TC03432

Appeal number: TC/2013/00699

CUSTOMS DUTY - claim for refund of import duty paid as result of error when goods wrongly declared as imported for home use when they should have been declared as eligible for inward processing relief - claim for repayment received more than 3 months after date of original declaration and therefore received out of time - appellant contended claim for repayment lost in post - appellant failed to make repayment claim in accordance with procedures for invalidating an incorrect customs declaration - whether repayment claim could be accepted out of time because appellant could show it had a duly substantiated exceptional case - no - Article 237 of Council Regulation 2913/92 - Article 251 of Council Regulation 2453/93 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WORLD CARGO LOGISTICS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
MS HELEN MYERSCOUGH

Sitting in public at Bedford Square on 14 February 2014

Paul Blake, a director of World Cargo Logistics Limited and Stephen Macey, a director of RSH Freight Masters Ltd, for the Appellant

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

DECISION

Introduction

1. This is an appeal by World Cargo Logistics Limited ("the Appellant") against a decision of The Commissioners for Her Majesty's Revenue and Customs ("HMRC") dated 14 December 2012 in which HMRC upheld on review their decision to reject a claim made by the Appellant for the repayment of customs duty paid in error on the importation of goods. The amount of customs duty for which the Appellant claims repayment is £24,039. The Appellant appealed to the tribunal against that decision on 17 January 2013. The Appellant's appeal is made under the provisions of section 16, Finance Act 1994.

2. In summary the circumstances giving rise to the Appellant's appeal are as follows. The Appellant, the person responsible for importing the goods in question, and acting through its agent, wrongly declared that the goods were imported for "home use" when they should have declared that they were imported in circumstances where they were eligible for "inward processing relief". Excess customs duty was in consequence paid in error on import of the goods. Under the relevant European Union legislation repayment of customs duty paid in error may be claimed within three months of the declaration pursuant to which the error was made. HMRC may permit that three-month period to be exceeded "in duly substantiated exceptional cases". The Appellant claims that it posted a repayment claim to HMRC within the three-month period, but HMRC did not receive a valid repayment claim until a further application was made by the Appellant considerably after the end of that period. HMRC contend that they cannot repay the customs duty paid in error since the repayment claim was made outside the three-month period and the Appellant cannot show that it has a duly substantiated exceptional case so as to allow HMRC to exercise the discretion to permit the time limit to be extended.

3. The issue we therefore have to decide is whether in the circumstances of the Appellant's case HMRC should permit the three-month period in which a repayment claim can be made to be exceeded (and thereby allow the Appellant's repayment claim) because the Appellant has a duly substantiated exceptional case. As provided in section 16(6) Finance Act 1994 it is for the Appellant to show, on the balance of probabilities, that it has such a duly substantiated exceptional case.

4. For the reasons given below we have reached the decision that the Appellant has not established that it has a duly substantiated exceptional case which provides the ground for HMRC to permit the relevant three-month period to be exceeded. The Appellant's repayment claim is therefore out of time, and its appeal is dismissed.

A preliminary matter - the Appellant's appeal made out of time

5. There is a preliminary matter, which relates to our jurisdiction to hear the Appellant's appeal, which we need to deal with.

6. As stated, the decision against which the Appellant appeals is dated 14 December 2012. Under the terms of section 16(1) Finance Act 1994 the Appellant has the period of 30 days beginning with the date of the disputed decision in which to appeal to the tribunal. The Appellant's notice of appeal to the tribunal is dated 17 January 2013, and is therefore out of time by four days. This was acknowledged by the Appellant's representative in the notice of appeal, and a request was made for permission to appeal out of time. The reason given for the late notice of appeal was that "the responsible parties [had] holiday leave over the Christmas and New Year period".

7. In accordance with normal procedure the tribunal office notified HMRC that the notice of appeal was out of time, but HMRC did not indicate that they wished to oppose the Appellant's request for permission to appeal out of time.

8. Section 16(1F) Finance Act 1994 confers on the tribunal a discretion to allow an out of time appeal to proceed. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that if a notice of appeal is provided out of time, the tribunal must not admit the appeal unless (the appellant having first requested permission to service the notice out of time) the tribunal gives such permission. In the normal procedure if an appeal is not significantly out of time and HMRC do not challenge an appellant's request for permission to appeal out of time, the tribunal will allow the appeal to proceed to a hearing as a matter of course. In the present case it appears that no decision was made by the tribunal to allow the Appellant to serve its notice of appeal out of time, but both parties (and also the tribunal) proceeded as though there had been such a decision, and the appeal came to its hearing before us.

9. At the hearing of this appeal Mr Pritchard, who appeared for HMRC, drew our attention to the recent decision of the Upper Tribunal (Tax and Chancery Chamber) in the case of *HMRC v McCarthy & Stone (Developments) Limited and Anr* [reference PTA/345/2013] which was released on 10 January 2014. That case considers the approach which the Upper Tribunal should take when deciding whether or not to exercise its discretion to grant an extension of time where a party appealing to the Upper Tribunal has served its notice of appeal after the period permitted by the Upper Tribunal's procedural rules. In particular, the case considers such matters in the light of the decision of the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537, which is concerned with the approach a court should take in enforcing matters of compliance with orders and time limits imposed in court proceedings having regard to changes in procedural rules which implement the so-called Jackson reforms. Those reforms have as a principal objective the conduct of litigation in a manner which is efficient and at proportionate cost and which ensures compliance with court rules and orders. We accept that the guidance which the Upper Tribunal gives as to its approach to such matters in its own jurisdiction applies also to the approach which this tribunal should take in relation to the self-same matters when they occur within its jurisdiction.

10. Mr Pritchard told us that HMRC were not seeking to challenge the Appellant's request for its notice of appeal to be admitted out of time, but he raised the matter in

case, having regard to these recent cases, the tribunal felt it needed to direct itself that it did not have the jurisdiction to hear the appeal.

11. As we have stated, the tribunal has a discretion to admit a notice of appeal which is made out of time. That discretion is not ousted by the decisions in the *Mitchell* and *McCarthy & Stone* cases - they simply provide guidance as to how the discretion should be exercised. The question is therefore not strictly one of jurisdiction, but one of whether in all the circumstances the tribunal's discretion should be exercised to allow the Appellant to make its appeal out of time. It appears that no decision has yet been taken by the tribunal as to whether that discretion should be exercised in this case, and until such a decision has been made the tribunal cannot entertain the Appellant's appeal. We informed the parties at the hearing that we would reserve our decision on this particular matter, but would hear their submissions on the appeal itself pending our decision as to whether we would admit the out of time notice of appeal.

12. In considering whether we should exercise our discretion to allow the Appellant's appeal to be made we have had regard to the guidance on this issue derived from the *Mitchell* case and the *McCarthy & Stone* case, and the approach of the courts to matters such as extending appeal time limits in the light of the objectives of the Jackson reforms. We have taken note that in considering such matters we should give primacy to the need for litigation to be conducted efficiently and at proportionate cost and to the need to enforce compliance with procedural rules so that effect is given to the objectives of the Jackson reforms. Those matters weigh against us allowing the appeal to be made out of time, but considerably less so, in our view, in circumstances such as the present where HMRC raise no objection to the Appellant being allowed to make its appeal. We are also required to consider all the circumstances of the case, and we note that the Appellant was not legally represented when making its appeal (it was at that time represented by a customs consultancy), and that the notice of appeal was only four days late. The reason given for the late making of the appeal is that the relevant persons were on holiday over the Christmas and New Year period (which fell, of course, in the middle of the 30 day period in this case). If the Appellant had been legally represented we would not have given much, if any, weight to such a reason, but we accept that a different standard should be applied where a party is not legally represented, and where the importance and significance attached to complying with time limits may not be so readily appreciated. We have also noted that HMRC by their quiescence have given no indication that they will be prejudiced by the appeal being allowed to proceed.

13. Taking all these factors together we have concluded that we should allow the Appellant's request, made in the notice of appeal, that its appeal be admitted notwithstanding that it is made four days after the end of the period specified in section 16(1) Finance Act 1994. The notice of appeal is therefore admitted.

14. We can now turn to the substantive matters in this appeal.

The relevant legislation

15. Matters concerning the system for the levying, administration and payment of customs duties and claims for repayment of customs duties are common to all member states of the European Union and the legislation relating to such matters is to be found in European Union Council Directives and Regulations. In this appeal we are concerned with provisions in Council Regulation 2913/92 ("the Customs Code") and the further regulation which implements the Customs Code in its detail - Council Regulation 2454/93 ("the Implementing Regulation").

16. The Customs Code proceeds on the basis that the person responsible for importing goods ("the declarant") will make a customs declaration which will specify the goods and their value and also the customs duty payable on import by reference to the nature or purpose of the import and the categorisation of the goods by reference to which the relevant rate of duty is specified. On making the declaration the duty is payable by the declarant. There is provision for such declarations to be made electronically.

17. Article 78 of the Customs Code provides for the situation where, after goods have been imported, a declaration is to be amended because it was incorrect. So far as relevant to this appeal it provides as follows:

> 1 The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.
>
> 2 ....
>
> 3 Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularize the situation, taking account of the new information available to them.

18. Article 237 of the Customs Code deals with the repayment of customs duties which have been paid pursuant to a declaration which proves to be incorrect:

> Import duties or export duties shall be repaid where a customs declaration is invalidated and the duties have been paid. Repayment shall be granted upon submission of an application by the person concerned within the periods laid down for submission of the application for invalidation of the customs declaration.

19. Article 199 of the Implementing Regulation deals with a declarant who uses a data-processing system to produce and file electronically his customs declaration (which the Appellant did). So far as relevant it provides:

> 1. Without prejudice to the possible application of penal provisions, the lodging of a declaration signed by the declarant or his representative with a customs office or a transit declaration lodged using electronic data-processing techniques shall render the declarant or his representative responsible under the provisions in force for:

> - the accuracy of the information given in the declaration,
>
> - the authenticity of the documents presented, and
>
> - compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.
>
> 2. ... .
>
> 3. Under the conditions and in the manner which they shall determine, the customs authorities may allow some of the particulars of the written declaration referred to in Annex 37 to be replaced by sending these particulars to the customs office designated for that purpose by electronic means, where appropriate in coded form.

20. Article 251 of the Implementing Regulation sets out the time limit within which a declarant may request the customs authorities that they render invalid a declaration made in error (so that import duties wrongly paid may be repaid). So far as relevant Article 251 provides as follows:

> By way of derogation from Article 66 (2) of the Code, a customs declaration may be invalidated after the goods have been released, as provided below:
>
> 1. where it is established that the goods have been declared in error for a customs procedure entailing the payment of import duties instead of being placed under another customs procedure, the customs authorities shall invalidate the declaration if a request to that effect is made within three months of the date of acceptance of the declaration provided that:
>
> - any use of the goods has not contravened the conditions of the customs procedure under which they should have been placed,
>
> - when the goods were declared, they were intended to be placed under another customs procedure, all the requirements of which they fulfilled, and
>
> - the goods are immediately entered for the customs procedure for which they were actually intended.
>
> The declaration placing the goods under the latter customs procedure shall take effect from the date of acceptance of the invalidated declaration.
>
> The customs authorities may permit the three-month period to be exceeded in duly substantiated exceptional cases;
>
> 1a. where it is established that the goods have been declared in error, instead of other goods, for a customs procedure entailing the obligation to pay import duties, the customs authorities shall invalidate the declaration if a request to that effect is made within three months of the date of acceptance of the declaration, provided that:
>
> - the goods originally declared:
>
> (i) have not been used other than as authorized in their original status; and

(ii) have been restored to their original status; and that

- the goods which ought to have been declared for the customs procedure originally intended:

(i) could, when the original declaration was lodged, have been presented to the same customs office: and

(ii) have been declared for the same customs procedure as that originally intended.

The customs authorities may allow the time limit referred to above to be exceeded in duly substantiated exceptional cases.

The evidence and the findings of fact

21. In evidence before us we had a bundle of documents comprising the import entry acceptance advice documents recording the customs duty declarations filed electronically with HMRC on behalf of the Appellant; the Form C285 (Application for Repayment) submitted by the Appellant to HMRC; HMRC's letter to the Appellant refusing the repayment of customs duty requested by the Appellant; correspondence between HMRC and the Appellant (or the Appellant's agent) in relation to HMRC's refusal to repay the duty concluding with HMRC's review decision of 14 December 2012 against which the Appellant is appealing; and guidance published by HMRC in relation to customs duty repayment claims.

22. The Appellant produced a witness statement of Sarah Fox of RSH Freight Masters Ltd. Miss Fox is the person responsible for making the incorrect declaration on the Appellant's behalf which led to the Appellant's repayment claim. Miss Fox was not called as a witness at the hearing. We discuss below the content of her statement and the weight we attribute to it.

23. Stephen Macey, a director of RSH Freight Masters Ltd, gave evidence for the Appellant and was cross-examined by Mr Pritchard. Mr Macey explained the entries made (by way of declaration of the goods in question on import) in the electronic system maintained for these purposes by HMRC. He also set out the sequence of events relating to the declaration, its purported correction and the claim for repayment of the duty paid in error. Certain parts of Mr Macey's evidence related to his understanding of the action taken by Miss Fox. We discuss below the weight we attribute to this part of his evidence. As to the rest of Mr Macey's evidence, we accept it without reservation.

24. Paul Martin Blake, a director of the Appellant, gave evidence for the Appellant. Mr Blake's evidence related to the Appellant's business and its role in importing the goods, the consignee of the goods, the reasons for the import of the goods and their eventual export. We accept Mr Blake's evidence as to these matters without reservation. Mr Blake also gave evidence as to certain conversations he had with Rachel Hallam, an officer of HMRC (see below). To the extent that his evidence conflicted with that of Miss Hallam (which was as to whether Miss Hallam had encouraged the Appellant to pursue its repayment claim by stating that the Appellant had an exceptional case) we prefer, as we mention below, the evidence of Miss

Hallam. This particular matter is in any event, as we mention below, not relevant to the scope of the appeal falling within our jurisdiction.

25. HMRC called one witness, Rachel Hallam, an officer of HMRC employed in the CITEX Authorisations and Returns Team. Miss Hallam had prepared a witness statement. Miss Hallam was cross-examined by Mr Blake. Miss Hallam's evidence related to her examination of the entries made by the Appellant (through its agent) in HMRC's electronic system by way of declaration of the goods and the purported correction of those entries; the procedures which should be followed in cases where errors have been made in the declaration of goods on importation; the procedures which are applied by HMRC on receipt of applications for repayment of customs duties paid in error; the absence in the record held by HMRC of repayment claims of any repayment claim made by the Appellant; and the discussions she had with the Appellant as to the procedures they might follow in an attempt to secure repayment of the overpaid duty. We accept Miss Hallam's evidence without reservation.

26. From the evidence we find the facts as follows.

27. The Appellant carries on business as a freight forwarder and in the course of that business is engaged in importing goods into the United Kingdom on behalf of its customers. It takes responsibility for documenting the import of goods, including making the necessary declarations for the purposes of customs duty payable on import. When acting in this manner it is the declarant for the purposes of the procedures relating to the payment of customs duties, and it had that responsibility in the transaction with which this appeal is concerned.

28. The Appellant's customer in the transaction with which this appeal is concerned was Harris Systems Limited, the consignee of the goods in question. The goods comprised 8 items of broadcasting equipment which were imported from Canada. They had a value for customs purposes of approximately £745,000. Harris Systems Limited was not importing the goods for "home use" (that is, for free circulation in the UK market), but in order to process the goods in some way, following which they would be exported. Harris Systems Limited was entitled to import the goods under the "inward processing procedure" - in effect, it was relieved from customs duty provided it processed the goods and then exported them. Its intention was to import the goods under this procedure and it instructed the Appellant as the declarant responsible for the import to enter the goods on that basis. Harris Systems Limited has processed the goods and the goods have been exported.

29. The Appellant appointed RSH Freight Masters Ltd ("RSHFM") as their clearance agent in relation to the import of these goods. RSHFM was responsible for all the entries in relation to the goods by way of declaration of the goods for customs duty purposes.

30. On 24 August 2011 an entry was made in relation to the goods in the CHIEF electronic system ("the August CHIEF entry"). CHIEF is the electronic system established and run by HMRC by which importers, by entering all the information required, declare goods on import for customs duty and value added tax purposes.

The declarant has access through a computer terminal to CHIEF and makes an entry in the system by entering data in all the fields or boxes necessary to complete the entry. The entry is linked to a shipment reference number. On submission of the entry a full record of the entry (titled "Import Entry Acceptance Advice") is produced. This shows the amount of customs duty payable in relation to the import of goods entered in the system.

31. The Import Entry Acceptance Advice for the August CHIEF entry shows that the entry was made by Sarah Fox of RSHFM. It shows the consignee of the goods to be Harris Systems Limited and the declarant in respect of the import of the goods to be the Appellant. It lists the items of goods with their respective values in pounds sterling. It shows that the goods were imported for "home use" (this is indicated by the use of Code 40 (being the customs procedure code), which represents "Home use with simultaneous entry for free circulation" in the relevant box, Box 37). In Box 40 it shows a consignment number for the goods. It shows customs duty payable of £24,039.90.

32. On 10 November 2011 a further entry was made in the CHIEF system in relation to the same goods ("the November CHIEF entry"), but this entry could not be linked to the shipment reference to which the link was made in the August CHIEF entry. The Import Entry Acceptance Advice for the November CHIEF entry shows that the entry was made by Sarah Fox of RSHFM. As to the consignee, the goods and the declarant the November CHIEF entry replicates the August CHIEF entry. It also shows the same consignment number for the goods in Box 40 as in the August CHIEF entry. In Box 37, however, the customs procedure code which has been entered is Code 51, which represents "Inward processing procedure (suspension system)". It shows the customs duty payable (but with payment suspended because of inward processing relief) as £23,824.35. This figure differs from the duty shown as payable in the August CHIEF entry because in each entry the value of the goods (originally priced in Euros) is shown in pounds sterling at the Euro/pound sterling exchange rate prevailing on the date of the relevant entry.

33. On 20 January 2012 Sarah Fox of RSHFM wrote to the National Duty Repayment Centre of HMRC (who received the letter on 23 January 2012). The letter is headed "Duty repayment request", and is in the following terms:

> "I have enclosed documentation for an import entry error. The shipment was entered as home use under 120 099195T 24.08.11 in error, I have now completed the correct IPR entry 120 043645T 10.11.11.
>
> Please can you process this duty reclaim for the customer - I have attached their bank details. Please do not hesitate to contact myself for any further information.
>
> Please accept my sincere apologies for this error."

34. Enclosed with Miss Fox's letter was a completed form C285 "Application for repayment" signed by Miss Fox (form C285 is a standard form produced by HMRC). This referred to the goods, their customs value, Harris Systems Limited as the

importer (although wrongly named as "Harris Broadcast"), and the Appellant as the declarant. The customs procedure code is shown as 40. In the box headed "Basis of claim" Miss Fox has written "Shipment entered as home use in error - should be IPR". The amount of duty paid is shown as £24,039.90, the amount of duty due is shown as £0.00, and the amount of total repayment as £24,039.90. In the section of the form headed "Application is made for repayment or remission of import duty under the following Article of the [Customs] Code" the box ticked is for Article 236 (in fact, the claim for repayment in this case properly falls to be made under Article 237, which is an alternative box which can be ticked in this section of the form).

35. The form C285 is completed in manuscript. It is not dated. The form shows clearly where the date is to be entered, which is immediately below Miss Fox's signature and the fax number which she has entered, and immediately above a box which Miss Fox has ticked showing her status (in completing the form) to be the representative of the importer.

36. On 13 February 2012 HMRC wrote to the Appellant stating that they intended to refuse the application for repayment on the grounds that it was not submitted within three months of the date of acceptance of the original declaration as specified in Article 251 of the Implementing Regulation, and that the three month period can only be exceeded in duly substantiated exceptional circumstances. They invited the Appellant to provide evidence or arguments which might influence their proposed decision. The Appellant did not provide any such evidence or arguments, and HMRC formally refused the application for repayment on 15 March 2012. The Appellant was informed that, within a period of 30 days, it could request a review of the decision or appeal to this tribunal.

37. On 23 March 2012 Miss Fox wrote to HMRC asking, in effect, for a review of the decision refusing the repayment claim. Her letter includes the following:

> "This is relating to a shipment of which the importer requested an IPR entry to be made however the goods were submitted as home use incorrectly under entry number 120-099195T 24.08.11. When we became aware of this error a post entry was made on the 10th November 2011 please see copy enclosed entry 120 043645T and a claim for repayment was made on the same day within the 3 month time limit.
>
> The importer contacted us for an update regarding this claim for which we made enquiries to the NDRC and we were informed that, according to their records, no claim had been received.
>
> We were then asked to submit a duplicate repayment claim with all supporting documentation which was sent on the 20th January 2012."

38. On 8 May 2012 the review officer wrote to the Appellant to inform it that, following the review, the decision not to allow the repayment claim was upheld. This was on the ground that the repayment claim was received on 23 January 2012, which was beyond the three month period specified in Article 251 of the Implementing Regulation, and that no exceptional circumstances had been shown to allow the three month period to be extended. The letter refers to Miss Fox's assertion that a claim for

repayment was made on 10 November 2011 when the November CHIEF entry was made. It then states: "Please note that NDRC has no record of a previous claim being submitted, nor was any reference made to a previous application in [RSHFM's] letter dated 20 January 2012."

39. Further correspondence followed between HMRC and, variously, Harris Systems Limited, RSHFM and the Appellant. In the course of that correspondence Miss Hallam advised Harris Systems Limited of the correct procedure to be followed when an import entry has been made incorrectly and the importer wishes to claim a repayment of the customs duty paid in error as a result of that entry.

40. That correct procedure, which is set out in HMRC's published Notice 199 "Imported goods: Customs procedure and Customs debt" and also in HMRC's published internal manual at PCC02450 - Roles and Responsibilities of the National Duty Repayments Centre, requires that a "paper" substitute entry is submitted to HMRC together with a completed form C285 and a copy of the incorrect import entry made in the CHIEF system together with a request for the incorrect entry to be invalidated and replaced by the substitute entry. Once matters have been verified, HMRC will take the action required manually to invalidate the incorrect import entry and replace it with the substitute entry and will repay the overpaid duty if the claim is made within the time limits specified by Article 251 of the Implementing Regulation. The substitute entry must set out the correct circumstances and details of the import of the goods.

41. In July 2012 Miss Fox followed this procedure by sending to HMRC a manual substitute entry, a copy of both the previous import entries (i.e. the August CHIEF entry and the November CHIEF entry), and a completed form C285 requesting repayment of the duty paid in error. Miss Fox had signed the form C285 and dated it 20 July 2012, and had correctly identified Article 237 of the Customs Code as the provision under which the application was made.

42. This application was also refused by HMRC. The Appellant asked for a review of the refusal decision, claiming that a repayment claim had been made on 10 November 2011. The Appellant submitted a copy of the undated form C285 (that is, the form sent with the letter of 20 January 2012) on which someone has written "Posted 10/11/11" - it is not immediately apparent that this is the handwriting of the person who completed the undated form C285. The Appellant also claimed, alternatively, there were exceptional circumstances which allowed HMRC to extend the claim period beyond three months so as to accept the claim submitted on 20 July 2012. The Appellant further asserted that once the claim submitted in January 2012 was refused, the Appellant had followed the procedures which HMRC had advised were required for the repayment to be made and in doing so had relied on verbal assurances given to Mr Blake by Miss Hallam to the effect that the circumstances of the Appellant's case would count as exceptional.

43. HMRC conducted a further review, and by their letter of 14 December 2012 informed the Appellant of their decision to uphold the original decision to refuse the

repayment claim. It is against the decision in this letter that the Appellant is appealing.

44. As for the internal procedures in HMRC in relation to the receipt and processing of customs duty repayment claims, applications for repayment are recorded on receipt by the relevant office of HMRC on a spreadsheet. Once the application has been dealt with a further entry is made on the spreadsheet to record the action taken in respect of the application and the date such action is completed. The records of HMRC for repayment applications contain no entry for a repayment application made by the Appellant or otherwise on behalf of Harris Systems Limited in relation to the goods in question dated 10 November 2011. We conclude that if the Appellant posted the repayment application and accompanying documents on or about 10 November 2011 then they were never received by HMRC.

45. Repayment applications are normally processed within 30 days of receipt, and that 30 day turnaround period is published as a target by HMRC. It is common practice (but not universal practice) for an importer or its agent to contact HMRC if they do not have a response to a repayment application within the 30 day period.

The submissions of the parties

46. The Appellant's case was ably put to us at the hearing by Mr Blake and Mr Macey. In recording the Appellant's submissions we have also taken note of the points made by the customs consultancy engaged by the Appellant, and in particular the points made by that consultancy in its lengthy letter to HMRC requesting a review of their refusal decision.

47. The Appellant asked us to note that the customs duty was paid in error: the goods were imported for processing, and they were then exported. Inward processing relief was properly available, and no customs duty should have been paid. The Appellant was doing no more than asking HMRC to repay what had wrongly been paid to them.

48. The Appellant argues that, through the agency of RSHFM, it recognised that an error had been made in the declaration of the goods and took steps to correct that by the November CHIEF entry. It argues that, as corroborated by the November CHIEF entry, Miss Fox submitted a repayment claim by posting it to HMRC on or shortly after 10 November 2011. That claim should be regarded as received by HMRC when delivered in the ordinary course of post, which would be on or before 23 November 2011, that is, within three months of the date of the August CHIEF entry. In this regard Mr Blake referred us to the decision of this tribunal in the case of *The Trustee of the De Britton Settlement* [2013] UKFTT 106 (TC). On that basis the repayment claim was made in time.

49. Alternatively, the Appellant argues that the repayment claim was posted to HMRC on or shortly after 10 November 2011 and was then lost in the post and so was never received by HMRC. It argues that the repayment claim sent by Miss Fox with her letter of 20 January 2012 was a duplicate copy of the lost form C285. It argues

that by posting the repayment claim the Appellant's agent had done everything required to make the claim, and its loss in the post was an exceptional case or circumstance over which it had no control. The provision in Article 251 of the Implementing Regulation which allows for an extension of the three month time limit is intended to allow for such an exceptional eventuality. That this is indeed an exceptional case is clear from the fact that RSHFM, an agent which is highly experienced and reliable in matters of importing goods, has not previously had this experience. The Appellant referred us to the decision of the European Court of Justice in the case of *Firma Söhl & Söhlke v Hauptzollamt Bremen* Case C-48/98 [1999] ECR I-7877 which held that, in relation to a different article in the Customs Code, "Exceptional circumstances which, although not unknown to the trader, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances." [at paragraph [74]]. It was not unknown to the Appellant that a repayment claim might be lost in the post, but that was not a circumstance which normally confronted the Appellant in the exercise of its occupation - it was therefore an exceptional circumstance or case, and the late delivery of the repayment claim consequent upon the original repayment claim being lost in the post should be accepted within a time limit extended beyond the normal three month period.

50. The Appellant also argued that in the course of conversations with Miss Hallam after February 2012, when the Appellant was trying to sort matters out, it had been told that the circumstances of its case amounted to an exceptional case which should permit HMRC to accept the repayment claim once the proper procedures had been followed (which they were in relation to the repayment claim made on 20 July 2012). An expectation was thereby created that the customs duty would be repaid if the Appellant followed those procedures.

51. For HMRC, Mr Pritchard said that the only repayment claim made by the Appellant in accordance with the proper procedures was that made on 20 July 2012. The tribunal has to consider whether a duly substantiated exceptional case existed so as to permit HMRC to accept this claim nearly eight months after the end of the period in which the claim could have been made as of right. He said that the context of this case was that the Appellant, through its agent RSHFM, had made a mistake in not following the instructions of the consignee, Harris Systems Limited, and then not following, within the clear prescribed time limits, the proper procedures for having the mistaken entry invalidated and the duty repaid. The risks and costs of those mistakes were properly matters to be resolved between those trader parties and not by claims against HMRC.

52. HMRC argue that the Appellant has not proved to the required standard of proof that a repayment claim was posted in November 2011. The statement of Miss Fox can be given very little weight as she was not available for questioning at the hearing, and the documentary evidence (in particular the undated form C285 submitted in January 2012 and the fact that the covering letter with that form makes no reference to a previous claim) does not support that assertion. There is no certificate of proof of posting or receipt of a letter for recorded delivery, which the tribunal has regarded as

evidence that a party has duly submitted a customs duty document: *Westland Geoprojects (Holdings) Limited v HMRC* [2011] UKFTT 408 (TC).

53. HMRC also argue that even if the repayment claim was posted in November 2011 and lost in the post, that is not an exceptional case for the purposes of Article 251 of the Implementing Regulation. In deciding whether there is an exceptional case it is necessary to consider whether there are exceptional circumstances. We have the guidance in the *Firma Söhl & Söhlke* case. For a trader who uses the post, and who acknowledges that letters go missing in the post, it is not exceptional that something goes missing. The arrangements which the Royal Mail makes available to avoid this eventuality (such as recorded delivery) shows that it is not exceptional.

54. Finally, HMRC reject the assertion that they told the Appellant that its case was exceptional and that if they followed the correct procedures they would be entitled to the repayment of the duty. That was not the evidence Miss Hallam gave. In any event, the claim was out of time before the Appellant raised the issue with HMRC, so the Appellant suffered no detriment even if it had been encouraged to continue with its claim. There were no grounds for judicial review, and the tribunal did not have the jurisdiction in relation to such matters.

Discussion and conclusion

55. The legislative provisions relevant to this case are clear. If (as is accepted by HMRC in this case) a customs duty declaration on import has been wrongly made and as a result customs duty has been paid when on the facts relating to the import it should not have been paid, then the duty is to be repaid if and when the customs declaration is invalidated. That is provided by Article 237 of the Customs Code. However, Article 237 goes on to specify that in such a case repayment can be made only if the declarant applies for repayment within the periods specified for the submission by the declarant of the application for the customs declaration to be invalidated.

56. It is therefore necessary to turn to Article 251 of the Implementing Regulation, which tells us how, and within what circumstances, and within what period a customs declaration may be invalidated. In short (and so far as relevant to this case), a declaration may be invalidated if the goods in question have been declared for the "wrong" customs procedure (and as a result the "wrong" duty has been paid) and if certain conditions are satisfied; it is the customs authorities which invalidate the declaration upon the declarant's request; and such a request must be made within three months of the date the "wrong" declaration was accepted. That request may be made outside that period of three months, at the discretion of the customs authorities, only where there is a duly substantiated exceptional case.

57. As is to be expected, the procedures of HMRC accord with these provisions: where a customs duty declaration has been incorrectly made they require the declarant to apply to them with a copy of the incorrect CHIEF entry together with a manual substitute entry, so that they may verify that the required conditions are satisfied, and then proceed to invalidate the original entry and replace it with the manual substitute

entry. They will then consider any repayment claim made with the application to invalidate the original entry. The declarant must apply for these steps to be taken within the time limit provided by the legislation.

58. The Appellant did not comply with these procedures until July 2012 when it submitted, under the guidance of HMRC, the correct papers and forms seeking invalidation of the August CHIEF entry, the substitution of an entry of the goods under the Inward processing procedure, and a fully and accurately completed form C285. We agree with Mr Pritchard that it is this July 2012 repayment claim which we have to consider. For it to fall within the three month time limit it should have been submitted by 24 November 2011. It was not, and therefore HMRC have no basis for deciding to make the repayment of duty requested unless the Appellant can show that there exists a duly substantiated exceptional case for it to be accepted some eight months after the end of the three month period.

59. Before dealing with the matter in detail, we make this observation about the significance of compliance with procedures in customs duty matters. The volume of international trade and the movement of goods in the course of that trade is such that individual imports and exports cannot, of course, be examined by customs authorities. The system of customs duty works only because importers are required to conform to precise procedures (paper or electronically based) which are derived from the relevant legislation. At its simplest, importers are expected to fill in the right form appropriate to the circumstances of the particular importation, and to tick the right boxes. They are expected to do this within prescribed time limits. Customs authorities may review particular entries, either because something in the entry catches their attention or on a "spot check" basis, but full and proper compliance is the responsibility of the importer. The procedures provide scope for correcting innocent mistakes, but any limitation in the extent to which mistakes may be corrected is a reflection of the assumption which underlies the whole process, namely that an importer or declarant will know - or must make it his business to know - what he has to do to comply with the relevant procedures.

60. Time limits are a critical part of these procedures. Their purpose is not only to ensure a measure of discipline in compliance with the procedures, but also to ensure that critical matters - such as the verification of qualifying conditions or circumstances - can be conducted whilst facts and evidence remain available.

61. The Appellant, on the occasion we are concerned with, and acting through its agent RSHFM, failed in its responsibility to comply with the relevant procedures. It made an incorrect import entry in CHIEF in August 2011. More relevantly, it failed, until July 2012, to follow the correct procedures to rectify that error. On 10 November 2011, when the error was discovered, a further CHIEF entry was made - as if to all intents and purposes the goods were then being imported. An uncompleted and incorrect form C285 by way of repayment claim may then have been posted to HMRC. HMRC could not have known from the November CHIEF entry that this was a misconceived attempt to invalidate the August CHIEF entry - they would rightly consider it to be an entry made in relation to the import of further goods (it is true that both entries used the same consignment number for the goods, but that may not have

been sufficient to enable HMRC to relate the November CHIEF entry to the August CHIEF entry - in any event, it was not their job to try to reconcile the two entries). The purpose of the proper procedure for manually invalidating an erroneous entry and substituting a correct entry is to allow HMRC to check whether the invalidation and substitution complies with the required conditions, and if it does, for HMRC, not the declarant, to correct the entries.

62. The basis of the Appellant's case is that its application for repayment of the customs duty was lost in the post - which it claims was an exceptional circumstance or case. We deal with that point below. More significant is the fact that if the Appellant had indeed posted on 10 November 2011 what it claims was posted to HMRC (a copy of the August CHIEF entry, a copy of the November CHIEF entry, and an undated form R285), that was not what was required to comply with the procedure to enable HMRC to invalidate the entry and make a substitute entry. One might speculate that, before 24 November 2011, HMRC would have seen what the Appellant intended and may have pointed out to the Appellant the need for it to comply with the correct procedure, but HMRC had no duty to do that, either at all or with sufficient alacrity to enable the Appellant to submit the right documents in time to meet the three month deadline.

63. Within the terms of the relevant legislation, a request (that is, one compliant with the procedures in place for such matters and so including a manual substitute entry, as was eventually submitted in July 2012) was not made by the Appellant in November 2011 for HMRC to invalidate the August CHIEF entry, and so it was not invalidated pursuant to Article 251 of the Implementing Regulation. A repayment claim could not be entertained until the August CHIEF entry had been invalidated, as required by Article 237 of the Customs Code.

64. The Appellant made its repayment application in July 2012. Its failure to make that application within the stipulated three month period was the result of its not following the correct procedures. It may well be rare for the Appellant or its agent to make mistakes of this kind, but on no basis can that be said to be an exceptional case such as is contemplated by Article 251 of the Implementing Regulation so as to permit it to be accepted out of time.

65. On this ground therefore we have to dismiss the Appellant's appeal.

66. We also dismiss the Appellant's appeal by reference to the case which the Appellant argued before us, namely that it made a repayment claim on 10 November 2011 which would have been within the three month time limit had it not been lost in the post, and that its being lost in the post was an exceptional case. The Appellant's case assumes (contrary to our conclusion, as set out above) that the repayment claim application was correctly made following, or in connection with, a proper application to invalidate the original declaration. It also assumes that the Appellant can establish that the claim was indeed posted on or about 10 November 2011 (a matter we deal with below) - so that the fact that it was lost in the post is an exceptional case which is "duly substantiated".

67. The first question is whether, if a valid repayment claim was posted on 10 November 2011 it was "made" on that date, or should be treated as made on the date when in the ordinary course of the post it would have been delivered to the addressee, HMRC, had it been posted on 10 November 2011. The Appellant found support for its case that it was so made from the decision in the *De Britton Settlement* case.

68. We were not taken to any provision in the Customs Code or related legislation which sets out when an application to customs authorities is to be regarded as made. In the absence of special rules, an application must be regarded as made to a body when the applicant delivers it to that body - if it is not so delivered the intended recipient cannot act upon it. The date upon which an application is made is therefore the date on which it is actually delivered to that body. If for any reason it is not delivered it is not made. An application therefore is not made when the applicant posts it, nor is there any presumption that a document when posted is delivered, or can be regarded as delivered after a certain interval. However, it seems to be the practice of HMRC, as we understood it from Mr Pritchard's argument, that if a declarant provides formal proof of posting of an application then that application will, at least for the purposes of complying with any notice period, be treated as made (presumably on the day of posting, but this was not clear), and this practice is supported by the observations of this Tribunal in the *Westland Geoprojects (Holdings) Limited* case.

69. On this point the Appellant relied on the *De Britton Settlement* case. However, cases relating to the delivery of a tax return, such as *De Britton Settlement*, have a different context: it is expressly provided in the relevant United Kingdom tax legislation that a document such as a tax return which is required to be delivered may be served by post, and therefore the special provision in the Interpretation Act 1978 applies to the effect that (unless it is proved to the contrary) such a document (if posted in a properly addressed and stamped envelope) is deemed to be sent or served on the day it would have been delivered in the ordinary course of post. That context, and those provisions, do not apply to customs duties.

70. The next question is whether, if a valid repayment claim was made on 10 November 2011 and it was lost in the post, that was an exceptional case for the purposes of Article 251 of the Implementing Regulation so as to permit the three-month period to be exceeded.

71. There is no case law on what constitutes an exceptional case for these purposes. Both parties referred us to the *Firma Söhl & Söhlke* case, which makes a passing reference to "exceptional circumstances" in the context of justifying the extension of a time limit imposed by Article 49 of the Customs Code, which requires goods covered by a summary import declaration to be assigned a customs treatment or use within a period of 20 days. Article 49(2) is in terms of "circumstances", not "exceptional circumstances", since it provides as follows:

> Where circumstances so warrant, the customs authorities may set a shorter period or authorise an extension of the periods referred to in paragraph 1. Such extension shall not, however, exceed the genuine requirements which are justified by the circumstances.

72. In discussing that provision the ECJ said as follows (at [73] to [75]), having reviewed the purpose of Article 49 and of the time limit which it imposed:

> [73] Therefore, the term "circumstances" within the meaning of Article 49(2) of the Customs Code must be interpreted as referring to circumstances which are liable to put the applicant in an exceptional situation in relation to other traders carrying on the same activity.
>
> [74] Exceptional circumstances which, although not unknown to the trader, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances.
>
> [75] It is for the customs authorities and the national courts and tribunals to determine in each case whether such circumstances exist.

73. We note first that Article 251 of the Implementing Regulation requires the declarant to demonstrate an "exceptional case" and not just "circumstances" that warrant an extension of the notice period. It is a higher hurdle for the declarant to surmount. The guidance to be drawn from the *Firma Söhl & Söhlke* case is that, in relation to a trader seeking to establish that a circumstance is "exceptional", it must be a circumstance which is particular to him, or impacts on him, rather than a circumstance affecting a body of similar traders. It does not have to be a circumstance which is so remote that it could not be foreseen.

74. Mr Pritchard argued, and we agree with him, that a document lost in the post is not a circumstance which is particular to the Appellant and should not be regarded as "exceptional". It is a feature, or at least a risk, of using the post to send important documents and as such impacts on all traders who use that means of communication. That it is such a circumstance is apparent from the fact that Royal Mail offers a number of premium postal services (recorded delivery, insured post) which enable a person to eliminate that circumstance, or to be compensated if that eventuality occurs. He contrasted that with the case where, say, the trader's premises are destroyed, or his records destroyed in flooding. That is a circumstance peculiar to that trader, and as such may fairly be regarded as "exceptional".

75. We make the further point that for a case to be exceptional, it must be one which the trader could not, by the taking of reasonable steps, avoid - it must arise from events or circumstances outside his control. A prudent trader whose entitlement to a repayment of a substantial amount of customs duty depends upon his application being received by HMRC can avoid the risk of that application being lost in the post by the simple and reasonably cheap expedient of sending it by recorded delivery or similar facility provided by postal or courier services.

76. We conclude, therefore, that if a valid repayment claim was made by the Appellant on 10 November 2011 and it was lost in the post, that was not an exceptional case for the purposes of Article 251 of the Implementing Regulation so as to permit the three-month period to be exceeded. We therefore dismiss the Appellant's appeal on this ground also.

77. It s not necessary for us, in reaching the conclusions we have reached, to determine whether the Appellant established, on the balance of probabilities, that the

repayment claim was posted on or about 10 November 2011. The point was, however, the subject of much argument at the hearing, and in case this matter goes to appeal, and it is material that there is a finding of fact on this point, we deal with it here.

78. The Appellant relies on the witness statement of Miss Fox, the employee of RSHFM. In that statement Miss Fox explains that the errors made in the August CHIEF entry were hers, and that once she was advised of her mistake she made the November CHIEF entry (which she regarded as a substitute entry). She states that this was done on 10 November 2011, and that "the full documents were then posted on the same day to HM Customs along with the reclaim form C285 which regrettably was not sent recorded delivery, the form was not dated which was an oversight on my behalf, no other reason". She then says that on 20 January 2012 the Appellant asked her for progress on the repayment claim, and her statement continues, "I called HM Customs and they were not aware of my application to amend this error so as requested by HM Customs I submitted a duplicate claim by recorded delivery to them on the 20th January 2012, I did not mention about the fact that this was the second time of posting as I literally resent the original documents, which is why the C285 was still undated which went unnoticed by myself."

79. Miss Fox completes here statement by saying that it all stemmed from human error in the making of the August CHIEF entry, and that there was no attempt to defraud HMRC. We accept that this was the case.

80. Our principal difficulty with Miss Fox's evidence is that, for reasons which were not explained to us, the Appellant did not produce her as a witness at the hearing. Her evidence as it appears in her statement is therefore not given under oath and, more importantly, it could not be challenged in any way by cross-examination. Certain parts of Mr Macey's evidence related to the actions taken by Miss Fox, and as her manager there may be matters to which he could properly speak as a witness. But he cannot, without some means of corroboration, give evidence as to what she did or did not do unless he observed her doing it - he cannot give the evidence that she alone can give, and therefore to the extent that he purported to give such evidence we have disregarded it.

81. There are matters which would be the subject of legitimate challenge to Miss Fox's account. For example, if the purpose of sending to HMRC on 20 January 2012 duplicates of documents was to establish that they had originally been posted within the three month period which expired on 24 November 2011, would it not be obvious and elementary to make reference in the covering letter to the fact that the originals were posted on 10 November 2011 and had apparently been lost in the post, and that these were duplicates of what was sent at that time? Any person receiving the letter of 20 January 2012 (see paragraph 33 above for its content) could only conclude that this was a new application (which, indeed, was how HMRC treated it).

82. There are also questions as to why the form C285 purportedly completed and sent on 10 November 2011 was undated. Miss Fox ascribes this to an oversight, but it is difficult, without questioning her further, to understand this when she has

completed the entries immediately above and immediately below the entry in the form which requires the date. Our understanding of what happened was not assisted by further copies of the undated form C285 sent at a later date to HMRC and included in the evidence bundle which were endorsed in manuscript with "Posted 10/11/11", that endorsement not obviously being in the handwriting of Miss Fox (so far as we could assess that from the undated form).

83. The Appellant counters these queries by making the point that the November CHIEF entry was indisputably made on 10 November 2011, and asks what would be the point of Miss Fox making that entry if it were not followed through by sending in the papers at about that date to reclaim the duty paid in error. That point has some force, but it has to be said that in circumstances where a series of errors were made and procedures were not correctly followed and where some matters are not explained, we do not attach too much weight to the point.

84. Taking these matters together we find that the Appellant has failed to establish, on the balance of probabilities, that the undated form C285 was posted on or about 10 November 2011. We might have concluded differently if there had been opportunity to hear what Miss Fox had to say in evidence, but that was not the case. We repeat the point that this is in any event not a matter which was material to the decision we have reached to dismiss the Appellant's appeal.

85. The final matter we have to deal with is the Appellant's claim that their appeal should succeed because they were led to expect, by the conduct of HMRC, that the repayment claim would be accepted. The Appellant can point to no documentary evidence in support of this contention, but in the evidence of Mr Blake reference was made to conversations with Miss Hallam.

86. Miss Hallam is an officer of HMRC in the area of customs duty where she has worked since 1987. We heard her give evidence and we read her correspondence with various parties in this matter. We judged her to be experienced and very competent and reliable. We do not believe that she would have made a commitment - by stating that the Appellant could succeed in establishing an exceptional case - which she was in no position to give or to fulfil. It is clear that her aim was to ensure that the Appellant followed the correct procedure to invalidate the declaration made by the August CHIEF entry, to provide a manual substitute entry, and to submit a completed and accurate form C285 - in other words, to do what it should have done no later than 24 November 2011, and which, under her guidance, it eventually did in July 2012. Only when the Appellant had done this could HMRC formally verify whether the required conditions for repayment were satisfied, and reach a decision whether it could permit the three-month period to be exceeded.

87. No doubt Miss Hallam expressed sympathy for the Appellant's plight, and perhaps Mr Blake interpreted that as something more. We are, however, of the definite view that she did not create an expectation that the out of time repayment claim would be accepted.

88. We make, briefly, two further points. First, even if Miss Hallam created an expectation of that kind, it did not result in the Appellant taking action, in reliance upon that expectation, whereby it was unable to make its repayment claim in time, or whereby it was unable to show that it had an exceptional case justifying an out of time claim. It did not, in short, act to its prejudice by reason of relying upon the expectation. Its claim was out of time, and the circumstances which caused it to be out of time had arisen, before Miss Hallam was involved in the matter.

89. Secondly, if the Appellant has a case that it has acted to its prejudice or detriment in reliance upon a commitment given by HMRC, that is not a matter which can be pursued before this tribunal, which has no jurisdiction in matters of judicial review.

90. For these reasons we dismiss the Appellant's appeal.

Right to apply for permission to appeal

91. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 25 March 2014