[2017] UKFTT 0142 (TC)

**TC05636**
**Appeal number: TC/2015/06502**

*Import VAT – paid by agent on behalf of importer – importer in liquidation – Article 239 of the Customs Code – special situation – extra statutory concession – unjust enrichment – appeal dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

| | |
|---|---|
| **GRANGE SHIPPING LIMITED** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

**TRIBUNAL: JUDGE RUPERT JONES**
**DR CAROLINE SMALL**

**Sitting in public at Fox Court on 29 November 2016**

**Carol Bun, Barrister and Tax Consultant, Birketts LLP for the Appellant**

**Amelia Walker, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

**© CROWN COPYRIGHT 2017**

DECISION

1. Grange Shipping Limited (the "appellant") has appealed against the decision of the respondents ("HMRC") dated 6 October 2015. HMRC's decision refused the appellant's claim dated 12 June 2015 requesting a refund of Import VAT in the sum of £127,213.85.

**Background Facts**

2. The Tribunal considered two witness statements from the financial controller of the appellant, Hazel Pendle who gave oral evidence and was cross examined. The Tribunal finds the following facts.

3. In 2015 the appellant acted as shipping agent on behalf of two clients and importers (Howard Smith Paper Group Ltd and Robert Horne Group Ltd, hereafter referred to as the "companies"). The appellant was the companies' direct representative for the purpose of the Customs Code.

4. In the appellant's capacity as the companies' shipping agent the appellant paid Import VAT from its deferment account on behalf of the companies in respect of the following 12 import consignments of blank paper from the USA (hereafter referred to as the "Consignments"):

Import Entry 191 012435K 16/03/2015

Import Entry 191 012445E 16/03/2015

Import Entry 191 012486X 16/03/2015

Import Entry 191 015373B 20/03/2015

Import Entry 191 017794P 23/03/2015

Import Entry 191 019876G 25/03/2015

Import Entry 191 019879P 25/03/2015

Import Entry 290 009263C 09/03/2015

Import Entry 290 013786H 12/03/2015

Import Entry 290 015858K 13/03/2015

Import Entry 290 023197L 20/03/2015

Import Entry 290 025606X 24/03/2015

5. The exporter of the goods was a Canadian company, Domtar corporation.

6. By way of an email transmitted on 16 April 2015 the appellant contacted HMRC and informed HMRC that the companies had appointed a group administrator. The companies had gone into administration on 01 April 2015.

7. The email stated that the group administrator had confirmed that as the transactions in relation to the Consignments had taken place prior to the group administrator's appointment date, the group administrator would not be taking delivery of the Consignments nor recompensing the appellant for payments of Import VAT that the appellant had made on behalf of the companies.

8. The appellant's email stated that as the companies had not paid the owners of the goods, Domtar Corporation, for the goods, the owners of the goods had decided to sell the goods that comprised the Consignments to alternative customers. The appellant explained that they proposed to raise 'Post Entry Adjustments' by way of correction to the original import entries and requested that HMRC withhold or cancel the issue of form C79 to the companies in respect of the Consignments.

9. Ms Pendle gave further oral evidence regarding the transaction.

10. The appellant took some steps take to mitigate the commercial risk in the event of insolvency of the companies. It had conducted credit and commercial checks on the companies, which it had updated. It had paid the Import VAT from its VAT deferment account on behalf of the companies. Ms Pendle stated that the appellant had a common-law lien over the imported consignments at any time before it received reimbursement of the Import VAT from the companies. The appellant had hoped this would prevent the re-sale of the goods to third party paper retail merchants.

11. However, the Consignments were delivered at the request of the companies to their end customers on the day after the VAT / Customs import clearance. Therefore the companies were no longer in the possession / control of the Consignments so that the appellant could not exercise its lien over the goods. It was said that Domtar Corporation had re-sold the goods to end buyers for the companies.

12. The appellant took steps to identify to ascertain the end buyers as it only had information to identify those responsible for delivering the goods to depots. It contacted Domtar but they were not prepared to spend the time identifying and releasing the name of the end buyer. Ms Pendle stated that the depot was not interested in assisting a small freight forwarder such as the appellant and was not prepared to spend the time attempting to identify the end buyer. The appellant knew the main customers of the depot but without the detailed information from Domtar they could not identify the consignments.

13. The appellant had no written contract with Domtar or the companies. It carried no insurance against customers becoming insolvent. This was a very unusual occurrence. The insolvency of the companies had happened to occur when the appellant was owed very large amounts and it would not normally have had that level of debt. The appellant did not understand why HMRC want to benefit twice as it would receive VAT from the end purchaser as well as the appellant.

14. Between 17 April 2015 and 22 April 2015 the parties exchanged further emails in relation to the Import VAT the appellant had paid in respect of the Consignments. On 23 April 2015 HMRC referred the appellant to VAT Notice 702 and explained that this VAT Notice set out the circumstances in which an agent may reclaim VAT it has paid.

15. By way of a letter dated 10 June 2015 the appellant formally declared to HMRC that the appellant would not recover the Import VAT it had paid on behalf of the companies from the companies' group administrator.

16. By way of a letter dated 12 June 2015 the appellant contacted HMRC to make a claim for recovery of Import VAT in the in the sum of £127,213.85, which the appellant had paid to HMRC on behalf of the companies prior to the companies entering into administration on 1 April 2015 (the "Claim").

17. The appellant's letter set out that the companies did not repay the amount of the Import VAT to the appellant before the companies became insolvent and went into administration. The appellant's letter stated that the companies' administrator was in possession of the Forms C79 pertaining to the Import VAT that the appellant wished to recover from HMRC.

18. By way of a letter dated 14 July 2015 HMRC contacted the appellant to acknowledge the Claim and requested that the appellant provide further information to support the Claim. HMRC's letter specifically requested that the appellant confirm in writing that the appellant had met all of the conditions set out in VAT Notice 702, in particular those conditions relating to the appellant's control of the goods in question and their re-exportation. HMRC's letter also requested that the appellant confirm where the goods in question were currently held.

19. As recorded above, the exporter, of the Imported goods, Domtar Corporation, had re-sold the Goods to other UK customers as they had not been paid by the companies for the Goods. Hence, they were never re-exported.

20. The appellant responded to HMRC by way of a letter dated 20 July 2015. The appellant stated that it could not meet the requirements set out in VAT Notice 702 in respect of the re-exportation of the imported goods at issue. It stated that all other conditions had been met, save for the reference to the re-exportation of the Goods: "The U.S. supplier/exporter of the Goods has re-sold the Goods to another trader in the UK."

21. On 14 August 2015, HMRC wrote to the appellant stating it agreed in principal to HMRC Officer Barry Jordan's recommendation that the appellant could complete a new entry in the name of the new importer. HMRC sought copies of the original import entries, E2s1 and invoices for the attached twelve claim entries were sought. The letter sought the clearance of a Post Entry, or Entries to cover the importations as taken over by the new buyer via the Post Clearance section at Ralli Quay in Salford.

22. On 4 September 2015, the appellant wrote to state that it was unable to obtain the required information from the exporter, who had re-sold the imported

consignment to new buyers. The American exporter had not responded to urgent requests for the information requested, the Administrators had not offered any further assistance beyond their confirmation that they would not be claiming VAT input tax credit on the C79s in their possession.

5 23. On 6 October 2015 HMRC refused the application for a refund, due to the provisions of VAT Notice 702, paragraph 2.5 having not been met, particularly those relating to the control of the good on a re-exportation. HMRC noted that the provision for repayment may have been made on the completion of a Post Entry in the name of the new recipient but without this, HMRC was unable to forward the claim.

10 24. Despite its acknowledgment that it could not meet all of the requirements set out in VAT Notice 702, the appellant requested that HMRC permit it to recover the Import VAT the appellant had paid on behalf of the companies in respect of the Consignments.

25. By way of a letter dated 14 August 2015 HMRC contacted the appellant to 15 request further information in respect of the claim. HMRC's letter requested that the appellant provide copies of the original import entries, the entry acceptance advices and invoices in respect of the Consignments and also instructed the appellant to arrange for the clearance of a Post Entry, or Entries, to cover the importations as taken over by the new buyer via HMRC's Post Clearance section.

20 26. By way of an email transmitted on 4 September 2015 the appellant responded to HMRC and set out that they had been unable to obtain the required information from the American exporter who had re-sold the Consignments to new buyers. The appellant's email also set out that the Companies' administrator had not offered the appellant any further assistance in this matter beyond their previous written 25 confirmation that they (the Companies' group administrator) would not be claiming VAT input tax credit on the C79s in their possession (each of which related to the Import VAT paid by appellant on behalf of the Companies).

27. Despite the appellant's acknowledgment that it could not meet all of the requirements set out in VAT Notice 702, the appellant again requested that HMRC 30 permit the appellant to recover the Import VAT the appellant had paid on behalf of the companies in respect of the Consignments.

28. On 6 October 2015 HMRC issued a letter to the appellant (the "Decision"). The Decision refused the Claim on the basis that the appellant had not met the requirements set out at Paragraph 2.5 of VAT Notice 702. In particular, the Decision 35 referred to the appellant's failure to meet the requirements relating to control of the goods on re-exportation.

29. The Decision explained that whilst provisions for repayment may have been made on the completion of a Post Entry in the name of the new recipient of the Consignments, without this information HMRC could not progress the Claim. The 40 Decision set out that the appellant was permitted to, within 30 days of the date of the

Decision, request that HMRC conduct a statutory of the Decision or notify an appeal of the Decision to the Tax Chamber of the First-tier Tribunal (the "FTT).

30. By way of a notice of appeal dated 15 October 2015 the appellant notified an appeal against the Decision to the FTT.

5 **The Law**

31. Section 1(4) of the Value Added Tax Act 1994 provides:

VAT on the importation of goods from places outside the member States shall be charged and payable as if it were a duty of customs.

32. Section 16(1) of the Value Added Tax Act 1994 provides:

10 (1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—

(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom;
15 and

(b) the EU legislation for the time being having effect in relation to EU customs duties charged on goods entering the territory of the European Union, shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case
20 may be, EU customs duties.

33. European Council Regulation 2913/12 (The Customs Code) provides:

Article 4

……

(12) 'Debtor' means any person liable for payment of a customs debt.

25 ……

(18) 'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

Article 5

1. Under the conditions set out in Article 64 (2) and subject to the provisions adopted within
30 the framework of Article 243 (2) (b), any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representation may be:

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

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

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

— by direct representation, or

5 — by indirect representation,

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

Article 201

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

10 (a) the release for free circulation of goods liable to import duties, or (b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. The debtor shall be the declarant. In the event of indirect representation, the person on
15 whose behalf the customs declaration is made shall also be a debtor.

Article 236

Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered into the accounts contrary to Article 220(2).

20 Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Article 239

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

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

34. For the purpose of Articles 4(12) & (18), 5(2) and 201(3), the declarant and debtor were the companies and the appellant was the direct representative acting on behalf of the companies in their name.

35. Article 239 must be read alongside the provisions of Commission Regulation
35 (EEC) No. 2454/93 (laying down provisions for the implementation of Council

Regulation (EEC) No 2193/92 establishing the Community Customs Code) ("the Implementing Regulations").

36. Article 878 of the Implementing Regulations provides:

CHAPTER 2

5 Implementing provisions relating to Articles 236 to 239 of the Code

Section 1

Application

Article 878

1. Application for repayment or remission of import or export duties, hereinafter referred to
10 as ′ application for repayment or remission′ , shall be made by the person who paid or is liable to pay those duties, or the persons who have taken over his rights and obligations.

Application for repayment or remission may also be made by the representative of the person or persons referred in the first subparagraph.

2. Without prejudice to Article 882, application for repayment or remission shall be made, in
15 one original and one copy, on a form conforming to the specimen and provisions in Annex 111.

However, application for repayment or remission may also be made, at the request of the person or persons referred to in paragraph 1, on plain paper, provided it contains the information appearing in the said Annex.

20 37. Article 899 of the Implementing Regulations provides:

1. Where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239 (2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the
25 person concerned, it shall repay or remit the amount of import or export duties concerned,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import or export duties concerned.

2. In other cases, except those in which the dossier must be submitted to the Commission pursuant to Article 905, the decision-making customs authority shall itself decide to grant
30 repayment or remission of the import or export duties where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

38. In *Hughes v The Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0688 (TC) the Tribunal considered Article 239 and an 'Information paper on

the Application of Articles 220 (2) (b) and 239 of the Community Customs Code.' ("the Guidance") (see paragraph 8 of the decision).

39. Part 2 of the Guidance states that Article 239 'constitutes a general equity clause.' It goes on to say that 'according to Community case law, if the person liable for payment can demonstrate both the existence of the special situation in the absence of deception and obvious negligence on his part, he is entitled to the repayment or remission of the amount of duty legally owed.'

40. 'Special situation' is not defined in Article 239, but the Guidance describes the expression as follows:

'According to Community case-law, the existence of the special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties. In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be borne by the operator.'

41. In *Hughes* the Tribunal noted that the Guidance reflects the case-law including *Eyckeler & Malt AG v Commission of the European Communities* (T/42/96- 19 February 1998) [1998] ECR II-401 (see paragraphs 12 -14 of the judgment in *Hughes*) and *Kaufring AG and others v Commission* (T/186-9710 May 2001) [2001] ECR II-1346 (see paragraph 15 to 17 of the judgment in *Hughes*). The following paragraphs of the decision in *Hughes* set out the background law:

11. 'Special situation' is not defined in Article 239, but the Guidance describes the expression as follows: 'According to Community case-law, the existence of the special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties. In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be born by the operator [...] A prudent trader aware of the rules must assess the risks inherent in the market which is prospecting and accept them as normal trade risks'.

12. This reflects the decided case-law to which we were referred. In Eyckeler & Malt AG v Commission of the European Communities (T42/96 - 19 February 1998) 30 [1998] ECR II-401, the Court of First Instance considered Article 13 of Council Regulation 1430/79, which was the immediate precursor of (and is in almost identical terms to) Article 239.

13. The Court remarked (at [3]) that Article 13: 'constitutes an equitable provision designed to cover situations other than those which arose most often in practice [...] It is intended to apply, inter alia, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred. The Commission must assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision. Although it enjoys a margin of assessment in that respect, it is required to exercise that power by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk'.

14. The same reasoning applies to Article 239.

15. Article 239 was subsequently considered, at more length, by the Court of First Instance in Kaufring AG and others v Commission (T/186-97 - 10 May 2001) [2001] ECR II-1346. That case concerned the remission of customs duties exacted in relation to the importation into various Member States of colour television sets from Turkey. The factual issue was whether the applicant importers (being large industrial combines in several Member States) were entitled to remissions having relied on certificates from the Turkish exporters which falsely stated that the television sets only contained components which had been released for free circulation in Turkey.

16. The Court remarked (at [218] and [219]): "the case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business ... And that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties. As regards the condition concerning the absence of obvious negligence or deception on the part of the interested party ... The aim is to limit the post-clearance payment of import.'

17. The Court went on to say (at [279]): '[...] account has to be taken inter-alia of the precise nature of the error and the professional experience of and the care taken by the trader. That assessment must be made in the light of the particular circumstances of the case.'

18. This is reflected in the Guidance, which states that: 'The criteria to be used to determine whether an operator acted with obvious negligence or not are the same as those used to determine whether an error on the part of the customs authorities within the meaning of Article 220(2)(b) of the Code could reasonably have been detected by the operator. Particular account should therefore be taken of the precise nature of the error, the trader's professional experience 35 and the care exercised'.

42. In *Hughes* the Tribunal went on to consider the facts of the appeal which involved an individual making a personal importation of a motorhome in exceptional circumstances where he had return to the UK on medical grounds. The Tribunal was considering the application of Article 239 in a non-commercial context and not in relation to a trader importing goods for commercial purposes. The Judge stated at [53] to [58]:

53. HMRC wrongly glossed Article 239 to the effect that 'operators' and 'traders' should mean 'travellers'. This was both seeking to confine Article 239 to too narrow a 5 compass and it was going against both the letter and spirit of the Guidance.

54. HMRC wrongly treated the appellant as if he were a trader. He is not a trader. He was not engaged in any business. He had not imported a motorhome previously (and he is unlikely to want to do so again). He was not doing so for the purposes of trade: the Motorhome is still on his driveway. The risk of his falling ill and then 10 finding himself potentially uninsured was not part of his 'normal professional and commercial risk'. It was wrong to regard it in this way.

55. In short, we do consider that the appellant's situation was a 'special' one, within the meaning and intent of Article 239.

'Obvious negligence'

56. In REM 09/01 the Commission remarked (at [45]): "As regards the professional experience of the operator, it must be asked whether or not an economic operator whose main economic activity is import-export operations is concerned, and whether it had 20 acquired a certain amount of experience of such operations"

57. So, and by way of illustration, in Kaufring AG all the applicants were companies with a certain amount of experience of importing electronic equipment. The nature of the error had persisted for more than three years. The manner in which the applicants had entered into purchase contracts and carried out their checks were in 25 conformity with standard trade practice.

58. No such considerations are present here. But even if the terms of the appellant's insurance cover were indeed relevant (and we do not think they are, for the reasons already explained) we still do not consider that the appellant had done anything which could be characterised as 'obviously negligent'. He told us, and we accept, that he did 30 not consider it appropriate to declare his head injury (which had happened in 2007) and he was not asked about his grommet. He had taken out insurance. He genuinely believed that he was unwell and reluctantly took the decision to return to the UK.

43. Paragraph 2 of the Guidance states as follows:

APPLICATION OF ARTICLE 239 OF THE COMMUNITY CUSTOMS CODE

In accordance with Article 239 of the Community Customs Code, import duties or export duties may be repaid or remitted in special situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

This provision constitutes a general equity clause.

According to Community case-law, if the person liable for payment can demonstrate both the existence of a special situation and the absence of deception and obvious negligence on his part, he is entitled to the repayment or remission of the amount of duty legally owed (67).

……………………………….

2.1. The concept of a special situation

2.1.1. Principle

According to Community case-law, the existence of a special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties (69).

………………..

In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be borne by the operator.

5 A declarant normally assumes liability for the payment of import duties and due presentation of the proper documents to the customs authorities (70). It follows that the damaging consequences of its contractual partners' incorrect behaviour cannot be borne by the Community (71). For instance, the fact that documents are subsequently found to be falsified or inaccurate represents part of the professional and commercial risk inherent in the work, in particular of a customs agent (72), who can attempt to obtain compensation from the businesses implicated in the fraudulent use of the documents concerned.

……………..

10 15 A prudent trader aware of the rules must assess the risks inherent in the market which he is prospecting and accept them as normal trade risks. Post-clearance checks would be rendered almost useless if the use of forged, falsified or invalid documents could, of itself, justify repayment or remission. Such a situation could also discourage traders from exercising proper vigilance and shift to the public purse a risk that should be borne by traders. It is therefore the responsibility of traders to take the necessary steps in the context of their contractual relations to guard against the risks of post-clearance recovery.

However, if serious shortcomings on the part of the competent customs authorities or of the Commission contributed to the improper use of documents, the repayment or remission of the duties may be allowed provided that no deception or obvious negligence may be attributed to the person liable for payment (see point 2.3.2) (73).

20 …………..

2.1.2. Examples of special situations

(A) The following situations which lie outside the normal professional and commercial risk of an operator may be regarded as special situations within the meaning of Article 239 of the Code:

25 • the situations referred to in Articles 900, 901 and 903 IP,

• errors of the customs authorities within the meaning of Article 220(2)(b) of the Community Customs Code (74) (see point 1.1.),

30 • serious failings on the part of the competent customs authorities or the Commission when applying the rules in force and monitoring their implementation, where such errors are such as to contribute to irregularities (75) (see point 2.3.2),

…….

• …………………

(B) The following, however, are part of the trader's normal professional and commercial risk and are not therefore considered special situations:

35 • the situations referred to in Article 904 IP,

• objective situations applicable to an indefinite number of traders (e.g. the special geographical and economic situation of a part of the Community customs territory (80), the time limit starting from the moment that the person liable for payment is notified of the customs debt which differs according to whether the original failure to enter the duties in the

accounts was the result of an act that could, at the time it was committed, lead to criminal court proceedings (81), the obligation to come into line with the Community Customs Code from 1 January

………………..

5 ……………………

• the inability of a customs clearance professional to recover the amount of duties from its client because the latter is insolvent or bankrupt (85),

…………………….

• the interested party's economic difficulties (risk of bankruptcy or liquidation if the duties are
10 not repaid or remitted) (86),

……………………

• the declarant's personal problems (illness, leave, etc.) (90),

………………….

• difficulties connected with the introduction of a new computer system at the company (91),

15 ………………

• the failure of the trader to submit an application for repayment or remission of the duties under Article 236 of the Community Customs Code within the prescribed time …………………………

44. The two examples from 2.1.2 of the Guidance as above which most closely
20 apply to the facts of this case exclude the following from being considered special situations:

• The inability of a customs clearance professional to recover the amount of duties from its client because the latter is insolvent or bankrupt

• The interested party's economic difficulties (risk of bankruptcy or liquidation if the duties
25 are not repaid or remitted).

45. It is not clear that Article 239 of the Customs Code does apply to VAT in addition to Customs Duty by virtue of section 16 of VATA so as to enable to taxpayers to reclaim Import VAT based upon a special situation. However, for the purpose of this appeal, HMRC did not seek to argue that Article 239 is not available
30 on which to base a claim for Import VAT. This Tribunal will adopt the approach set out at paragraphs 92 and 93 of the decision in *DNATA Ltd v Revenue & Customs Commissioner)s* [2016] UKFTT 682 (TC) in which Judge Jonathan Richards stated:

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

Article 239 did apply) but his overall submission was that Article 239 did not apply to Import VAT.

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

46. The specific guidance applicable to claims for recovery of Import VAT paid by agents on behalf of importers is set out at paragraphs 2.4 & 2.5 of VAT Notice 702. This guidance covers the nature of the Extra-Statutory Concession ("ESC") available:

2.4 Can a shipping or forwarding agent reclaim input tax?

If you act as a shipping or forwarding agent for an importer and pay or defer VAT on their behalf, it is a commercial arrangement between you and your principal. You cannot claim the VAT as input tax because the goods are not imported for the purpose of your business. Although HMRC usually deal with agents in relation to the importation and clearance of goods, it is the importer's responsibility to ensure that goods are properly entered, and that any Import VAT and other charges due are paid. Only the importer has the legal right to reclaim the VAT paid on imported goods as input tax, subject to the normal conditions being met.

2.5 What can I do as a shipping or forwarding agent if an importer does not pay me the Import VAT?

If an importer fails to pay you Import VAT you paid on their behalf, your only recourse is to the importer, except where one of the following applies:

- the importer has gone into liquidation

- an administrator or administrative receiver has been appointed, who certifies that in their opinion, ordinary unsecured creditors will receive nothing in the liquidation

In such cases you may be able to recover amounts paid as tax from HMRC. All of the following conditions must be met:

- the interval between the date of the import entry for the goods and the date the importer became insolvent is no more than 6 months

- you entered the goods in accordance with instructions from the importer

- during their stay in the UK the goods were under your control and were not used

- the goods have been re-exported in the same state as they were imported

To claim repayment you should write to the National Duty Repayment Centre at Dover, enclosing:

- evidence that the Import VAT has been paid to HMRC

- a certificate from the person in charge, for example, the liquidator, that the VAT has not been, and will not be, reclaimed as input tax

 within six months of Confirmation from the person in charge that the importer became formally insolvent the date the entry was lodged with HMRC

 a declaration that you will not recover the relevant VAT in whole or in part from the insolvency

5  evidence to satisfy HMRC that you have acted in accordance with the importer's instructions

47. HMRC VAT Notice 48 gives details of all of HMRC's Extra-Statutory Concessions ("ESCs") in force at the time that VAT Notice 48 went print.

48. Paragraph 3.13 of VAT Notice 48 sets out HMRC's ESC in relation claims for
10 the repayment of Import VAT to shipping agents and freight forwarders. Paragraph 3.13 of VAT Notice 48 states:

Import VAT may be paid directly to shipping agents and freight forwarders where importers go into liquidation, or where an administrator or administrative receiver has been appointed who certifies that, in his or her opinion, ordinary unsecured creditors would receive nothing in
15 liquidation, leaving the agents unable to recover VAT paid on their behalf. The importers must have gone into a formal state of insolvency or receivership within 6 months of the date of lodgement of the Customs entry, and the goods must have remained under the agents' control throughout their stay in the UK and have been re-exported unused from the European Community.

20 49. The Tribunal's statutory jurisdiction in respect of this appeal is pursuant to the provisions set out at section 13A to section 16 of the Finance Act 1994 ("FA 1994").

50. Section 16(6) of FA 1994 provides:

(6) On an appeal under this section the burden of proof as to—

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

25 (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

30 shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

51. The appellant's appeal does not engage either section 8 of FA 1994, section 114(2) of the Management Act, or the Hydrocarbon Oil Duties Act 1979.

52. Pursuant to the provisions set out at section 16(6) FA 1994, in order for the
35 appellant to be successful in its appeal, the appellant must satisfy the FTT that it has established the grounds on which the appeal has been made.

53. In light of the above the onus in this appeal is on the appellant to satisfy the Tribunal that either: the Import VAT on the Consignments was not due; or that the appellant has met the requirements for the ESC for the recovery of Import VAT by agents, as set out by HMRC at Paragraph 2.5 of VAT Notice 702.

## The appellant's submissions

54. The appellant's grounds of appeal, as set out in its Notice of Appeal dated 15 October 2015, were as follows:

1. The Appellant is appealing against HMRC's decision on 6 October 2015 to refuse a refund (in the amount of £127,213.85) to the Appellant in respect of Import VAT ("the Import VAT") which the Appellant (as shipping / clearing agent) paid to HMRC in March 2015 on behalf of consignee companies ("Consignee Companies"), Howard Smith Paper Group Limited and Robert Home Group Limited (both companies in Administration since April 2015). The Administrators of the foregoing companies have advised the Appellant that it is not likely that it will recover any amount (in respect of the Import VAT) in the Administration.

2. The grounds for the Appeal are as follows:

i) HMRC made an error of fact and / or law in refusing the Appellant's claim for a refund of the Import VAT, as the Appellant is entitled to a repayment or remission of the Import VAT on equitable grounds, pursuant to Article 239 of the Community Customs Code.

ii) Furthermore, the Appellant is also, under domestic law, entitled, on a claim for restitution, to repayment of the Import VAT (Banque Financiere de la Cite v Parc (Battersea) Limited [1999] 1 AC 221), as HMRC have been unjustly enriched in the circumstances (the Administrators having confirmed that they will not be claiming any VAT credits in respect of the C79s they hold in relation to the Import VAT).

iii) In the premises, the Appellant is entitled to a full refund of the Import VAT for the reasons given above, and the Appellant respectfully requests the Tribunal to overturn HMRC's refusal to refund the Import VAT and to direct and order HMRC to repay the Import VAT to the Appellant forthwith (with interest).

55. In addition, Ms Bun made the following submissions on behalf of the appellant.

56. Ms Bun submitted that article 239 applies and Import VAT should be remitted as there was a special situation. She submitted that article 239 is a general equity provision allowing for the remission of the Import VAT where there is a special situation and there had been no fraud or negligence on the part of the appellant. It was inequitable for the appellant to pay the Import VAT where the companies had become insolvent and there had been no fraud or negligence on the appellant's part.

57. She submitted that the appellant's position was that of a normal commercial relationship with the companies. There was no insurance available for it to insure against its debtors going into insolvency. The appellant had conducted prudent normal commercial practice by doing its due diligence and placing checks on the traders through commercial credit authorities including the normal credit and financial checks. The companies were part of a large global Paper Linx group.

58. She submitted there was a special situation in the appellant's case because Domtar, the exporter, had refused to help the appellant in a situation where it could have done so. It had refused to supply the details of the end customer it had re-sold the goods to and the location of the goods. Domtar had also sold on the goods to another customer without a right to do so when the appellant had a lien over thereover. Therefore, an unfair and unjust situation had arisen for the purpose of article 239.

59. She submitted that this situation had not been caused through negligence or fraud or deception by the appellant – it had arisen through circumstances outside its control. It was an application of generally equity. It was unfair and unjust that the appellant should not be repaid the Import VAT it had paid when the companies / their administrators would not be reclaiming the VAT. HMRC would benefit greatly.

60. Ms Bun submitted that under article 878 of the Implementing Regulations the appellant was entitled to make the application for remission of the Import VAT. The threshold was that the application was made for repayment or remission shall be made by person the person who had paid the VAT, namely the appellant.

61. Ms Bun also submitted that HMRC had made its decision on a mistake of fact or law when it stated it had refused the application under article 236 in its decision letter of 6 October 2015. This would suggest it had not considered the application under article 239 and it should be re-considered on that basis.

62. Alternatively she submitted that because the appellant's position fell within the special situation exception the matter could be referred to the Commission under article 905(1) of the Implementing Regulations.

**HMRC's Submissions**

63. It was submitted that after importation in to the UK the Consignments were declared to free circulation under Tariff Heading 4802. The release of the Consignments to free circulation incurred a customs debt pursuant to Article 201 of the Customs Code. Import VAT became due at the standard rate (20%). It is not disputed that the appellant acted on behalf of the Companies in settling the customs debts incurred in respect of the importation of the Consignments.

64. It was submitted that the appellant had not met the requirements for the ESC for the recovery of Import VAT by agents set out at Paragraph 2.5 of VAT Notice 702, so HMRC could not have permitted the Appellant to recover the Import VAT in question.

65. The ESC requirements that the appellant must meet in order to recover the Import VAT in question are set out above. The appellant has been unable to evidence that the Consignments had remained under their control during their stay in the UK and the goods were under its control and that the goods were not used. The appellant has also been unable to produce any evidence demonstrating the HMRC that the Consignments were re-exported in the same state as that in which the Consignments were imported.

66. It was submitted on behalf of HMRC that the Appellant was not entitled to a repayment or remission of the Import VAT pursuant to Article 239 of the Customs Code as this was not a 'special situation'. The appellant had previously declined to provide any details setting out how their appeal meets the test provided at Article 239 of the Customs Code for the repayment or remission of import duties.

67. In any event, the customs declarations in respect of the Consignments were made out in the names of the Companies (i.e. the Appellant was not declared to be the importer of any of the Consignments). Therefore the only persons entitled to apply for a refund of import duties (or who could conversely be held liable for any underpayment of import duties) in respect of the Consignments would be the companies. As a result of this, and without the express permission of the companies, the appellant could not make any claim for the remittance or remission of the import duties paid in respect of the Consignments.

68. It was submitted on behalf of HMRC that in its second ground of appeal, the appellant had raised a ground of unjust enrichment. HMRC disputed the appellant's claim that HMRC has been unjustly enriched. It was HMRC's position that the appellant had failed to establish either that the Import VAT in question was not due, nor had the appellant established that it was due a refund of that Import VAT.

**Discussion and Decision**

69. The Tribunal considers each of the appellant's grounds of appeal in turn.

*Article 239*

70. The appellant's first ground relied upon Article 239 of the Customs Code: that HMRC made an error of fact and/or law in refusing the appellant's claim for a refund of Import VAT, as the appellant was entitled to a repayment or remission of the Import VAT on equitable grounds, pursuant to Article 239 of the Community Customs Code.

71. The appellant's ground of appeal relating to Article 239 fails for the following four reasons:

72. First, Part 2 of the Guidance on Article 239 provides that it is the person liable for payment who if they "can demonstrate both the existence of the special situation in the absence of deception and obvious negligence on his part…..is entitled to the repayment or remission of the amount of duty legally owed."

73. The appellant was not the person liable for payment. Liability fell on the companies as the declarant and debtor for the purposes of articles 201(3) and 4(12) & (18) of the Customs Code.

74. Ms Bun relied on Chapter 2 of the Implementing Regulations 'Implementing provisions relating to articles 236 to 239 of the Code' and Article 878(1) thereof which states:

'application for repayment or remission of import or export duties, hereinafter referred to as 'application for repayment or remission', shall be made by the person <u>who paid</u> or is liable to pay those duties or the persons who have taken over his rights and obligations.

5 Application for repayment or remission may also be made by the representative of the person or persons referred in the first subparagraph.'

75. The Tribunal is of the view that the Implementing Regulations do not extend the substantive rights as to who may make an application under Article 239 so as to include those who paid the duties such as direct representatives in addition to those 10 who were liable to pay the duties. Even if the Tribunal is wrong and Article 878 does extend the entitlement to make the application to the person who paid the duties, it does not extend the entitlement to receive the benefit of a successful application: ie to receive the remitted duties.

76. Chapter 2 of the Implementing Regulations merely provide a procedural code 15 for the manner in which an application under Article 239 is to be made. This article appears to be directed to indirect representatives who for the purposes of article 4(12),(18), 5(2) and 201(3) are the declarant and debtor and have taken over the rights and obligations of the importer and not a direct representative such as the appellant.

77. Accordingly, the appellant is not entitled to make an application under Article 20 239 or to receive any remitted duties.

78. Second, even if the appellant were entitled to make an application under Article 239 and receive the remitted funds it would be as the agent for the companies as principal and the appellant would have to be acting on the instructions of the companies. There is no evidence that the appellant is so acting.

25 79. Third, the appellant also relied upon but has not explained how its case falls within any of Articles 900 to 903 of the Implementing Regulations.

80. Fourth, the Guidance to Article 239 specifically provides that the following is not a "special situation" - "The inability of a customs clearance professional to recover the amount of duties from its client because the latter is insolvent or 30 bankrupt."

81. Even if the Tribunal had considered that Article 239 can be relied upon by persons other than a declarant/debtor, the appellant's situation is specifically precluded from being considered a 'special situation.' This is consistent with the purpose of Article 239 which is directed at situations other than those which can face 35 other operators and traders in that business. Bankruptcy and liquidation are not exceptional circumstances in commercial relationships. The appellant should be expected to protect its own position in commercial relationships through contractual terms, insurance or any other means or alternatively accept the risk of non-reimbursement of duties paid.

82. The case is clearly contrasted with the special situation in *Hughes* which involved a personal importation in exceptional circumstances rather than a trader involved in a normal commercial relationship in which commercial risk is entered into and accepted.

5 83. The appellant could reasonably have done more to guard against the risk of non-payment such as by contractual terms or taking out insurance. It could have created a client fund or sink account. It could have guarded against the risk of a sudden rise in Import VAT liability at the end of any month.

84. A company has the ability to consider its trading history with its client in doing 10 so and a prudent trader would assess the risk on the basis that things can go wrong without warning. That is the nature of the risk – insolvency of clients may well take traders by surprise. If there were continued or repeated defaulted payment on behalf by a trader's client it is very unlikely there would be a further sustained commercial relationship. A company such as an appellant must assess and accept the level of 15 trade risk it is prepared to absorb. The fact that the appellant may not now be able to seek redress against the companies is the consequence of a normal commercial undertaking – it falls within normal parameters and does not constitute a special situation.

85. A special situation under article 239 should not be given a wider ranging 20 meaning as a general equitable provision beyond that already provided. It should be construed to in accordance with the case law and guidance.

86. Furthermore, in the Tribunal's view, for a special situation to apply there has to be a causal connection between the reasons that the appellant is seeking to rely upon to be repaid and the circumstances giving rise to the liability to the duties ie. the 25 Import VAT. In the appellant's case the insolvency of the companies is not causally connected to the importation of the goods and liability to payment of Import VAT. The 'special situation' which the appellant seeks to rely upon was not pre-existing at the time of importation and liability to the payment of Import VAT. The insolvency of the companies occurred after the event. Thus a 'special situation' under article 239 30 is to be contrasted with an extra statutory concession as set out below.

87. Finally, on this issue, Ms Bun raised a new argument during the hearing that in its decision of 6 October 2015 HMRC wrongly referred to the appellant's application for the Import VAT as being under article 236 rather than article 239. Therefore, she submitted, HMRC had made a mistake of law and / or fact in considering the 35 application under article 236 and had not done so under article 239.

88. Even were the Tribunal to agree to this being a substantive rather than typographical error in HMRC's decision, it would not assist the appellant. It would mean that HMRC has never made a decision under article 239 which is capable of being appealed by the appellant. Therefore the current appeal would not be within the 40 Tribunal's jurisdiction. In any event, the Tribunal is of the view that any application under article 239, if it has not already been considered by HMRC, would result in a refusal for the reasons set out above.

*Extra-statutory concession*

89. Although it was raised in the appellant's grounds of appeals, it was accepted by the appellant that the extra statutory concession did not apply. Nevertheless, the Tribunal records the following.

90. The extra statutory concession ("ESC") relating to shipping or forwarding agents did not apply in this case. Paragraph 1.1 of HMRC's VAT Notice 48: extra statutory concessions states:

"In certain circumstances where remission or repayment of revenue is not provided for by law, the department may allow relief on an extra-statutory basis. ESCs are remissions of revenue that allow relief in specific sets of circumstances to all businesses falling within the relevant conditions. They are authorised when strict application of the law would create a disadvantage or the effect would not be the one intended."

91. The conditions for the ESC are set out in paragraph 3.13 of Notice 48 as set out above and in paragraph 2.5 of Notice 702 as repeated below:

If an importer fails to pay you Import VAT you paid on their behalf, your only recourse is to the importer, except where one of the following applies: • the importer has gone into liquidation • an administrator or administrative receiver has been appointed, who certifies that in their opinion, ordinary unsecured creditors will receive nothing in the liquidation In such cases you may be able to recover amounts paid as tax from HMRC. All of the following conditions must be met: • the interval between the date of the import entry for the goods and the date the importer became insolvent is no more than 6 months • you entered the goods in accordance with instructions from the importer • during their stay in the UK the goods were under your control and were not used • the goods have been re-exported in the same state as they were imported To claim repayment you should write to the National Duty Repayment Centre at Dover, enclosing: • evidence that the Import VAT has been paid to HMRC • a certificate from the person in charge, for example, the liquidator, that the VAT has not been, and will not be, reclaimed as input tax • within six months of Confirmation from the person in charge that the importer became formally insolvent the date the entry was lodged with HMRC • a declaration that you will not recover the relevant VAT in whole or in part from the insolvency evidence to satisfy HMRC that you have acted in accordance with the importer's instructions."

92. It was common ground that the appellant cannot meet the conditions for the ESC as set out in Paragraph 2.5 of VAT Notice 702 because the imported goods had not been re-exported.

93. In addition, the Tribunal notes that the administrators of the companies had stated in a letter dated 29 May 2015 that they anticipated that the unsecured creditors would receive a distribution of approximately 5p in the £. Therefore the condition was not met that 'an administrator or administrative receiver has been appointed, who certifies that in their opinion, ordinary unsecured creditors will receive nothing in the liquidation'.

94. It is also common ground that appellant has been unable to meet the recommendation supported in principal by HMRC that if new entries were submitted

in the new importer's name and the correct VAT were paid, a repayment could be made (assuming that any change in the original value(s) declared had not reduced too much).

*Unjust enrichment*

5 95. The appellant's second ground of appeal was one of unjust enrichment. The appellant submitted it is entitled on a claim for restitution under domestic law to repayment of the Import VAT as HMRC have been unjustly enriched.

96. The appellant's ground of appeal based on unjust enrichment fails for the following reasons.

10 97. The first is the lack of jurisdiction. The Tribunal is not satisfied it has jurisdiction to consider what is effectively a claim in restitution. Its jurisdiction is limited to that provided by statute. Such a claim, if to be made, would likely have to be made in a claim seeking restitution pursued in court, for instance in the Chancery Division. The Tribunal is of the preliminary view that it does not have jurisdiction to 15 consider such a claim and was directed to any authority or statutory provision that confers such a jurisdiction.

98. Even were the Tribunal to have jurisdiction to consider such a claim, it is of the view that the conditions for such a claim in restitution are not met: In *Banque Financière de la Cité v Parc (Battersea) Limited* [1999] 1 AC 221 at 227A-B Lord 20 Steyn set out the four conditions for a claim in restitution:

a. Has the defendant been benefited, in the sense of being enriched?

b. Was the enrichment at the claimant's expense?

c. Was the enrichment unjust?

d. Are there any defences?

25 99. In the Tribunal's view, HMRC is right to submit that it has not been enriched, the Import VAT was due on the release for free circulation of the Goods and HMRC was obliged to charge it.

100. Therefore, there has been no enrichment at the appellant's expense. It was the companies and not the appellant that were entitled to apply to claim the Import VAT 30 in question as input tax (subject to the usual conditions). The fact that the appellant entered into a commercial arrangement with the companies (which ultimately resulted in the appellant not being paid by the companies) is a matter between the appellant and the companies and is wholly incidental to the obligation on HMRC to charge Import VAT and any entitlement to apply to reclaim it.

35 101. This is made clear in paragraph 2.4 of VAT Notice 702: "If you act as a shipping or forwarding agent for an importer and pay or defer VAT on their behalf, it is a commercial arrangement between you and your principal. You cannot claim the

VAT as input tax because the goods are not imported for the purpose of your business. Although HMRC usually deal with agents in relation to the importation and clearance of goods, it is the importer's responsibility to ensure that goods are properly entered, and that any Import VAT and other charges due are paid. Only the importer has the legal right to reclaim the VAT paid on imported goods as input tax, subject to the normal conditions being met."

102. It was open to the companies to claim any Import VAT as input tax and if they did not do so, that is at their expense.

103. In any event, the Tribunal is of the view that the payment of Import VAT cannot constitute unjust enrichment of HMRC. HMRC were obliged by law to levy Import VAT and properly did so. There was no mistake or error or unlawfulness in the charging of Import VAT such as to create a circumstance in which HMRC was enriched unjustly. The companies were entitled (but not obliged) to apply to claim input VAT, the fact that they have chosen not to do so does not constitute the unjust enrichment of HMRC.

104. The appellant's complaint, in reality, concerns the commercial relationship that it has entered into with the companies. The companies' liquidation has given rise to a loss to the appellant. However, that commercial relationship and the effect of the commercial decisions made between agent and principal does not satisfy the requirements of conditions for any claim in restitution, even if the Tribunal had jurisdiction to consider it.

**Conclusion**

105. Accordingly, there is no basis for the Tribunal to find that HMRC applied the law incorrectly or have wrongly failed to repay the Import VAT to the appellant. There were no circumstances where repayment of the Import VAT to the appellant was required by law, policy or guidance.

106. For the reasons set out above, the Tribunal has decided that this appeal should be dismissed and that HMRC's decision should be upheld.

107. 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.

**RUPERT JONES**
**TRIBUNAL JUDGE**

**RELEASE DATE: 27 JANUARY 2017**