time when the communication is received. I have considered whether this provision might support an argument that there could be a communication even where it was not actually received. I did not hear argument on this provision. Whatever the circumstances in which Article 222(1) might apply, it does not seem to me that I can disregard the ordinary meaning of "communication" in English law nor the requirement identified in Belgische Staat v Molenbergnatie NV that any rules adopted by a Member State should ensure that the debtor received adequate information so as to enable him, with full knowledge of the facts, to defend his rights.

45. The FtT held that, subject to the WSL point, the C18 had not been communicated to Villodre before 1 October 2010. As I agree with that conclusion, I will dismiss the appeal on this first point.

The WSL point

46. In relation to the WSL point, HMRC referred to Article 5 which provides that "any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules". HMRC then argued that Villodre had appointed WSL as a direct representative to act on its behalf. HMRC submitted that the receipt by WSL of the HMRC letter of 7 August 2007 enclosing the C18 was an act or formality laid down by "customs rules". Article 1 refers to "customs rules" as consisting of the Code and the provisions adopted at Community level or nationally to implement them. HMRC submitted that these rules included the

rule in Article 221(3) requiring communication by the customs authority to the debtor.

47. There are a number of difficulties with HMRC's submissions. The first difficulty is as to the facts. Villodre's case was that it had never appointed WSL to do anything on its behalf. It was accepted that Villodre had imported the relevant goods into the UK and that WSL had acted as a customs clearance agent in accordance with that importation. Villodre contended that this came about notwithstanding the fact that it had never appointed WSL to act for it. Even if it might be right to infer that Villodre must have appointed WSL to handle the importation in February 2005, that is a long way from justifying an inference that Villodre had appointed WSL in relation to the matter of receiving a communication under Article 221 from HMRC in August 2007. HMRC did not attempt to lead evidence to establish that there had been such an appointment. I suppose HMRC's submission would have to be that if an importer appoints a customs clearance agent to make a customs declaration for the purposes of the Code that necessarily means that the agent is appointed to receive any subsequent communication from a customs authority for the purposes of the Code. If that were HMRC's case, then I would not accept it. It seems to me that it is open to an importer to appoint a representative to do specific acts without making that person his representative for all purposes relevant to the Code.

48. The second difficulty with HMRC's case is that it is difficult to describe the passive act of receiving a communication from HMRC as performing an act or formality laid down by the customs rules. This difficulty is emphasised by a consideration of Article 5(4) which provides that a representative must state that he is acting on behalf of the person represented. Article 5(4) strongly suggests that the performance of an act or a formality within Article 5(1) requires some positive step or action on the part of the representative and this is not satisfied in a case where HMRC wish to rely upon the passive receipt by the representative of a letter delivered to it through the post.

49. Thirdly, Article 5(4) has a further part to play in this case. Even if the passive receipt of a letter through the post could be the performance of an act or formality within Article 5(1), then WSL did not comply with Article 5(4) in relation to that act and so has not validly performed the act on behalf of Villodre for the purposes of Article 221. In particular, by reason of Article 5(4), because WSL did not state that it was receiving the C18 on behalf of Villodre, WSL was deemed to be receiving it on its own behalf.

50. Accordingly, HMRC did not communicate to Villodre the amount of the customs duties by sending documents to WSL in or around August 2007. I will dismiss the appeal on this second point also.

The application for permission to amend

51. The result so far is that HMRC did not communicate the amount of the customs duty to Villodre within 3 years from the date on which the customs debt was incurred; the relevant dates for the two consignments were 14 and 18 February 2005. The effect of Article 221(3), unless it is overridden by Article

221(4), is that HMRC are not entitled to recover from Villodre customs duties in accordance with its C18 of August 2007.

52. I have set out Article 221(4) above. HMRC's case is that Article 221(4) does apply in this case so that it is not prevented from recovering the proper amount of customs duties from Villodre even though HMRC did not comply with Article 221(3).

53. For the purposes of establishing an act which, at the time it was committed, was liable to give rise to criminal court proceedings, HMRC relies on section 167 of the Customs and Excise Management Act 1979 which provided (in the terms current in February 2005):

> 167.— **Untrue declarations, etc.**
>
> (1) If any person either knowingly or recklessly—
>
> (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or
>
> (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,
>
> being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be arrested; and any goods in relation to which the document or statement was made shall be liable to forfeiture.
>
> (2) Without prejudice to subsection (4) below, a person who commits an offence under subsection (1) above shall be liable—
>
> (a) on summary conviction, to a penalty of the prescribed sum, or to imprisonment for a term not exceeding 6 months, or to both; or
>
> (b) on conviction on indictment, to penalty of any amount, or to imprisonment for a term not exceeding 2 years, or to both.
>
> (3) If any person—
>
> (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or

> (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,
>
> being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, then, without prejudice to subsection (4) below, he shall be liable on summary conviction to a penalty of level 4 on the standard scale.
>
> (4) Where by reason of any such document or statement as is mentioned in subsection (1) or (3) above the full amount of any duty payable is not paid or any overpayment is made in respect of any drawback, allowance, rebate or repayment of duty, the amount of the duty unpaid or of the overpayment shall be recoverable as a debt due to the Crown or may be summarily recovered as a civil debt.
>
> (5) An amount of excise duty, or the amount of an overpayment in respect of any drawback, allowance, rebate or repayment of any excise duty, shall not be recoverable as mentioned in subsection (4) above unless the Commissioners have assessed the amount of the duty or of the overpayment as being excise duty due from the person mentioned in subsection (1) or (3) above and notified him or his representative accordingly.

54. HMRC did not seek to rely on Article 221(4) in their pleaded response to Villodre's appeal. HMRC agreed that there should be preliminary issues which were relevant to the application of Article 221(3) but they did not at the same time raise the argument that the time limit in Article 221(3) was overridden by Article 221(4) on the facts of this case. However, a matter of days before the hearing of the preliminary issues, HMRC applied to amend their response to rely on Article 221(4). The case put forward in the draft amended pleading referred to the facts in February 2005 giving rise to an offence under "section 167(4)" which must have been meant to be a reference to section 167(3) of the Customs and Excise Management Act 1979. In the draft amended pleading, HMRC referred to the findings of OLAF, to which I have earlier referred, that the garlic was from China, not India, and that the importation by way of Bahrain was part of an attempt to circumvent a quota system applicable to Chinese garlic.

55. It should be noted that whereas section 167(1) of the 1979 Act creates an offence where a person knowingly or recklessly makes, or causes to be made, an untrue declaration, the offence created by section 167(3) is a summary offence which is committed by making, or causing to be made, a materially untrue declaration, whatever the state of knowledge of the person accused of the offence.

56. In the present case, if HMRC were to establish that the garlic was not of Indian origin but was of Chinese origin they would thereby establish that the person who made or caused to be made the customs declarations in February

2005 was guilty of an offence under section 167(3). There might conceivably be an issue as to whether Villodre did make, or cause to be made, the declaration of Indian origin but there is plainly a case to answer in that respect.

57. The FtT refused to grant permission to HMRC to amend their pleading. It gave four reasons:

(1) the application for permission only arose if the preliminary issues were resolved in favour of HMRC and they had not been so that the application was not relevant;

(2) the application was made very late;

(3) HMRC sought to raise a serious allegation at a very late juncture;

(4) HMRC had adduced no persuasive evidence sufficient to show that Villodre had a case to answer.

58. The second of these reasons was right but it was not put forward as a sufficient reason on its own to justify a refusal of permission to amend. I consider that the other three reasons were wrong. It is difficult to understand the first reason. The position was the opposite of what was stated by the FtT; the application for permission to amend was only relevant if HMRC lost on the preliminary points and they had. The third reason was wrong. The essential allegation being made by HMRC was that the customs declaration was untrue as the garlic was not Indian but Chinese. That allegation had been made by HMRC, to the knowledge of Villodre, as early as 1 October 2010 and had been specifically pleaded by HMRC in their original pleading. As to the fourth reason, HMRC would in due course need to show that the Garlic was not Indian but Chinese. That matter had throughout been in issue but the evidence in support did not have to be produced until after the preliminary issues had been decided. For the purposes of seeking permission to appeal, no doubt HMRC had to explain enough to show that there was some reality behind their allegation but they had done more than enough to show that this was the case. The FtT had been told of the contents of the OLAF report and of the alleged admission by the supplier in Bahrain. The OLAF report would in due course be admissible in evidence before the FtT: see Article 9(2) of the Regulation (EC) No 1073/1999 of the European Parliament and Council.

59. It follows that the reasoning of the FtT, when refusing permission to amend, was wrong in law and cannot stand. Even if the first reason referred to above is not to be regarded as a reason for refusing permission to amend but only a misunderstanding of whether permission was needed, it remains the case that the FtT took into account three matters, two of which it should not have taken into account.

60. The question of permission to amend therefore remains to be decided. The parties sensibly agreed that the question should be decided by the Upper Tribunal on this appeal and not remitted to the FtT. There are two principal matters which I need to consider. The first is whether, as Villodre submitted to me, HMRC's case on Article 221(4) was unarguable as a matter of law. The

second is, assuming that HMRC have an arguable case, whether their delay in seeking permission to amend should persuade me to refuse permission.

61. Villodre's submission that it is not even arguable that HMRC can rely on Article 221(4) is a bold one. Villodre went so far as to submit that HMRC's attempt to rely on Article 221(4) was "hopeless". The difficulty in the way of this submission is that the Upper Tribunal has now decided in HMRC v FMX Food Merchants Import Export Co Ltd ("FMX") [2015] UKUT 0669 (TCC) that HMRC can rely on Article 221(4) in a case like the present.

62. Although Villodre's contention that HMRC's reliance on Article 221(4) is hopeless is a bold one, I will consider what is said by Villodre and, for that purpose, I will describe what was decided in FMX. I will also refer to the period during which FMX was being considered by the FtT and by the Upper Tribunal in case that is relevant to Villodre's argument as to delay on the part of HMRC in raising Article 221(4) in the present case.

63. The facts of FMX are very similar to what HMRC say are the relevant facts of the present case. It is said that both cases concerned false declarations as to the origin of imported garlic and in both cases the communication of the under payment of import duties was more than 3 years after the relevant event of importation.

64. In FMX, the FtT rejected HMRC's attempt to rely on Article 221(4). It pointed out that Article 221(4) referred to the amount being communicated to the debtor outside the 3 year period "under the conditions set out in provisions in force". "Provisions in force" is defined by Article 4(23) to mean Community or national provisions. It was not argued that there were any relevant Community provisions and it was accepted that there were no specific national provisions which had been enacted to set out the conditions under which it was permissible to communicate the underpayment to the debtor outside the 3 year period. This was held to be fatal to the attempt to rely on Article 221(4). The hearing before the FtT was on 13 and 14 June 2013 and its decision was released on 29 November 2013.

65. HMRC appealed the decision of the FTT in FMX. The appeal was heard by the Upper Tribunal (Birss J) on 2 and 3 November 2015 and the decision of the Upper Tribunal, reversing the decision of the FtT, was released on 10 December 2015. The Upper Tribunal allowed the appeal on two grounds. The first was that Article 221(4) did not require there to be provisions enacted in national law in order to disapply the 3 year time limit. The instrument which disapplied the 3 year limit was Article 221(4) itself. The second ground was that if it were necessary for national law to contain rules which controlled the circumstances in which a communication could be made outside the 3 year time limit, then there were various national rules which provided that control.

66. I was also told that the importer in FMX is pursuing an appeal to the Court of Appeal against the decision of the Upper Tribunal in that case. I was shown an Appellant's Notice (although it is apparently dated 1 March 2016) seeking permission to appeal to the Court of Appeal.

67. Villodre strenuously criticised the reasoning in FMX. It supported its submissions with an extensive citation of authority. In brief summary, it was said that:

    (1) an indefinite time limit for HMRC to communicate the amount of duty to a debtor by purporting to rely on Article 221(4) would be contrary to EU law;

    (2) Birss J was wrong to suggest that the doctrine of abuse of process, or the principles relating to laches, or Article 47 of the EU Charter of Fundamental rights or Article 6 of the European Convention on Human Rights and Fundamental Freedoms gave rise to a time limit within which HMRC had to communicate the amount of the duty to the debtor; and

    (3) in any event, any time limit imposed by the matters referred to in (2) above would not be finite or reasonably foreseeable or proportionate and, accordingly, would not satisfy the requirements of EU law.

68. Villodre's submission is that I should hold, on this application for permission to amend, that FMX was wrongly decided and, further, that the position is sufficiently clear so that I should not follow an earlier decision of the Upper Tribunal. Normally, when a court or tribunal is asked to give permission to amend, the court or tribunal does not determine whether the point to be pleaded will succeed but whether the point has a real prospect of success. If the point does have a real prospect of success then, unless there is some other reason to withhold permission, permission should be given. Where permission is given, then the point can be argued in detail at a later hearing and if a court or tribunal is asked not to follow an earlier decision of a court or tribunal of coordinate jurisdiction, the court or tribunal can ask itself whether the position is sufficiently clear that the earlier decision should not be followed.

69. I consider that, if I were to give HMRC permission to rely on Article 221(4), that such a plea would have a real prospect of success. I do not say that HMRC are bound to succeed on that ground but nor am I persuaded that they are bound to lose. Villodre has made a forceful attack on the decision in FMX and it may be that its arguments or similar arguments will be considered by the Court of Appeal in FMX itself. As matters stand, FMX is a fully reasoned decision of the Upper Tribunal following argument on both sides and if I had to decide the same point again in this case I would have to consider very carefully whether I should follow FMX, even if I had doubts as to the correctness of the decision. In the event, because I consider that the proposed amended pleading has a real prospect of success, I will not accede to Villodre's submission which is, in effect, an application for summary judgment in its favour on the Article 221(4) point.

70. I next consider whether HMRC's delay in seeking to rely on Article 221(4) is a good reason for refusing them permission to amend. HMRC could have taken the point at any time. They served their pleaded response to Villodre's appeal on 28 February 2013 and the point could have been pleaded then. HMRC were relying on Article 221(4) in the FMX case (the hearing was in

June 2013) and it is a little surprising that the point was not taken in the present case in February 2013. There was no explanation given as to why the point was not taken.

71. In July 2013, the FtT gave directions for the hearing of preliminary issues. If HMRC had succeeded on these preliminary issues then they might not have had to rely on Article 221(4). If HMRC had succeeded on the preliminary issues, that would not have been the end of the case. It would still have been necessary to deal with the matters raised by Villodre's appeal, as to the origin of the garlic and as to Villodre's application for a waiver of duty on the grounds that it had not been at fault. Conversely, if Villodre had succeeded on the preliminary issues, that would have been the end of the case. Now that Villodre has succeeded on the preliminary issues, if I grant HMRC permission to amend the case will not be at an end after all. Equally, if the Article 221(4) point had been pleaded back in February 2013, the preliminary issues would still have arisen and would still need to be decided.

72. When HMRC applied for permission to amend in July 2014, they did not have the benefit of a decision in FMX in its favour. The FtT decision of 29 November 2013 was adverse to HMRC and HMRC's appeal against that decision was only allowed on 10 December 2015. Accordingly, it cannot be said that the decision of the Upper Tribunal in FMX is the explanation for the HMRC's late application for permission to amend.

73. Villodre submitted that until the application for permission to amend was made, it could proceed on the basis that if it won the preliminary issues, it would have won the whole case. It says that if permission to amend is given, its expectations in that respect will be defeated. Villodre also submitted that even if HMRC had been confident of winning the preliminary issues (and it is submitted that they should not have been) that was still no excuse for not pleading its intended reliance on Article 221(4).

74. At the hearing of the appeal, in view of Villodre's submission as to disappointed expectations, I referred to the decision of the House of Lords in Ketteman v Hansel Properties Ltd [1987] AC 189 as a potentially relevant authority. That case was procedurally complex but I referred to it because of the statement in the speech of Lord Griffiths at 220E-F that when considering a late application for permission to amend the court could take into account the strain of the litigation, the anxieties occasioned by facing new issues, the raising of false hopes and the legitimate expectation that a trial will determine the issues one way or the other. That shows that Villodre's submission as to its expectations does raise a permissible consideration. On the other hand, the facts of Ketteman were very different from the facts of the present case.

75. On balance, I consider that HMRC should be given permission to amend their pleading notwithstanding their delay in raising the new point as to Article 221(4). The point which HMRC wishes to rely upon is reasonably arguable on the authority of the decision in FMX. The hearing before the FtT in July 2014 concerned preliminary issues and was not necessarily a stage which would finally decide matters one way or the other. If HMRC had relied on Article 221(4) in their earlier pleading then it would still have been necessary to

determine the preliminary issues so I doubt if it can be said that money has been wasted as a result of the trial of those issues. If HMRC are permitted to attempt to rely on Article 221(4) and if they were to succeed on Article 221(4), then the case would be decided on its merits as to the origin of the garlic and as to the relevance of any arguments about the culpability of Villodre. These reasons persuade me that it is in the interests of justice and not procedurally unfair to permit the proposed amendment.

The result

76. The result is that I will allow the appeal in relation to HMRC's application to amend and I will grant permission to amend but, in all other respects, I will dismiss the appeal.

MR JUSTICE MORGAN

RELEASE DATE: 7 APRIL 2016