TC02014

Appeal number: LON/2008/7123

CUSTOMS DUTY – Hardship – Duty or security pending appeal – Post-Clearance demand- Appellant the declarant – Joint and several liability for debt – Appellant's Customer successful in appeal against demand by HMRC – Whether payment by Appellant to HMRC would cause irreparable damage or serious economic damage – Relevance of dividends paid to controlling shareholders – Relevance of Tribunal decision in favour of customer – FA 1994 s.16(3) – Community Customs Code (Reg (EEC) 92/2913) Act 244 – Appeals entertained

FIRST-TIER TRIBUNAL
TAX CHAMBER

GATEWAY SHIPPING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE THEODORE WALLACE
ANDREW PERRIN FCA

Sitting in public in London on 21 and 22 July 2011 and 8 March 2012

John Shelley, CTA (Fellow), for the Appellant

Andrew McNab, instructed by the Solicitor for the Respondents

DECISION

1. This decision concerns a hardship application in respect of consolidated appeals against the following:

(1) a deemed review confirming a post clearance demand made on 8 June 2008 in respect of declarations by the Appellant of consignments of garments imported from Bangladesh at GSP preferential rates on the basis that the Appellant was jointly and severally liable with the importer Marco Trading Co Ltd ("Marco") for the full duty of £149,994.58;

(2) a review decision dated 3 October 2008 upholding a further post clearance demand on 12 August 2008 for £199,701.49 made on a similar basis;

(3) a review decision dated 8 January 2009 upholding a decision to refuse to remit the above duties under Article 220(2)(b) of the Community Customs Code.

2. The first two appeals were consolidated by a direction on 7 February 2009. On 24 February 2009 Customs applied for the appeal to be dismissed because it could not be entertained as the duty had not been paid and no hardship certificate had been issued; this application was under section 16(3)(b) of the Finance Act 1994. The third appeal was consolidated on 22 May 2009. On 17 June 2009 HMRC applied for the appeals to be struck out.

3. On 9 September 2009 following a hearing the Tribunal gave directions for the hearing of a hardship application by the Appellant and directed that the question of the compatibility of section 16(3) with Articles 243 and 244 of the Community Customs Code, Council Regulation (EEC) No.92/2913, be deferred until the issue of hardship is decided.

4. There was an initial hearing on 22 February 2010 before Judge Wallace sitting alone at which Rodney Sutton ACA gave evidence for the Appellant and was cross-examined. There was a hearing of a disclosure application by HMRC in respect of hardship on 5 August 2010 following which agreed directions were given. On 20 December 2010 there was a further hearing on an application by HMRC to strike out the appeal unless the Appellant complied with certain of the August directions; that application was not granted, however the Tribunal directed the Appellant to produce updated material for a two day hardship hearing in July 2011 with a report by Mr Sutton on the financial statements to 1 June 2011, and for HMRC to serve statements by any witnesses or expert and skeleton arguments.

5. At the hearing on 21 and 22 July 2011 Judge Wallace was joined by Mr Perrin and HMRC were represented by Mr McNab in place of the counsel who appeared in 2010.

6. Colin Camin, director of the Appellant, confirmed witness statements dated 4 November 2010 and 13 June 2011, gave supplementary evidence and was cross-examined; his evidence occupied the whole afternoon of the first day.

The witnesses for the Appellant

7. Mr Camin said that the Appellant carries on a family business which started in 1973; he and his wife are the directors. The business has been carried on at 44 Castle Street, Dover, for 32 years. There are 14 staff, including four accounts and six shipping staff.

8. He said that a duty deferment guarantee of £500,000, being £250,000 for two months, is provided to HMRC by the Appellant's bank, Barclays plc. The deferred duty paid by the Appellant on behalf of its customers is collected by HMRC by direct debit on the 15th day of the following month. Barclays also guarantees £36,000 of a Transit Guarantee of £120,000, the balance being provided on the Appellant's own surety. The Appellant maintains a Customs Guarantee account of £195,000 with Barclays which does not bear interest, on which the Appellant cannot call without the bank's consent.

9. Mr Camin said that on 3 August 2010 the Appellant asked for a bond of £500,000 for a Transit Guarantee from the bank for a few days to cover the movement of a Ferrari for a client to Switzerland : the bank required this to be fully cash covered and the Appellant was consequently unable to do the job.

10. He produced a schedule dated 15 June 2011 listing duty outstanding from customers for June clearance which was payable to HMRC on 15 July totalling over £220,000, duty for May clearances having been debited on 15 June. He said that he would hope that the duty for any month would be paid by customers before it was paid to HMRC but not all customers did pay. In fact £747,000 was paid to HMRC in July. The deferred duty varied from £300,000 to £750,000 a month.

11. Mr Camin said that on 4 March 2010 he had a meeting with Mr Edge at Barclays when he went through the situation including Marco; Mr Edge said that a yearly review was due in a couple of months. Mr Camin produced a letter dated on that day from Mr Edge which referred to the meeting and included this,

> "In light of the figures now provided I feel I must forewarn you that it is very likely that when the facilities fall due for review the Bank will request that the level of cash covered formally charged to us is increased to the level of the Duty Deferment Bond in line with our standard policy for lending."

Mr Camin said that he was told orally that the bank was looking to increase cash cover to the full amount of the guarantee but that he had said that the Appellant could not afford another £300,000; the bank had agreed to accept a charge on 42 Castle Street, provided £200,000 stayed in the Treasury account.

12. He said that the Appellant needs £150,000 headroom to cover one month's expenditure. There were occasional post clearance demands, maybe 3 or 4 a year; generally the Appellant paid the demands and then recovered the payment from the customer. He said that he used the standard trading conditions of the British International Freight Association which at clause 20 included an indemnity by the customer.

13. He said that payments by customers for deferred duty went into a Duty Deferment Guarantee account; if these payments were insufficient when the duty was payable to HMRC, the balance was made up from general funds.

14. He said that in March 2010 the Appellant had made a statutory demand on Marco under the Insolvency Act 1986. This was referred to in a letter by Mr Shelley dated 5 March 2010 to HMRC offering security of £130,000 secured on 42 Castle Street.

15. Cross-examined, Mr Camin said that there is a floating charge in favour of the bank in clause 3 of the conditions agreed when the facility was increased to £500,000 in September 2003. If HMRC was told that the Appellant's bank could not meet the deferred duty, he imagined that HMRC would call on the guarantee.

16. He said that when the directors resolved on 18 July 2008 to pay a dividend of £1.4 million on 31 July, Mr Sutton was present and drew up the resolution. At that time the first demand from HMRC had been received; although the Appellant was told by HMRC on 25 July that the decision was deemed to be upheld the letter stated that reconsideration was still being carried out.

17. Mr Camin was then asked about the dividends. He said that there was enough money to take out £1.4 million; the plan was to split the business with part being run by four senior employees. He agreed that a further dividend of £300,000 was declared after the second demand on 12 August. Asked why he did not provide for the demands, he said that he knew that Marco was jointly liable : Marco was a very large company and there was no reason to believe that it would not pay. He and his wife were planning to retire; the Appellant then had more than enough money to pay Customs; they just carried on as they had planned. He stated that he was given to understand by Customs at Leeds in a conversation in June 2008 that in the first instance HMRC would look to Marco; this was confirmed by the Appeals team at Southend, although not in writing.

18. He said that at the time of the meeting with Mr Edge on 4 March 2010 (see paragraph 11 above) Barclays had the accounts to 31 March 2009.

19. He accepted that a statement in a letter dated 8 September 2009 to HMRC that the dividends were paid before any assessment was raised was incorrect.

20. Mr McNab told the Tribunal that he was not alleging that in paying the dividend there was any intent to evade duty; he had not put such an allegation to Mr Camin.

21. Re-examined, Mr Camin said that it was not until late on that Marco had said that it was not going to pay the demand.

22. He told the Tribunal that a direct debit payment was collected by HMRC monthly for deferred duty; customers' money was received for the duty daily; the Appellant's credit controllers tried to get in the money before it was paid to HMRC. If there was a problem with a client, a later import might be left uncleared until payment. The Appellant received maybe three or four post clearance demands in a year. On one or two occasions the Appellant had been caught when a customer went bust.

23. Mr Sutton produced a report dated 10 May 2011 based on the unaudited financial statements for the year ended 31 March 2011, the Appellant being a private limited company. His report included a comparison with profits for previous years, an analysis of debtors, creditors and cash resources, the net cash position at 31 March and dividend payments.

24. The report showed a downward trend in turnover from £2.34 million in the year to March 2008 to £2.06 million to March 2011. These figures excluded duty and tax paid on behalf of customers. Net profit after tax in the year to March 2011 was £81,122 with dividends of £45,312 being paid to Mr and Mrs Camin in addition to remuneration of £39,640; other staff salaries totalled £319,275. Trade debtors including duty recovery debtors totalled £337,516 of which £272,251 was less than 30 days old; there were nearly 80 trade debtors in all.

25. Mr Sutton also produced an updated report dated 13 June 2011 showing the position at 31 May 2011. This showed total cash balances of £1,354,934, including a Duty Deferment Guarantee account of £634,582, Treasury deposit of £200,000 and Customs Guarantee account of £195,000. This report contained a "cash headroom" calculation which we summarise as follows:

Bank accounts	£1,354,934
HMRC liabilities due 15.6.11	(695,483)
leaving	£ 659,451
Guarantees to Barclays	
Duty deferment guarantee	(500,000)
Transit guarantee 30% of £120,000	(36,000)
Balance of Transit guarantee to HMRC	(84,000)
leaving cash surplus	£39,451

He listed the following additional funds tied up in working capital:

Trade debtors at 31.5.11	£303,554
less Trade creditors at 31.5.11	(105,200)
less Corporation tax liability	(22,167)
less VAT/PAYE/NIC May 2011	(12,038)
less Expenses accruals	(45,963)
leaving available cash	£118,186
Total Cash headroom	£157,637

The figure for cash headroom was close to that in his earlier report showing £157,988 at 31 March 2011.

26. Cross-examined, Mr Sutton said that the accounts showed a contingent joint and several liability to HMRC of £350,000 on which no loss was anticipated and for which no provision had been made; the existence of the demands had never been denied. Mr Camin had told him soon after the demands were received. He said that he knew that Marco was very much in the frame. He said that it had "not entered into his thought process that Gateway would have to pay". He said that if the Appellant had to pay £350,000 he would expect the bank to demand more cover.

27. He said that the Duty Deferment account was best described as a clients' account, although included in "cash at bank" in the accounts. It was money received from clients to be paid to HMRC for deferred duty. The Appellant would have hoped to receive the balance due by 15 June 2011. The difference was a moving feast factored into the cash headroom.

28. Mr McNab put it to him that the Duty Deferment account was cover for Barclays' guarantee and that Barclays' maximum liability was the difference of £61,000 at 31 May 2011. Mr Sutton said that he assumed that full cash cover was needed for the maximum guarantee provided by Barclays. His assumption did not take account of the charge of £130,000 on 42 Castle Street which was not cash cover; Barclays needed full cash cover because time was needed to turn the charge into cash.

29. Mr Sutton said that there had been repeated meetings to discuss taking out the money in dividends. There had been detailed discussions as to cash requirements but the £350,000 demands were not taken into account because Marco was in the frame and was liable under the indemnity. In terms of arithmetic the Appellant had enough to pay HMRC. He did not advise Mr Camin to retain money to pay HMRC.

30. He was then asked about the dividends of £45,685 paid in 2010 and £45,312 in 2011. He said that these were purely a tax mechanism. He said that the amount they took out as directors and shareholders was what he would expect.

31. Re-examined, Mr Sutton said that he had never been involved in any appeals before and was unaware of section 16 until Mr Shelley had told him.

32. He told the Tribunal that the accounts did not meet the requirements for an audit and that it was a voluntary audit. His firm had looked at the balances and carried out a reconciliation. He said that there would not be a separate liability shown for clients' money. He said that the Appellant had to pay freight charges "on the nail". Customers were invoiced for duty and charges but HMRC had to be paid promptly. When payments were received from customers these went into the normal bank account and daily transfers of duty were made to the Duty Deferment account.

Submissions for HMRC

33. At the conclusion of the Appellant's case on 22 July 2011 Mr McNab said that he was not calling Mr Clarkson, an accountant employed by HMRC, who had produced an accountant's report; we disregarded the report. Mr McNab produced a chronology of 11 pages based on the documentary evidence which he said spoke for itself. He said that there was no material dispute of fact.

34. Mr McNab submitted that there was currently ready access to unencumbered funds sufficient to pay both demands or to provide security. As a fall back position, he submitted that, in the circumstances of the money taken out by dividends, there was no reason why Mr and Mrs Camin should not finance the payment of the demands. He said that to say that payment would involve hardship would make a mockery of the law. In essence Mr and Mrs Camin had moved money otherwise available to pay the debt from one pocket to another. He said that he was not suggesting that there was any evil or improper motive in payment of the dividends.

35. Mr McNab said that in *Giloy v Hamptzollamt Frankfurt am Main Ost* (Case C-130/95) [1997] ECR I - 4291, the Court of Justice held at [36] and [37] that "irreparable damage" in Article 244.2 means irreversible damage and that financial damage was not irreparable unless it could not be wholly recouped if the Appellant succeeded in the main action. He said that the "irreparable damage" test in Article 244.2 was different from the "serious economic or social difficulties" test in Article 244.3. The Tribunal should consider "all the relevant circumstances", see *Giloy* at [44]. In the present case these circumstances included the fact that standing behind the Appellant were Mr and Mrs Camin who had the means to pay because of the dividends, although this did not arise because of any bad faith. He said that the hardship claimed was self-inflicted.

36. He said that in *Customs and Excise Commissioners v Broomco* (*1984) Ltd* [2000] All ER (D) 1113 the Court of Appeal held that the Tribunal had exclusive jurisdiction in respect of the matters in Article 244.2 and 3. This was a full appellate jurisdiction, see *Anchor Foods Ltd v Customs and Excise Commissioners* [1999] V&DR 1.

37. Mr McNab said that, when considering a claim to hardship, the practice of the Senior Courts in considering an application for security for costs under Rule 25 of the Civil Procedure Rules is analogous. He cited *Keary Developments Ltd v Tarmac Construction Ltd* [1995] All ER 534 at page 540 per Peter Gibson LJ and *Hammond Suddard v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 per Clarke LJ at [27] and [28] where it was held that the Court should consider whether the company could raise the security "from its directors, shareholders or other backers or interested persons." This was consistent with *Giloy.*

38. Mr McNab said that the burden of proof was on the Appellant to show that it could not pay £350,000 without serious economic difficulties. That burden had not been discharged. The Appellant must show hardship in relation to each demand individually. There was no reason to believe that liquidation would be forced and no real risk of curtailment of business.

39. He submitted that the assumption underlying Mr Sutton's calculation (see paragraph 25 above) of cash surplus and headroom was flawed. He said that £500,000 was the maximum guarantee to Barclays whereas the maximum liability at 15 June 2011 was around £61,000 since the Duty Deferment account covered the remainder: there was double counting since he had deducted both the liabilities due on 15 June and the full guarantee. He said that there was no legal obligation to Barclays to hold £536,000 in cash; the only relevant legal liability was in respect of £195,000. He referred to the facility letter of 18 August 2003 which provided for a right of recourse against credit balances and a charge on the Treasury deposit. An e-mail from Barclays on 7 July 2009 stated that the Appellant had bank guarantees of £542,000 for which £195,000 held in an account was the supporting security. Note 17 to the financial statements at 31 March 2011 recorded the guarantees as £536,000 and stated that the bank "are holding a legal charge over the company's investment property and are holding a cash deposit of £195,000." He said that the warning letter from Mr Edge of 4 March 2010 did not state any requirement; in the event the bank took a charge over the Castle Street property but no more.

40. At the resumed hearing on 8 March 2012, Mr McNab said that on 5 October 2011 a Tribunal sitting in Manchester had released the decision *Marco Trading Ltd v Revenue and Customs Commissioners* [2011] UKFTT 646 (TC) allowing the appeal by Marco in relation to the demands made on it jointly with the Appellant; HMRC had been given permission to appeal by the Upper Tribunal but no hearing had been listed. The outcome in *Marco* did not affect the present proceedings, although obviously the ultimate appeal to the Upper Tribunal would. He had no instructions as to the position of HMRC if meanwhile Gateway's appeal was not entertained.

41. Mr McNab said that Mr Sutton had understated the headroom by £425,000 : the duty deferment and transit guarantees totalling £620,000 less the £195,000 Customs Guarantee deposit with Barclays. He said that Mr Sutton had failed to take account of the £130,000 charge on 42 Castle Street. There was no documentary evidence that the Treasury deposit was held on the same terms as the Customs Guarantee account or that the Appellant did not have ready access to that money. He

said that guarantee provided by Barclays covered two months at £250,000 each, although the liability of Barclays was inevitably less than £250,000 for the first month because of the amounts received before the direct debits were collected. He said that HMRC had no charge over the £84,000 balance of the Transit guarantee.

42. Mr McNab said that in any event the cash headroom would enable some security to be provided.

43. Mr McNab said that when the dividends were paid the directors were aware of the demands but did not take account of them; their motive was irrelevant. Either it was prudent to pay the dividends taking account of their duties under the Companies Act 2006 or it was not. He said that HMRC could only pursue the company for the debt and could not enforce the directors' duty to the company. However, Mr and Mrs Camin control the company and could reverse the position so enabling it to meet the demand. The Appellant had continued to distribute dividends since. He said that HMRC do not seek to pierce the corporate veil.

44. He said that if the final decision is that the Appellant is liable for the demands, looking at the balance sheet there is no doubt that the Appellant could satisfy the debt; however, if the appeal is pursued, it is possible that the Appellant might in the future be unable to do so.

45. Mr McNab distinguished the decision in *Buyco Ltd and Sellco Ltd v HMRC* [2006] V&DR 57, saying that the payment of the dividends here was not in the ordinary course of business and that no assets were acquired. He said that the approach of the Tribunal at [15] in *Totel Ltd v HMRC* 11 May 2009 (not published) was correct. He said that the facts in *Anchor Foods* were "light years away."

46. Finally, he said that the test of hardship is an objective test to be applied on the basis of the circumstances at 21 July 2011 when the hearing started, there being no evidence of a change in circumstances since then.

Submissions for the Appellant

47. Mr Shelley said that the demands were based on joint and several liability for customs debts; the Tribunal had since held that the other party, Marco, does not owe the debts. This Appellant had been shut out from that appeal because of the hardship issue. He said that if the reference in Article 244.2 to a disputed decision which is inconsistent with customs legislation has any relevance it may well be in a case such as this where there has been a tribunal decision as to debts for which there is joint liability.

48. He said that the offer of 42 Castle Street as security when Marco had already been given a hardship certificate should have been accepted by HMRC.

49. He said that, if the Appellant put up £350,000 and Marco refused to pay, the Appellant would have great difficulty in recovering on its indemnity.

50. Mr Shelley said that the cases on CPR 25 which concerned security for costs are not relevant to a hardship application in the Tribunal. In any event under CPR 25 the Court would look at the strength of the Appellant's case, see *Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC).

51. Mr Shelley said that this is not a situation where an approach to the bank is realistic. He referred to the letter of 4 March 2010 (see paragraph 15 above); he said that clause 3(b) of the conditions referred to was effectively a floating charge. Mr McNab interjected that it was a right of combination. Mr Shelley referred to the requirement referred to at paragraph 9 that a £500,000 bond for a Transit Guarantee be fully cash covered. He accepted that when 42 Castle Street was charged as security there was no mention in the offer of the Treasury deposit.

52. Mr Shelley said that it is wrong to say that the Appellant does not need to allow for full liability on the £500,000 guarantee. From a commercial viewpoint the Appellant needed to make provision for contingent liabilities. It needed liquid assets to carry on its business. Headroom was needed to provide for jobs such as the Ferrari. It needed to maintain its liquidity over and above its legal liability. The necessary headroom covers fluctuating amounts such as debtors and contingencies in the ordinary course of business. The volume of trade would have to be adjusted unless the Appellant was to trade unacceptably on the edge. He said that it was very difficult to know how the bank would respond if the Appellant wrote a cheque for £350,000 to HMRC; he accepted that the cheque would be met but said that then the problems would start. He submitted that the bank would take fright and would reduce the facility of £500,000. He said that the headroom is an intentional part of the Appellant's business plan. Mr Sutton's calculations were perfectly correct.

53. He said that under *Giloy* financial damage is irreparable if it could not be wholly recouped. Provision of £350,000 security would have an enormous impact in that the Appellant would have to scale back its trading and could not carry the same level of trade debtors. It would unquestionably cause serious economic difficulty. Insolvency is only a species of irreparable damage. He said that the correct test of hardship is "whether the Appellant has the capacity to pay without financial hardship", see *Seymour Limousines Ltd v HMRC* [2009] Decision 20966.

Conclusions

54. The relevant legislation in the Community Customs Code which has overriding effect is as follows:

> "Article 244
>
> 1. The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.
> 2. The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have

good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

3. Where the disputed decision has the effect of causing import duties … to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. However, such security need not be required where such a requirement would be likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.

Article 245

The provisions for the implementation of the appeals procedure shall be determined by the Member States."

55. Section 16(3) of the Finance Act 1994 provides (so far as relevant) as follows:

"(3) An appeal …. shall not be entertained if any amount is outstanding … in respect of any liability of the appellant to pay any relevant duty … unless –

(a) the Commissioners have, on the application of the appellant, issued a certificate stating either –

(i) …; or

(ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;

or

(b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the circumstances has been given to the Commissioners."

56. Although section 16 of the Finance Act 1994 was enacted in order to implement the provisions of the Community Customs Code in relation to appeals procedure, even a cursory reading shows that there are substantial differences between the Code and section 16(3). Unlike a Directive, a Community Regulation is of binding effect without the need for domestic legislation. Any domestic legislation must be interpreted compatibly with Regulations and if this is not possible must be disapplied to the necessary extent.

57. Quite apart from the fact that the Code contains nothing to make the right of appeal dependent on payment of the duty or the provision of security, section 16(3) elides the concepts of irreparable damage and serious economic or social difficulties. Section 16(3) makes no provision for decisions which are inconsistent with customs legislation.

58. The Court of Appeal in *Customs and Excise Commissioners v Broomco (1984) Ltd* (supra) said that section 16(3) must be considered in the light of the overriding requirements of Article 244. That must refer to the whole of Article 244.

59. In normal circumstances the reference in Art 244.2 to a decision which is inconsistent with customs legislation would have no relevance. The customs authorities could not lawfully confirm on review a decision which they believe to be inconsistent with the legislation. The words "have good reason to believe" must indicate an objective standard, particularly in the context of a "disputed decision". We accept the submission of Mr Shelley that the reference to a decision which is inconsistent with customs legislation covers a situation where a tribunal after a full hearing has decided that the customs debt for which an appellant would be jointly and severally liable is not due. We are aware of the fact that HMRC have been given permission to appeal against the decision in *Marco Trading Ltd*, however unless that decision is reversed Marco is not liable. There was no suggestion on behalf of HMRC that the customs debt for which Gateway is said to be jointly liable is different in any way from that which was subject to Marco's appeal, albeit that the capacities of Marco and Gateway were not the same. We can see no basis on which HMRC could properly seek to uphold the demand on Gateway if the decision in *Marco Trading Ltd* is upheld by the Upper Tribunal.

60. However that does not conclude the matter because on the footing that the decision should be suspended under Article 244.2, the question then arises whether security should be required under Article 244.3.

61. In any event we are satisfied that, if the demands are implemented in advance of the Appellant's appeal, irreparable damage is to be feared for the Appellant. The test of irreparable damage is not a high test in relation to financial damage since it merely involves damage which could not be wholly recouped if the Appellant succeeds in the main action, see *Giloy* at [36] and [37].

62. The trade of the Appellant involves incurring substantial liabilities to HMRC on behalf of clients which must be covered by guarantees if the goods are to be cleared. The guarantee is provided by the Appellant's bank. In the current economic situation there are substantial pressures on banks making them particularly cautious in undertaking or maintaining commitments without secure cover.

63. We have considered carefully the criticisms by Mr McNab of the headroom calculations by Mr Sutton summarised at paragraph 25 above. We accept that it could be said that there is an element of double counting, however what matters is the attitude of the bank. The bank will have been fully aware of the level of the

Appellant's bank balances and of the monthly direct debits collected by HMRC. We have no doubt that, if the cash balances were reduced by £350,000, Barclays would either require increased security or would reduce the guarantee or possibly a combination of both.

64. We are satisfied that the Appellant would have to scale back its trading activities resulting in a loss of profit. There is no provision in the legislation for such loss to be recouped from HMRC.

65. This brings us to the question whether the provision of security would owing to the Appellant's circumstances cause serious economic or social difficulties. Normally security should be for the full debt, but just as suspension under Article 244.2 may be in whole or in part, so also in our judgment the security may be partial. Section 16(b) refers to "such security (if any)" as would have been reasonable.

66. Apart from a case where there is good reason to believe that the decision is inconsistent with the law, the question of security only arises where irreparable damage is to be feared. It follows that "serious economic or social difficulties" involves a more stringent test. It would not cover a small loss of profit which is only temporary. The difficulties must be serious and they must be "likely" as opposed to merely "to be feared". It does not seem to us that the words "owing to the debtor's circumstances" in Article 244.3 add anything to Article 244.2 which must also relate to the person's circumstances. It may be that the difficulties include difficulties for persons other than the debtor, such as employees.

67. In our judgment Article 244.3 must be applied objectively. Mr Camin and Mr Sutton both gave evidence that the approach of the Appellant is prudent and conservative. Mr Shelley submitted that the Appellant should not be obliged to depart from its normal business model. We do not accept that the Appellant's claim to hardship is to be judged by the directors' subjective approach. In our judgment the test in Article 244.3 and therefore in section 16(3) is to be judged by reference to the reasonable businessman in the Appellant's circumstances.

68. Mr McNab did not suggest that the effect of providing security for the demands would be any different from paying or depositing the demands. No difference occurs to us. We find that the provision of any substantial security from the Appellant's own resources would be likely to cause serious economic difficulties. In our judgment it is probable that the provision of such security would not only result in a loss of profit through the reduction of trading but would have a serious effect on the Appellant's goodwill. It is likely that if business is turned away, some customers will be lost for the future. Goodwill is clearly important in this type of business.

69. This brings us to the submissions by Mr McNab arising out of the dividends paid to Mr and Mrs Camin.

70. At the hearings in 2010 HMRC questioned whether the dividends were properly declared and sought disclosure of signed documents for all dividend

resolutions since April 2008, submitting that if the dividends were not properly declared the distributions were loans repayable on demand. This was separate from the question whether the payment of the dividends was abusive as being to avoid paying HMRC.

71. Neither of these challenges was pursued at the hearings in July 2011 and March 2012. In our judgment if the dividends were paid with intent to avoid payment or deposit of the duty or the provision of security that would constitute an abuse and would fall to be disregarded under Article 244 and section 16(3). This is the situation referred to in *Totel Ltd v HMRC* at [15].

72. Mr McNab did not rely on any allegation of abuse and told the Tribunal that he was not alleging that the dividends were paid with any intent to evade duty (see paragraph 20). In closing he said that he was not suggesting that there was any evil or improper motive (see paragraph 34).

73. Mr McNab also stated that he was not seeking to pierce the corporate veil. His approach to the dividends was twofold. First, he said that "all the relevant circumstances" within *Giloy* at [44] included the fact that standing behind the Appellant were Mr and Mrs Camin who could pay the demands because of the dividends. Second, he relied on the practice under CPR 25 in relation to security for costs which he said was consistent with *Giloy*. Essentially those were two ways of putting the same argument.

74. In *Hammond Suddard* the Court of Appeal considered an application for security for costs under CPR rule 25 against an appellant. At [28] Clarke LJ cited the following passage from Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534,

> "[T]he court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons."

Whereas *Hammond Suddard* concerned security for costs by appellant, *Keary Developments* concerned security for costs in relation to a claim at first instance.

75. Mr Shelley correctly pointed out that the Civil Procedure Rules do not apply in the Tribunal. However whatever the position of directors and shareholders in other cases, the position of Mr and Mrs Camin in the present case is in our judgment part of "the debtor's circumstances" within Article 244.3 and of "all the relevant circumstances" in *Giloy*. Although Mr McNab said that he did not seek to pierce the corporate veil, the passage from Peter Gibson LJ shows that in certain circumstances the Court will do so. It is to be noted that he referred to whether the company "can raise the amount needed" as opposed to whether the directors, shareholders etc could provide the money. Clearly if the directors do not have the money needed, it could

not be raised from them. There is however no evidence that they could not finance the payment of security if necessary.

76. However that does not conclude the matter. It seems to us that the facts that HMRC granted Marco. who are jointly and severally liable for the same debts, a hardship certificate and that in the subsequent appeal the Tribunal decided that the certificates of origin on which liability depended were genuine are among the relevant circumstances. One of the consequences is that it is quite unrealistic to suggest that as matters stand the Appellant could rely on its indemnity from Marco.

77. It seems to us that Mr Camin is entitled to be aggrieved at the fact that the Appellant is being expected to provide security, when the actual importer was given a certificate of hardship and has succeeded in its appeal. Although HMRC is appealing against the decision in *Marco Trading Ltd* no hearing date has been fixed. We find it difficult to believe that either Article 244 or section 16(3) can have been intended to be applied in such a situation. Our view would have been wholly different if it had been shown that the payment of the dividends was abusive. It is to be noted that CPR rule 25 is discretionary; we consider it most unlikely that the Court would order security for costs against a litigant in comparable circumstances.

78. We ask ourselves whether the provision of security in such circumstances would be likely to cause serious economic or social difficulties within Article 244.3. Article 244.3 must be applied purposively. It might be said that if Mr and Mrs Camin could finance the provision of security, the ability of the Appellant to recover from Marco is irrelevant. On the other hand it is arguable that it would be unreasonable to expect Mr and Mrs Camin to finance the provision of security in the circumstances and that it cannot be assumed that they would do so. In our judgment applying Article 244.3 purposively the provision of security in the circumstances would be likely to cause serious economic or social difficulties.

Summary of Conclusions

79(1) Section 16(3) must be interpreted consistently with Article 244 of the Community Customs Code (paragraphs 56 and 58);
(2) In the light of the decision in *Marco Trading* the disputed demands are objectively inconsistent with customs legislation (paragraph 59);
(3) In any event, irreparable damage is to be feared for the Appellant if the demands are implemented in advance of the Appellant's appeal (paragraphs 61-4);
(4) The provision of security from the Appellant's own resources would be likely to cause serious economic difficulties (paragraph 68);
(5) The position of Mr and Mrs Camin forms part of the relevant circumstances; there is no evidence that they could not finance payment of security if necessary (paragraph 75);
(6) The position of Marco and the Tribunal decision in *Marco Trading* which have the effect that as matters stand the Appellant cannot rely on its indemnity are also relevant circumstances (paragraph 76);
(7)

We do not consider that either Article 244 or section 16(3) were intended to apply in this situation (paragraph 77);

(8) Applying Article 244.3 purposively the provision of security in the circumstances would be likely to cause serious economic or social difficulties (paragraph (79));

(9) The Applications by HMRC for the appeals to be dismissed or struck out are dismissed and the appeals are hereby entertained.

THEODORE WALLACE
TRIBUNAL JUDGE

RELEASE DATE: 3 May 2012

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 18 July 2012.