02TACD2021

APELLANT'S NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the refusal of the Respondent to refund the Inward Processing (IP) "*drawback claim*" to the Appellant on the grounds that the periods from July 2011 to June 2012 inclusive were outside the 3 year time limit for processing reclaims for duty pursuant to Article 236 (2) paragraph 1 of COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (the Customs Code).

2. The Respondent also refused the Appellant's IP "*drawback"* claim for the period October 2012 to December 2014 on the basis that the claim fell outside the 6 month period for processing reclaims in accordance with Article 521 of COMMISSION REGULATION (EEC) No 2454/93 of 2 July 1993 (Implementing Regulation).

3. The total IP "*drawback claim*" denied by the Respondent amounted to €482,749.

4. The Appellant appealed the decision of the Respondent's refusal to refund the "*drawback claim"* to the Appeal Commissioners pursuant to Statutory Instrument No. 355/1995 - European Communities (Customs Appeals) Regulations, 1995, Regulation 5(2).

5. As such, this appeal is focused on the operation of the IP system by the Respondent whereby the Appellant applied for a customs duty "*drawback"* refund claim in respect of customs duty paid on the importation of goods from outside the European Community and subsequently re-exported those good outside the European Community and the time limits imposed by the Regulations and the extension of those time limits for the making of such claims.

Material Findings of Fact

6. From the evidence, I have made the following material finds of fact:

a) The Appellant is a large multinational based in Location Redacted that makes Activity Redacted. On 29th June 2012, the Appellant made an application for the IP "*drawback*" procedure, a process that allows an importer of goods coming from outside the European Community to apply for recovery of the customs duty paid where those goods are subsequently exported outside the European Community.

b) The application for the IP "*drawback*" procedure prompted a visit by a Representative of the Respondent, a control officer for Customs and Excise of the Respondent, to the Appellant on 25th July 2012. The purpose of the visit was to establish the type of goods imported and subsequently exported outside the European Community and an examination of the goods to ascertain the appropriate product codes.

c) The Appellant's application was approved by the Respondent but as the Appellant sought to make retrospective claims, the IP "*drawback*" authorisation issued by the Respondent on 8th October 2012, backdated to 29th June 2011 and was valid to 29th June 2014.

d) A Representative of the Respondent went through the conditions in the document entitled "*General conditions to be observed by persons authorized to engage in inward processing under the drawback system*" to Appellant's Employee, employed by the Appellant as the financial controller, and after confirming his understanding, Appellant's Employee signed the document on 19th October 2012 agreeing to conform with all of the conditions specified therein. The relevant part of those conditions are detailed below:

"GENERAL CONDITIONS TO BE OBSERVED BY PERSONS AUTHORISED TO ENGAGE IN INWARD PROCESSING UNDER THE DRAWBACK SYSTEM

1. The Authorisation is issued by the Revenue Commissioners and may be revoked for non-compliance with Community legislation governing Inward Processing.

2. …

3. The Authorisation does not relieve the importer from compliance with the law and regulations for the time being in force relating to the importation, transhipment, exportation, warehousing or entry for the free circulation of goods including the submission of Intrastat and/or VIES declarations.

4. ….

5. The Authorisation holder is responsible for ensuring that the tariff code numbers quoted on the Authorisation are correct.

6. ….

7. Each consignment of goods imported under the agreement must be entered in the Automated Entry Processing (AEP) system, in accordance with the AEP Trader Guide. The appropriate procedure code (first two digits 41) must be entered in box 37. The Authorisation number must be quoted in box 44.

8. ….

9. Accounts must be kept at the premises of the Authorisation Holder showing quantity of all of the goods: -
    a. imported under the agreement
    b. exported outside of the Community (or placed under a customs control procedure with a view to subsequent exportation) after having undergone the process of manufacture, the quantity of the compensating products concerned must be given.

……

18. Acceptance of these conditions does not relieve the Authorisation holder from compliance with the law and regulations for the time being in force relating to Inward Processing or to the importation, transhipment, exportation, warehousing or entry into free circulation of goods including the submission of Intrastat or VIES declarations.

19. The Revenue Commissioners reserve the right to vary or add to the conditions set out above."

e) A Representative of the Respondent thereafter had regular interaction with the Appellant's Employee by way of email and telephone communications. The Representative of the Respondent also conducted compliance checks on the Appellant from the Respondent's offices as there was no obligation to visit the Appellant's premises unless there was a suspicion that there was a misdescription of the goods.

f) In January 2013 the Appellant made a retrospective application for a repayment of the Customs Duty for the period July to September 2012. Incorrect commodity codes had been used on both the import and export Single Administrative

Document (SAD). On several occasions, the Representative of the Respondent explained to the Appellant how and in what manner the commodity codes were incorrect. Notwithstanding that the application was outside of the regulatory prescribed six months, a decision was taken by the Respondent to admit the claim as it was the Appellant's first claim.

g) The Appellant was informed by letter dated 21st August 2013 that future claims must be correct and that the goods must be imported under the appropriate procedure and that the proper codes be used in the SAD's. The Appellant was also informed that section 54 of the Finance Act 2011 would be relied upon to impose administrative penalties for contravention of the Customs Code if incorrect or incomplete declarations were submitted. The Appellant was further informed that future claims would be refused if not made in a timely manner and if the conditions attaching to the IP "*drawback*" procedure were not adhered to namely the insertion of the correct IP procedure codes and commodity codes on the related SAD's.

h) Appellant's customs agents were appointed by the Appellant in June 2014 to assist in the IP "*drawback*" refunds. Thereafter representatives from the Appellant and the customs agents Name Redacted met with the Representative of the Respondent in September 2014 and January 2015 to discuss and progress the historic claims for the IP "*drawback*" refunds.

i) On 19 October 2015 the Appellant submitted the claim for the IP "*drawback*" refund for the years 2011, 2012, 2013, 2014 and 2015. While some claims did not attach all of the SADs, from an examination of the attached SADs and notwithstanding the differences between the parties as to the exact quantum of incorrectly completed SADs, a significant number of those documents were incorrect despite the Respondent's previous communication in August 2013 for the need to make proper claims to include confirmation that the goods were imported under correct procedure and that the proper codes be used in the SADs.

j) In light of the delay in making the application, the failure to include all relevant documentation and the substantial number of incorrectly completed SAD's, the Representative of the Respondent, by email dated 4th November 2015 informed the Appellant of the Respondent's decision to deny the refunds of "*drawback*" claim on the grounds that:

- the period from July 2011 to June 2012 inclusive, the application was outside the 3 year time limit for processing reclaims for duty pursuant to Article 236(2)

paragraph 1 of COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, and

- For the period October 2012 to December 2014 inclusive, the claim fell outside the 6 month period for processing reclaims in accordance with Article 521 of COMMISSION REGULATION (EEC) No 2454/93 of 2 July 1993.

k) That decision to refuse to refund the IP "*drawback claim"* was appealed to the Appeal Commissioners.

Regulatory Provisions

7. Article 236 (2) of the Customs Code provides as follows:-

"Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative."

8. Article 239 of the 1992 Customs Code provides that:

1. *"Import duties or export duties may be repaid or remitted situations articles 236, 237 and 238:*

   - *to be determined in accordance with procedures of the 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. Repayment or remission may be made subject to special conditions.

2. *Duties shall be repaid or remitted set out in paragraph on submission of an application to the appropriate customs office within 12 months from the date on which the amount duties was communicated to the debtor.*

   However, the customs authorities may permit to be exceeded in duly justified exceptional cases."

9. Article 521(1) of the Implementing Regulation states:

"At the latest upon expiry of the period for discharge, irrespective of whether aggregation in accordance with Article 118 (2), second subparagraph, of the Code is used or not:

- *in the case of inward processing (suspension system) or processing under customs control, the bill of discharge shall be supplied to the supervising office within 30 days;*
- *in the case of inward processing (drawback system), the claim for repayment or remission of import duties must be lodged with the supervising office within six months.*

Where special circumstances so warrant, the customs authorities may extend the period even if it has expired."

Appellant's Submissions

10. The Appellant contended that there were "exceptional circumstances" and therefore the Appellant's claim should be allowed and relied upon the following:

    a) Exponential growth in the Appellant's business;

    b) Lack of visits by Customs Control Officers;

    c) That the Respondent would not make an issue of time limits;

    d) The absence of deceit or obvious negligence;

    e) Due process and fair procedure;

    f) The spirit, ambit and general intention of the IP "*drawback*" process

Exponential Growth

11. The Appellant went from a position where it had to impose redundancies to one of exponential growth in a very short period of time where the focus in those years was meeting the challenges that worldwide market demands placed on the company:

    (i) The Appellant is the worldwide headquarters for Group Name Redacted product line which is the fastest growing product line in the Group.

    (ii) This growth was driven by several contract awards which were in excess of €100m in value from some of the world's leading Activity Redacted.

    (iii) The headcount at the Location Redacted plant grew 5 fold over the period Redacted. Headcount at the start of the year 20** was Redacted. This had climbed to Redacted by the end of Redacted. A new R&D Department was established.

    (iv) Managing this growth proved to be a massive challenge to the Appellant who was under pressure to deliver highly technologically advanced products to demanding high end manufacturers on time and on budget. The projects had to be delivered with the back drop of using new employees coming from a wide variety of backgrounds and cultures.

(v) The campus at Location Redacted grew from Size of Expansion Redacted.

(vi) Units output over the period grew three-fold from Number Redacted to almost Number Redacted units per year. The majority of the units were launched as new products over the period, so the actual volume increase is not a true representation of the challenges faced by the production and logistics departments at Location Redacted.

(vii) Duty paid on imports went from €302k in 2011 to €1.4m in 2015

12. In the midst of this expansion, the Appellant had to make choices and prioritise workload in order to meet and sustain the exponential demand and growth.

Controls

13. The IP "*drawback*" authorisation was issued on 6th October 2012 with retrospective validity from June 2011. The first duty reclaim was processed for Q3 2012. This refund was only approved eight months later by letter dated 21st August 2013.

14. It was accepted that the Appellant should have allocated resources to address the outstanding returns sooner, but IP "*drawback*" is a highly specialised system which is why external agents were eventually appointed in June 2014. Every effort has since been made to regularise matters.

15. By the same token, for the 4 year period from 2011 until 2015, there was only one visit from the Respondent's Control Officer to the Appellant during that time.

Timeline

16. The Appellant's agents contacted the control officer as soon as they were engaged to address the outstanding matters. They issued correspondence, sent emails and held a number of meetings in conjunction with the control officer at various times from August 2014. They immediately brought it to the attention of the control officer that matters were being rectified and returns regularised for the outstanding periods. A member of Location Redacted attended 2 meetings with the control officer at Revenue buildings in to discuss and agree a format for the returns in September 2014 and January 2015. The Appellant was required to collate substantial amounts of import and export documentation to comply with the format that underpinned the initial refund claim. This took time and incurred considerable expense for the Appellant. It was

submitted that the Respondent was at all times aware and had full notice that this work was being completed within the 3-year time limit.

17. At no time following the initial authorisation for the scheme was any change made to the time limits applicable under the guidelines issued in October 2012 or was there any policy change to the effect that those time limits would be applied strictly brought to the attention of the Appellant or their agents. Specifically, the guidelines provide, at entry 14, that the claims "*should normally be lodged with Customs within six months from the date on which the compensating products have been dealt with in one of the ways referred to at (a) or (b) above.*" Accordingly, at no stage were prescriptive or strictly enforced deadlines brought to the notice of the Appellant, who, along with its agents, relied upon the guidelines. From the ongoing interaction with the control officer from August, 2014, within the three year period from Q3 2011, the Appellant and its agent were entitled to assume that the Respondent was accepting of the circumstances of exceptional growth and expansion of the Appellant together with their assiduous work in compiling the vouching documentation required by the control officer, as grounds for extending the time limits applicable or not strictly enforcing the same.

The absence of deceit or obvious negligence

18. The claims, the subject matter of the appeal, resulted from the Appellant seeking, in 2014, to regularise matters and invoke the terms of the scheme. As a highly specialised scheme, it was submitted that the internal accounts department of the Appellant was entitled to rely upon the guidelines furnished to it and in particular the non-prescriptive nature of the time limits set out therein, such that neither deceit nor obvious negligence arose on the part of the Appellant. The initial application for rebate was made in respect of Q3 2012 and was only approved by the Respondent for rebate in August, 2013 some 8-9 months after the initial application for a rebate was completed.

19. The fact that the initial claim which was approved by the Respondent and the subsequent claims subject matter of the appeal which were processed in 2015 provide for a 5% decrement for scrap when in fact decrement for scrap is not permitted under IP drawback, suggests that the operation of the scheme has been subject to a "learning curve" for all parties concerned such that the failure to put in the claims, in the exceptional circumstances of growth of the company, and without clear warning from the Respondent that the time limits would be strictly interpreted, cannot amount to obvious negligence on the part of the Appellant.

Due Process and Fair Procedure

20. There are specific protocols and fair procedures to be followed when an individual is adversely affected by a decision taken by Customs and Excise in relation to the refusal to grant a request for repayment of duty. The "right to be heard" process was not followed and the decision taken by the Respondent was unilateral and unequivocal and infringes upon the rights of the Appellant to fair process and procedure in the same manner extended to any other trader.

The spirit, ambit and general intention of the Inward Processing "drawback" process.

21. The broad objective of the IP regime is to help foster and facilitate trade in the European Union by allowing traders avail of a duty rebate for qualifying products that are re-exported outside the European Union. Traders who are granted such authorisations are *prima facie* authorised for duty rebates on exports outside the European Union, once they comply with the conditions underpinning the authorisation.

22. The Appellant finds it impossible to understand how refusing to grant the rebates on products that have been clearly exported outside the European Union the acute and selective interpretation of timelines, seeks to achieve the overall objectives of the IP legislation in helping to foster trade at either a National or European level.

Case Law

23. While reference was made to T-42/1996 *Eyckeler & Malt v. Commission* [1998] ECR II-401 and *Kaufring AG and Others v Commission of the European Communities* [2001] ECR II-01337 to support the Appellant's assertion that the conduct of the tax authorities themselves has to be considered in the balance, neither case was opened at the hearing**.**

24. The Appellant opened *Terex Equipment, FG Wilson and Caterpillar C-430/08 and C-431/08, a* judgment of the Court of Justice of the European Union (CJEU), which related to Article 78 of Regulation 2913/92 which permits the revision of declarations of goods in order to correct the customs procedure code and the extent to which customs authorities are obliged to take the necessary measures to regularise the situation where the objectives of the regime have not been threatened. Significant reliance was placed on paragraph 65:

> "*In view of the foregoing, the answer to the first question in Case C-430/08 and the third question in Case C-431/08 is that Article 78 of the Customs Code permits the*

revision of the export declaration of the goods in order to correct the customs code given to them by the declarant, and that the customs authorities are obliged, first, to assess whether the rules governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information and whether the objectives of the inward processing regime have not been threatened, in particular in that the goods subject to that customs procedure have actually been re-exported, and, second, where appropriate, to take the measures necessary to regularise the situation, taking account of the new information available to them."

25. In this context and having made the refund application in October 2015, the Respondent refused to process the refund application contrary to the obligations mandated by the CJEU in *Terex*.

26. The Appellant argued that Article 78 of the Customs Code is peremptory and states:

    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. *The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods…*

    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 regularise the situation, taking account of the new information available to them."*

27. Therefore it was incumbent on the Respondent to authorise the IP "*drawback*" refund claim as the Appellant had provided all of the evidence to demonstrate that the goods had been exported outside the Community.

28. In *Revenue Commissioners v. Moroney* [1972] I.R. 372 at p.381, Kenny J. adopted a formulation from the 26th edition of Snell's Equity, which defined estoppel by representation as follows:

"Where by his words or conduct one party to a transaction makes to the other a promise or assurance which is intended to affect the legal relations between them, and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it."

29. Extract from Revenue's own Instruction Manual on Inward Processing, paragraph 5.3 (pages 11/12) Monitoring/Checking of authorisations refers:

"*Checking of authorisations ensures compliance on the part of these authorised traders. It is a matter for each Regional office/LCD to ensure consistency in relation to this checking, having regard to risk strategy rather than resources. There are several aspects to an authorisation, which must be monitored by the Region/LCD. These include:*

- *Ensuring that the terms and conditions are being adhered to.*
- *Ensuring that the quantities and values as identified in the authorisation are not exceeded or likely to be exceeded. This should involve monitoring of bills of discharge on a regular basis. If quantities or values are not exceeded, this may result in customs debt arising.*
- *Ensuring that only tariff codes included on the authorisation are used. The automatic verification process in AEP should restrict importations to those on the authorisation. However, movements from warehousing into Inward Processing can take place outside of AEP using commercial documentation under local clearance, so checking of tariff number eligibility should continue.*
- *Ensuring that code 0100 is not used incorrectly in box 44 of the AEP entry. This code is only to be used in respect of a simplified authorisation.*
- *Ensuring that an authorised trader is subject to ordinary compliance checks at least once every six months. These compliance checks should not take place as a result of risk profiling or strategy but should be over and above any risk related visits. The level of detail that these compliance checks involve can be decided by the Region/LCD but should involve at least the four points above.*
- *Ensuring that all authorised traders are audited on a regular basis. The fact that these traders are visited for compliance checks on a regular basis should not exclude them from any audit program being undertaken by the*

Region/LCD. The Region/LCD should ensure that every authorised trader is audited at least once during the lifetime of an authorisation (The maximum term of an authorisation is three years)."

30. In *Case C-349/07 – "Sopropé"* [2008] ECR I-10369 the "Right to be Heard" provisions were enunciated. In its judgement delivered in December, 2008, the CJEU held that, where it is proposed to take a decision that will adversely affect a person, that person must be given an opportunity to express their point of view before the decision is taken. Instances of customs decisions where the right to be heard principle will need to be applied before the decision is taken include refusal to grant a request for repayment of duty or to remit a customs debt.

31. Despite the exponential growth that the company had experienced and the priorities it had to address in sustaining such growth and despite any contact from the Respondent under their own guidelines following admission to the scheme, the Appellant appointed experienced people to address the shortfall in June 2014. Once their agents were engaged, they immediately completed a detailed examination of the activity to date and contacted the control officer in August 2014. The experienced view of those agents was that success in the management of any procedure with economic impact requires a positive level of interaction with the control officer. The purpose of the meetings held in September 2014 and January 2015 was to create awareness that willing and experienced agents were now on board and aimed to rectify matters and to also agree a format for the completion of the outstanding returns. The Appellant supported their agents throughout these meetings and they actively sought to build a positive working relationship.

32. The format as outlined by the control officer required that each SAD number be linked against every single shipment exported from the plant. This format required detailed supporting documentation. As such the Appellant and its agents had to collate thousands of Import and Export SADs and corresponding invoices for the outstanding periods. This involved rigorous interaction with 8 different freight agents (as sometimes the Appellant's customers insist on using their own freight forwarders) and continuous analysis of documentation took some time.

33. At no stage during this process, in the full knowledge and with support from the control officer, was any suggestion made by that control officer that the Appellant's claim would not be categorised as one where the time limit ought to be extended. When the documentation was submitted, and without further comment, enquiry or invitation to express a view on this issue which had never been raised, the claims, amounting to €482,749 were nonchalantly dismissed.

34. The Appellant's business had undergone an exponential transformation in the space of a few years and while it sought to rectify matters in the full knowledge of the Respondent, those efforts have been disregarded. Furthermore, the timeline when the outstanding returns were first brought to the attention of the Respondent is within the 3-year time limit of the quarterly returns since the commencement of the authorisation.

35. The Respondent's own guidelines and practice advocates that a visit be made to the trader once every 6 months but this did not happen. There were no 6-monthly visits, there was no supervision of the tariffs codes used, procedure codes entered and there were no audit of the terms and conditions of authorisation itself and no interaction at all to ensure that the authorisation was being controlled and administered in a compliant manner. The primary obligation of the control officer is to ensure that the conditions of the authorisation are being met.

36. There were two Post-Entry audits completed. The Appellant got no feedback from the first audit in 2013. The second audit raised a concern over the classification of a redacted and a demand was issued for some €27k. While the classification was incorrect, the control officer failed to apply the correct rate of duty in issuing the demand.

37. Duty drawback holders arguably present the least amount of risk to the Revenue because duty is paid upfront on all imports. Between 2011 and 2015 the Appellant paid €4,996,239 in duty. The Appellant exported approximately 20% of their finished goods. Only one reclaim has been refunded to date for Q3 2012 for a sum of €25,449. Only 25% of all duties collected by the national authorities are retained. The remaining 75%is given to the European Commission.

38. It was submitted that it is both extraordinary and inconsistent that a trader can be refused a refund because of a statistical procedure code change when there has been no control exercised over the administration of the IP regime over a 4 year period and when the trader has not only provided substantive proofs that the products have been exported (including traceability to each and every SAD document as required by the control officer) but also sought to diligently process matters in a compliant way.

39. The Appellant has, thus far in this process been the only loser given the duties it has paid, and the monies and effort that it has expended to regularise matters.

Conclusion

40. At the hearing, Counsel for the Appellant acknowledged the limited jurisdiction of the Tax Appeals Commission. As such it was submitted that notwithstanding that Article 521(1) the Implementing Regulation provides that "*the claim for repayment or remission of import duties must be lodged with the supervising office within six months*" that "*special circumstances*" existed that warranted the Respondent to extend that period had "*expired.*" In this regard, it was asserted that the geographical location of the Appellant situated on the "western edge of Europe" compromised its ability to procure the necessary expertise to enable it complete the application of the IP "*drawback"* claim within the prescribed time period of 6 months. Therefore the Appellant's geographical location coupled with the fact that the Appellant had only received its first authorisation constituted special circumstances.

41. Therefore if a person, who is liable for the payment, can establish the existence of a special situation, the absence of deception and obvious negligence, as prescribed in the Code, allow for extension of time that the entitlement to the repayment or remission of the amount of duty is legally owed.

42. Furthermore the conduct of tax authorities as expressed by the CJEU in the case T-42/96 *Eyckeler & Malt AG v Commission [*1998] ECR II-401 has to be considered. The Appellant argued that there was a lack of control in the administration of the regime operated by the Respondent. The fact that there were no visits made by the control officer, no auditing of the regime itself contributed to the Appellant's failure to have made a timely application for the IP "*drawback"* claim.

43. The Appellant argued that the Respondent either knew, or ought to have known, that no returns were being filed over a period of time and that it was only a matter of time before the Appellant would seek to regularise matters. Furthermore, the Respondent had actual notice that a substantive effort had been carried out to collate, export and import documentation by the Appellant to finalise the returns. Despite the fact that there was regular interaction with the control officer at the time, the Respondent nevertheless allowed the Appellant to complete such work to its detriment only to refuse the reclaims on a technical point thereafter. In circumstances where both parties were on a mutual "learning curve" as to the operation of the scheme, and where one party has acted considerably to its detriment, both on foot of the guidelines, and in respect of the considerable work undertaken from August 2014 until the claims were fully documented, it was submitted that the Respondent cannot resile from the position that conditions for special circumstances permitting the time limits in the regulations to be extended have been met by the Appellant.

Respondents' Submissions

44. It was made clear to the Appellant in August 2013 that the Appellant was obliged to fully comply with the terms and conditions of its authorisation under IP Drawback signed on 19 October 2012. However the Appellant chose to ignore the said undertakings and failed to comply with the terms and conditions of the said authorisation and *"readily accepts that it should have allocated resources to address the outstanding returns sooner."*

45. It was clear that the alleged *"exceptional circumstance"* was one which arose purely as a consequence of the Appellant's own actions or lack thereof, being the failure to comply with the terms of its said authorisation. Furthermore time limits are common place in all taxes, including customs duties and it was a matter for the Appellant to abide by those time limits imposed by the Customs Code.

46. In the Case T-42/96 – *Eyckeler & Malt AG v Commission* [1998] ECR II-401, the Court considered whether there was a *"special situation"* in the context of an importer who had imported Argentinian beef and was unaware that the certificates of origin were falsified. At paragraph 162 the Court found that:

> *"According to the relevant rules and settled case-law, the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be falsified does not in itself constitute special situation justifying remission of duties even if such document were presented in good faith…"*

47. In that case, it was only because the Court went on to find that there had been a failure on the part of the Commission to supervise the arrangements with Argentina and given the very professional way that the falsifications had been carried out, of which the applicant company was unaware, that the Court found that matters "*exceeded the normal commercial risk which must be borne by the applicant, in accordance with the case-law cited in the preceding paragraph." [para. 188].*

48. The Court went on to find at paragraph 190:

> *"Since Article 13 of Regulation No 1430/79 is intended to be applied when circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred … it must be held that, in view of all the foregoing, the circumstances of the present case amount to a special situation within the meaning of that provision and justified remission of import duties."*

49. It is clear from the foregoing that the special situation was something which confronted the importer, without any knowledge or involvement on the part of the importer and was outside the control of the importer. That is not the position in the within appeal where the failure of the Appellant to comply with the terms of its authorisation under IP "*drawback"* was purely of its own doing.

50. In joined cases T-186/97 - *Kaufring AG & Ors v Commission* [2001] ECR II-01337 the Court again considered whether there was a *"special situation"* in the context of customs duties arising from the importation of colour televisions from Turkey. Post clearance checks revealed that certificates of origin were invalid, but the applicants were unaware of same. The applicants pleaded that serious errors were made by the contracting parties in implementing the arrangements with Turkey, such as to give rise to a *"special situation"* within the meaning of Article 13(1) of Regulation No. 1430/79. The Court found at paragraph 302 that:

> "*The serious deficiencies attributable to the contracting parties and the effect of placing applicants in a special position in relation to other traders carrying out the same activity. The deficiencies undoubtedly helped to bring about irregularities which led to customs duties being entered in the accounts post – clearance in respect of the applicants.*
>
> *Moreover, in the circumstances of the present case there was no obvious negligence or deception on the part of the applicants."*

51. In case C-86/97 – *Reiner Woltmann, trading as 'Trans-Ex-Import' v Hauptzollamt Potsdam* [1999] ECR I-1041 the Court (Sixth Chamber) considered Article 239 of the Customs Code. At paragraph 21 the Court considered:

> *"In undertaking its examination, in light of the objective of fairness underlying Article 239 of the Code, the customs authority must confine itself to verifying whether the circumstances relied on are liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business.*
>
> *It follows that the answer to the questions submitted must be that factors 'which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' exist, necessitating examination of the file by the Commission, where, having regard to the objective of fairness underlying Article 239 of the Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in*

*the same business are found to exist and the conditions laid down in Article 900(1)(a) of the Regulation, for remission of customs duties in favour of the applicant, are not fulfilled." [**Emphasis added**]*

52. In Case C-61/98 – *De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam* [1999] ECR I-5003 the Fifth Chamber of the Court considered circumstances where the applicant contended there was a *'special situation'* where the company was being pursued for customs duties which were due on a consignment of cigarettes which had been the subject of a fraud and were entered into circulation and in respect of which there was no negligence or deception on the part of the claimant. Interestingly, the Court found that there was no obligation on the customs authorities to warn a principal of any possible fraud, even where the principal could incur liability for customs duty as a result of the fraud, even where he had acted in good faith. The Court considered circumstances which may justify abstention from post-clearance recovery, or the reimbursements or remission of duties. At paragraph 40 the Court noted *inter alia* that *"the person liable must have complied with all the provisions laid down by the legislation in force as far as his customs declaration is concerned."* The Appellant herein failed to comply with its obligations as far as its customs declarations were concerned, failing to have the necessary supporting documentation and having failed to ensure that the goods were properly declared on the SAD and entered to IP.

53. In Case 58/86 – *Cooperative Agricole d'approvisionement des Avirons & anor v Collector of Custom*s [1987] ECR 1525 the Third Chamber of the Court considered whether *'special circumstances'* arose surrounding the importation of maize into the island of Reunion from South Africa at a substantially higher price that exceeded the Community threshold price. The applicant contended that "*special circumstances*" justified the repayment or remission of import duties pursuant to Article 13 of regulation 1430/79. At paragraph 22 the Court found that:

"As the Court held, Article 13 of Regulation No 1430/79 is a 'general equitable provision designed to cover situation other than those which had most often arisen in practice and for which special provisions could be made when the regulation was adopted'. (judgment of 15 December 1983 in Case 283/82 Papierfabrik Schoellershammer v Commission [1983] ECR 1633). The article is intended to apply where the circumstances characterizing the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred. As the Commission rightly observes, the geographical and economic situation of Reunion is of an objective nature and affects

an indefinite number of traders, and hence the circumstances in which maize is imported into that territory cannot be regarded as 'special circumstances' within the meaning of Article 13 cited above."

54. What is telling from the said authorities is that the Court in determining whether an exceptional situation arises, considers whether the imposition of the customs duties would put the claimant "*in an exceptional situation in comparison with other operators engaged in the same business."* [para 54 of Case C-61/98] It is clear that the exceptional situation must have been created outside of the control of the claimant and absent any negligence or deception. It was submitted that the Appellant's failures herein were entirely of its own making and cannot be blamed on any other party and furthermore there was negligence herein on the part of the Appellant in circumstances where the Appellant failed to comply with its obligations and undertakings pursuant to the said authorisation and was further negligent in its failure to comply with the rules governing its customs declarations.

55. The Appellant, no more than any of its competitors, was obliged to comply with its obligations pursuant to the Customs Code. There is no inequity in requiring persons to comply with their obligations pursuant to the Customs Code, it being an even playing field for all such persons, particularly if in competition. Indeed, during the relevant periods of time any such competitors, presumably, applied their resources to ensure compliance with the Customs Code, whereas the Appellant, by its own admission saw fit to apply its resources elsewhere to enhance its business growth. It was submitted that there were no exceptional circumstances herein as the Appellant's failure to comply with its customs obligations was of its own doing, having ignored its obligations and the warnings of the Respondent in August 2013. Indeed, to consider the facts set out by the Appellant herein as an exceptional circumstances would objectively create inequity and treat the Appellant in a manner different from its competitors, the very thing the Court in C-58/86 warned against.

56. The judgment of the CJEU in *Terex,* can be distinguished on the basis of factual dissimilarities and a consideration of different regulatory provisions to the extent that the CJEU was concerned with the system of "*suspension*" as opposed to *"drawback*" scheme and the different time limits applicable in both schemes.

57. It was also significant that the Appellant, on relying on *Terex*, did not invoke Article 78 of the Customs Code to *"amend the declaration after release of the goods."* On the contrary, the Appellant argued that special circumstances prevailed permitting the Respondent to extend the period to allow the Appellant make a late claim in accordance with Article 521

of the Implementing Regulation. The judgment in *Terex* can be further distinguished as that case dealt with different parts of the Custom Code namely Article 78 and Article 236.

58. Notwithstanding the application of different parts of the Custom Code, the Court made the following relevant observations:

> 42. *"It must be observed, first of all, as the Commission of the European Communities maintains, that the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying out of certain economic activities. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom.*
>
> 43. *....*
>
> 44. *The objective of the use of the customs code indicating the re-export of goods under the inward processing procedure is to ensure effective monitoring by the customs authorities and to give them the power to identify, solely on the basis of the customs declaration, the status of the goods concerned without the need for subsequent assessments and findings. That objective is particularly important since the goods which are introduced into the customs territory of the Community remain under customs supervision, pursuant to Article 37(2) of the Customs Code, only until such time as they are re-exported.*
>
> 45. *Therefore, the objective of the use of the customs code indicating the re-export of Community goods under the inward processing procedure is to permit the customs authorities to decide at the last minute to carry out a customs check pursuant to Article 37(1) of the Customs Code, namely to check whether the re-exported goods in fact correspond to the goods placed under the inward processing procedure."*

59. As such the Appellant was a victim of its own success in dealing with more pressing matters, given its business growth. Therefore the issue of customs was not given the attention it ought to have been given.

Lack of visits by Customs Control Officers

60. The Appellant alone is responsible for its compliance with the Customs Code. It is the responsibility of the IP authorisation holder, the Appellant, to make sure that the goods are properly declared on the SAD and entered to IP. It is only then that the goods come under supervision from the Customs authorities.

Appellant's alleged assumption that the Respondent would not make an issue of time limits

61. Time limits are an integral component of all taxes. It was a matter entirely for the Appellant to ensure that it complied with the time limits provided for. At no time did the Respondent make any representation, whether written or oral that time limits were not an issue. If an assumption was made by the Appellant, its servants or agents, then same was made without any basis and was mistaken.

The absence of deceit or obvious negligence

62. There was negligence herein on the part of the Appellant in circumstances where the Appellant negligently failed to comply with its obligations and undertakings pursuant to the said authorisation and was further negligent in its failure to comply with the rules governing its customs declarations.

Due process and fair procedures

63. At all material times the Appellant was responsible for its compliance with its customs obligations. In August 2013 the Respondent made clear to the Appellant that it had to comply with its customs obligations. The Appellant failed to do so. At all material times herein the Appellant was dealt with in accordance with the Respondent's duties as a customs authority. There was no breach of due process or fair procedure.

The spirit, ambit and general intention of the IP Drawback process

64. The Applicant's authorisation in respect of the IP Drawback was subject to an undertaking by the Appellant to comply with the terms and conditions attaching to the authorisation. The Appellant failed to comply with its undertaking having breached the terms and conditions thereof. Consequently, the Appellant, by its own volition, failed to comply with the spirit, ambit and general intention of the IP Drawback process and therefore has no entitlement whatsoever to seek what is considered by the CJEU to be a very limited equitable provision.

Overview

65. The Inward Processing (IP) procedure allows relief for customs duty on raw materials, components and other goods imported for processing and subsequently re-exported outside the European Community. The "*suspension*" and "*drawback*" schemes are the forms of IP. Under the "*suspension*" procedure, the holder of the authorisation is entitled to import materials without payment of duty at the time of import where it can be demonstrated that a high percentage of the imports are to be re-exported whereas under the "*drawback*" procedure, the duty is paid at the time of importation and a claim for refund of duty is claimed when the resultant products are exported to non-European Union countries. The application to use the procedure is made in advance to the relevant authority and is usually valid for a three-year period.

66. By communication dated 4th November 2015, the Respondent notified the Appellant of the decision to deny the Appellant's refund of the "*drawback"* claim on the grounds that:

- The application for a refund for the period from July 2011 to June 2012 inclusive was outside the 3 year time limit for processing reclaims for duty pursuant to Article 236 (2) paragraph 1 of the Customs Code, and

- For the period October 2012 to December 2014 inclusive, the claim fell outside the 6 month period for processing reclaims in accordance with Article 521 of the Implementing Regulation.

67. However and notwithstanding that the Respondent's decision to refuse the Appellant's claim was based on different Regulatory provisions, at the hearing it was submitted by the Respondent and not disputed by the Appellant that as the claim related to "*drawback*" procedure, the entitlement to the refund should be considered under Article 521 of the Implementing Regulation which provides*, inter alia*:

> *"in the case of inward processing (drawback system), the claim for repayment or remission of import duties must be lodged with the supervising office within six months.*
>
> *Where special circumstances so warrant, the customs authorities may extend the period even if it has expired."*

68. Therefore my consideration of the Appellant's entitlement to a refund is in accordance with Article 521 of the Implementing Regulation and the extent to which there were

"*special circumstances*" to warrant the extension of the period of six months for the purposes of making a "*drawback"* refund claim.

Analysis

69. The Appellant's application for the IP "*drawback*" authorisation was made on 29th June 2012 and approved by the Respondent on 8th October 2012 to include permission to make a "*drawback*" refund claim for the period commencing 29th June 2011.

70. The Appellant's first refund claim was made in January 2013 for the quarter July – September 2012 and approved by the Respondent notwithstanding that the Appellant's claim was incomplete and incorrect commodity codes were used on both import and export SADs documents.

71. As it was the first claim, the Respondent tolerated the Appellant's discrepancies but cautioned by letter dated 21st August 2013, that all future claims had to be correct and that the proper codes had to be used in the SADs. The Appellant was also informed that if incorrect or incomplete declarations were submitted, administrative penalties would be imposed and that future claims would be refused.

72. Despite the Respondent's clear instructions, it was not until June 2014 that the Appellant appointed specialist customs agents, Name Redacted. Following meetings between representatives from the Appellant, Name Redacted and the Respondent in September 2014 and January 2015, the Appellant made an IP "*drawback*" claim in October 2015 for the years 2011 to 2015, some 9 months after the last meeting with the Respondent. Furthermore and notwithstanding the delay in making the refund application, the Appellant failed to include all relevant documentation together with furnishing a significant number of incorrectly completed SADs. As such the Respondent, in accordance with the terms set out in its letter of 21st August 2013, denied the Appellant's claim for the "*drawback"* refund for the years 2011 to 2014.

73. In appealing the Respondent's refusal to refund the "*drawback*" claim, the Appellant asserted that its ability to make timely claims was prejudiced and therefore entitled to plead "*special circumstances*" as:

    a) its geographical location compromised its ability to procure the services of a customs expert, and

    b) contrary to settled law, the Respondent failed to provide sufficient assistance to the Appellant.

74. While there is no definition of "*special circumstances*" in Article 521 of the Implementing Regulation or indeed any apparent consideration of that concept in the jurisprudence of the CJEU, assistance can be derived by decision of that court in the *Eyckeler & Malt*. In that judgment, the CJEU considered whether *"special situations"* could be applied to a trader who had imported Argentinian beef but was unaware that the certificates of origin were falsified. However, the German customs authorities sought post-clearance payment of the import duties which prompted the applicant to apply to the German customs authorities for remission of the import duties pursuant to Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 (the Regulation) which provides *inter alia*:

> *"Import duties may be repaid or remitted in special situations ... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned."*

75. In considering "*special situations*" in Article 13 of the Regulation, which for all intents and purposes is analogous to "*special circumstances*" in Article 521 of the Implementing Regulation, the Court made the following observations:

> 188. *It is true that Community law does not normally protect the expectations of a person liable as to the validity of a certificate of authenticity, which is found to have been forged when subsequently checked, since such a situation forms part of commercial risk (Van Gend & Loos and Expeditiebedrijf Wim Bosman v Commission, cited above, paragraph 17, Acampora, cited above, paragraph 8, Mecanarte, cited above, paragraph 24, and Pascoal & Filhos, cited above, paragraphs 59 and 60).*
>
> 189. *However, in the present case, the falsifications made it possible for the Hilton quota to be exceeded to a significant extent only because the Commission had failed to discharge its duty of supervising and monitoring application of the quota in 1991 and 1992. In those circumstances, the falsifications, which, moreover, were carried out in a very professional way, exceeded the normal commercial risk which must be borne by the applicant, in accordance with the case-law cited in the preceding paragraph.*

190. *Since Article 13 of Regulation No 1430/79 is intended to be applied when circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred (Cooperative Agricole d'Approvisionnement des Avirons, cited above, paragraph 22), it must be held that, in view of all the foregoing, the circumstances of the present case amount to a special situation within the meaning of that provision and justify remission of the import duties"*

76. As such, the Court held that it was the error of the customs authorities that led to the customs debt being incurred and as a consequence the applicant should not be denied the entitlement to the remission of the import duties.

77. Furthermore in *Kaufring* AG *and others v European Commission* (Case T-186/97), the CJEU considered whether the applicant was entitled to remission of import duties when it relied on certificates from Turkish exporters who had falsely stated that the television sets only contained components which had been released for free circulation in Turkey. In establishing the existence of a "*special situation*" pursuant to Article 13(1) of Regulation, the Court concluded at paragraph 218:

> *"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 (see Case C-86/97 Trans-Ex-Import [1999] ECR I-1041, paragraphs 21 and* 22, and Case C-61/98 *De Haan [1999] ECR I-5003, paragraphs 52 and 53) and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the error in the* accounts *a posteriori of customs duties (Case 58/*86 *Coopérative Agricole d'Approvisionnement des Avions [1987] ECR 1525, paragraph 22)."*

78. The Court held that the Turkish authorities were responsible for serious deficiencies, and in particular had failed to implement provisions of the Association Agreement which applied to all exports of television sets from Turkey. Those failings had contributed to the occurrence of irregularities in exports and had created for the exporters a special situation as referred to in Article 239 of the Customs Code.

79. Therefore as identified in the jurisprudence of the CJEU, special situations or circumstances arise where:

(a) it would be inequitable to require the trader to bear a loss which he normally would not have incurred [Case T-42/96 – *Eyckeler* at para 190] & [Case 58/86 – *Cooperative Agricole* at para 22] and

(b) that the person liable is in an exceptional situation as compared with other operators engaged in the same business [C-86/97 – *Reiner Woltmann*, at para 21] & [Case T-186/97 - *Kaufring AG* at para 218]

80. There is no dispute between the parties that the Appellant would have received the "*drawback*" refunds had it lodged the "*claim for repayment or remission of import duties…. with the supervising office within six months"* pursuant to Article 521 of the Implementing Regulation. However the Appellant made a late refund application for the years 2011, 2012, 2013, 2014 and 2015 on 19th October 2015 and argued that "*special circumstances"* existed to warrant "*the customs authorities ….* [to] *extend the period even if it has expired*." As such, other than the year 2015 which appears to have been approved as it was not subject to this appeal, the claims for the years 2011, 2012, 2013, 2014 were submitted outside of the prescribed six month period.

81. As such it is necessary to consider whether it would be lawful to deny the Appellant the entitlement to the "*drawback*" refund for the years 2011 to 2014 to the extent that the Appellant would have to "*bear a loss which he normally would not have incurred*" and also to determine whether the Appellant was "*in an exceptional situation as compared with other operators engaged in the same business*".

Geographical location

82. The Appellant argued that its geographical location in Location Redacted compromised its ability to procure the expertise to assist in the making of timely refund applications. However as observed by the Respondent, the Location Redacted is situated ** kilometres from Location Redacted and in a part of the country in which there are several multinational companies and large accountancy firms with the ability to provide the necessary customs expertise.

83. It is therefore difficult to reconcile the Appellant's assertion that its geographical location compromised its ability to procure the services of a customs expert when it engaged customs experts in Location Redacted. Furthermore and notwithstanding the availability of local expertise, to engage Location Redacted based customs agents, some *** kilometres from Location Redacted, indicates to me that the process of completing timely and accurate refund claims did not require the presence of a local customs expert.

84. It is also relevant that in *Eyckeler,* the CJEU held that the "*Commission had failed to discharge its duty"* and as such the applicant in that case should not have to *"bear a loss which he normally would not have incurred*". However as explicitly acknowledged by the Appellant, "*it should have allocated resources to address the outstanding returns sooner"* notwithstanding that it had to make choices and prioritise workload in order to meet and sustain the exponential demand and growth. Therefore unlike *Eyckeler*, it is not possible to ascribe any fault to the Respondent for the Appellant's failure to have submitted not only timely but complete and accurate claims.

85. One would also expect basic competency in administrative matters of a company engaged in the supply of "*highly technologically advanced products to demanding Customers on time and on budget*". As such, I am in agreement with the Respondent, not only was the Appellant remiss in making timely applications, it also delayed in procuring expert assistance and made claims that were incomplete, inaccurate and failed to include the proper documentation to the Respondent.

86. Contrary to the Appellant's submissions, the judgment in *Terex* considered different parts of the Custom Code namely Article 78 in context of the IP "*suspension system*" as opposed to the IP "*drawback system*". However and notwithstanding the different Regulatory provisions, *Terex* is relevant to the extent that the CJEU recognised at paragraph 42, the importance of the IP procedure as:

> *"an exceptional measure intended to facilitate the carrying out of certain economic activities. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom."*

87. Correspondingly, the IP "*drawback system*" also facilitates economic activities and as a beneficiary of that system, the Appellant was also "*required to comply strictly with the obligations resulting therefrom."* As considered above, the Appellant failed to comply with its basic obligations.

88. The Appellant's geographical argument can be further discounted as in *Cooperative Agricole,* the CJEU considered that the geographical and economic situation pertaining to the Island of Reunion entitling it to certain privileges could not be regarded as "*special circumstances*".

89. Other than the assertion of being disadvantaged due to its geographical location, the Appellant did not provide any evidence to prove that it was "*in an exceptional situation as compared with other operators engaged in the same business*" [*Reiner Woltmann* &

Kaufring AG]. On the contrary and as considered above, standard business practice should have ensured that if there was an entitlement to seek a refund of €482,749 from the customs authorities that the proper care, attention and resources would have been allocated to ensure completion of accurate claims within the time prescribed by the Customs Code. As such, the Appellant was remiss in failing to put in place the proper resources and failed to devote the requisite time to have made complete, accurate and the timely refund claims.

Respondent's Purported Failure

90. The Appellant argued that there was a lack of control in the administration of the regime operated by the Respondent. The fact that there were no visits made by the control officer, no auditing of the regime itself contributed to the Appellant' failure to have made a timely application for the "*drawback*" claim. Furthermore it was asserted that the Respondent had actual notice that the Appellant had "*no in-house expertise*" and had the Respondent conducted visits, the Appellant's administrative weaknesses could have been resolved.

91. The Appellant thereafter relied on the following passages from the judgment of the CJEU in *Terex* to support the assertion that once the Respondent was satisfied that the goods had been re-exported, there was a positive obligation on the Respondent to assist the Appellant:

> 62. *If the revision indicates that the provisions governing the customs procedure in question were applied on the basis of incorrect or incomplete information and that the objectives of the inward processing procedure are not threatened, in particular in that the goods covered by that customs procedure had actually been re-exported, the customs authorities must, in accordance with Article 78(3) of the Customs Code, take the measures necessary to regularise the situation, taking account of the new information available to them (see, to that effect, Overland Footwear, paragraph 52).*
>
> 63. *Where it is apparent, in the final analysis, that the import duties were not legally owed when they were entered in the accounts, the measure necessary to regularise the situation can consist only in remission of those duties (see, to that effect, Overland Footwear, paragraph 53).*
>
> 64. *That remission is to be made in accordance with Article 236 of the Customs Code if the conditions laid down by that provision are fulfilled, in particular that there has been no manipulation by the declarant and that the application for remission*

has been submitted within the time-limit, which is in principle three years (see, to that effect, Overland Footwear, paragraph 54).

65. *Article 78 of the Customs Code permits the revision of the export declaration of the goods in order to correct the customs code given to them by the declarant, and that the customs authorities are obliged, first, to assess whether the rules governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information and whether the objectives of the inward processing regime have not been threatened, in particular in that the goods subject to that customs procedure have actually been re-exported, and, second, where appropriate, to take the measures necessary to regularise the situation, taking account of the new information available to them."*

92. However, as noted above, the judgment in *Terex* can be distinguished as it related to the insertion of the wrong customs procedure codes into the export declarations and a subsequent application to amend its export declarations in order to regularise the situation pursuant to Article 78 of Customs Code. However in this appeal, there was no such application. Instead the Appellant relied on Article 521 of the Implementing Regulation to sanction the approval of the Respondent to extend the period of time to make a "*drawback*" refund.

93. Therefore the Appellant's attempt to abdicate responsibility and attribute blame to the Respondent for its own failing is unacceptable. Furthermore I accepted the Representative of the Respondent's evidence of the Respondent's regular interaction with the Appellant by way of email, telephone communications and the ongoing compliance checks conducted from the Respondent's offices.

Right to be Heard

94. In its written submissions, the Appellant asserted that it was denied the "Right to be Heard" and relied on *Case C-349/07 – "Sopropé"* [2008] ECR I-10369 in which that principle was considered. However at the hearing, Counsel for the Appellant seemed to accept that the right of appeal to the Tax Appeals Commission constitutes the "Right to be Heard". Furthermore and as noted by the Respondent, the Appellant sought an internal review of the Representative of the Respondent's decision which was undertaken by a Mr Name Redacted, the designated Appeals Officer. Therefore I was not required to consider the Appellant's "Right to be Heard" submission as that right was conducted by the internal review officer of the Respondent and indeed by the Tax Appeals Commission.

Determination

95. Article 521 of the Implementing Regulation, prescribes a timeframe of 6 months to make a "*claim for repayment or remission of import duties …. with the supervising office.*" However where "*special circumstances*" necessitate, some element of discretion is afforded to "*customs authorities* [to] *extend the period even if it has expired."*

96. In considering "*special situation*" the corollary to "*special circumstances*", the CJEU overturned decisions that denied entitlement to a remission of import duties caused by errors or negligence of the European Commission and customs authorities. However in this appeal no such fault can be attributable to the Respondent. Therefore as I have found that Appellant's application was inaccurate, incomplete and out of time, a consequence of its own failures, there are no "*special circumstances*" or justification to extend the 6 month time period to claim a remission of import duties. On this basis, I have found that the Appellant is not entitled to the repayment of import duties in the amount of to €482,749.

Conor Kennedy
Appeal Commissioner
2nd November 2020

No request was made to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.