Neutral Citation: [2023] UKFTT 00754 (TC)

Case Number: TC08934

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Location/By remote video hearing]

Appeal reference: TC/2019/00529

CUSTOMS – use of incorrect customs procedure code for imports from Turkey – whether goods were eligible for preference – whether in order to claim preference an A.TR is required – whether there is requirement to amend declarations where an error is identified – appeal dismissed

Heard on: 21 August 2023
Judgment date: 07 September 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

WF & L LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown of Counsel instructed by Bird & Bird LLP

For the Respondents: Joshua Carey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns a post clearance demand issued by HM Revenue and Customs (**HMRC**) to WF & L Limited (**Appellant**) dated 18 October 2018 in the sum of £768,742.57 duty and £153,748.51 VAT. The demand concerns 85 import entries for vehicles (**Vehicles**) manufactured in Turkey and transported under duty suspension from Turkey via Spain and Gibraltar to the UK (**Decision**).

2. The Vehicles had been imported on the basis that they were liable to 0% duty using the customs procedure code for returned goods relief (**RGR**). It is agreed between the parties that the Vehicles are not eligible for RGR and that the declarations were thereby incorrect. The dispute between the parties is whether the Appellants are now entitled to amend the import declarations declaring the Vehicles under the customs procedure code for preference from Turkey which also carried a 0% duty rate. If the Appellant cannot do so it is agreed that they will be liable to duty at 10% together with the associated VAT.

3. I have determined that the correct duty rate is 10% and the appeal is dismissed.

BACKGROUND

4. The Appellant is a trader in commercial light vehicles, in the main, to the motor industry. The Appellant purchased the Vehicles from Lucas Imossi Motors Ltd (**LIM**) in Gibraltar. The Vehicles were all manufactured/assembled by Ford Otosan (**FordO**) in Turkey and were moved under duty suspension from Turkey to Ford's Spanish vehicle holding compound in Valencia and then on to Gibraltar before being transported, initially by land and then sea, to Portbury where they were cleared into free circulation.

5. Each transit was accompanied by a T1 document facilitating the movement of goods originating outside the European Customs Union into the territory of the Union by suspending import duties and other charges and commercial policy measures until the goods arrived at their final destination in the Union at which point all relevant duties and charges are paid. These documents evidence the journey taken by the Vehicles. The transits were not accompanied by an A.TR.

6. On 24 October 2017 HMRC notified the Appellant that they intended to undertake a visit to check their customs and international trade records. This was to include a verification that the Appellant had correctly declared the Vehicles under RGR.

7. The Appellant provided HMRC with access to their records and all documents held in respect of the Vehicles. It was quickly established that the Vehicles did not meet the requirements necessary to have been imported at 0% duty under RGR. It appeared to HMRC that the only other basis on which 0% duty was appropriate was if they complied with the requirements for preference under 2006/646/EC: Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee of 26 September 2006 (**Turkey Decision**) laying down the detailed rules for application of Decision No 1/95 of the Turkey Association Council (**Council Decision**). However, to meet the terms of preference the declarations needed to be accompanied by an A.TR document. As the Appellant had no A.TRs in respect of the Vehicles. accordingly, HMRC proceeded to issue the Decision.

8. The Decision was reviewed and upheld on review.

THE LAW

Preference

9. Pursuant to the Council Decision and the Turkey Decision goods may be imported into the EU under preferential rules (which do not, in this case, require the 10% duty otherwise chargeable) provided certain requirements are met.

10. So far as relevant in this appeal Articles 3 and 4 of the Council Decision provide that there shall be no EU import customs duties and charges in respect of the Vehicles provided that they originate in Turkey or were produced in Turkey and where they are produced wholly or partially from products coming from third countries those products were in free circulation at the point at which the Vehicles were themselves exported. For these purposes "in free circulation" is defined as having complied with all import formalities including payment of import duties, such import duties not having then been reimbursed.

11. Article 3.6 provides that the Customs Cooperation Committee shall determine the methods of administrative cooperation to be used in implementing the terms of preference set out in paragraph 10 above.

12. These methods are prescribed in the Turkey Decision:

(1) Article 3 provides that the terms of the Turkey Decision shall apply for the purposes of implementing the Council Decision.

(2) Article 5 and 6 requires that the proof that the necessary conditions for implementation of duty-free trade between the EU and Turkey are met "shall" be provided by documentary evidence in the form of the A.TR. The A.TR may be used alone where goods are transported directly from Turkey to the EU or vice versa. Where goods constituting a single consignment are transported through third countries under duty suspension the A.TR must be accompanied by either a) a single transport document, or b) a certificate issued by the customs authorities of the third country (including specified particulars) or c) other substantiating documents.

(3) Article 7 provides that the A.TR shall be endorsed by the customs authorities of the exporting state when the goods are exported. The exporter is required to be prepared to submit all appropriate documents proving the status of the goods and fulfilment of the requirements of both the Council Decision and the Turkey Decision. The customs authorities of the exporting country shall take any necessary steps to verify the status of the goods and the fulfilment of the requirements of the Council and Turkey Decisions and check that the A.TR has been duly completed.

(4) Article 8 requires that the A.TR be provided to the importing state within 4 months of the date of issue by the exporting state but may be accepted outside 4 months in exceptional circumstances.

(5) Article 9 and Annex II provide details and an explanation on how to complete the A.TR.

(6) In accordance with Article 10 where an A.TR is lost or destroyed the exporter may apply for a duplicate which, if issued, is endorsed as a duplicate.

(7) Article 11 provides for a simplified procedure for issue of A.TRs whereby exporters may be authorised, subject to the provision of specified guarantees, to become an approved exporter not required to submit the goods or the A.TR to the customs authorities for endorsement prior to export.

(8) Article 15 provides for the exceptional issue of an A.TR after exportation where the A.TR was not issued at the time of export because of errors, involuntary omissions

or special circumstances, or where the customs authorities are satisfied that the A.TR was not accepted at import for technical reasons. Such A.TRs are endorsed as "issued retrospectively".

Amendment

13. Article 78 Community Customs Code (**CCC**), effective for imports to 30 April 2016 provides that the customs authorities may, on their own motion or at the request of the declarant, amend a customs declaration after release of the goods. Where revision indicates that the provisions governing the customs procedure have been applied incorrectly or on the basis of incorrect information the customs authorities "shall" regularise the situation.

14. Article 173 Union Customs Code (**UCC**) (which replaced CCC from 1 May 2016) similarly provides for amendment of a declaration but requires such amendment to be made within 3 years or the date of acceptance of the declaration and that no amendment may be made where it is applied for after the customs authorities have informed the declarant that they intend to examine the goods, the goods have been released or the customs authorities have established the particulars of the customs declaration are incorrect.

THE APPROACH

15. As identified in paragraph 2 above the principal issue between the parties is whether the RGR declaration may be amended so as to claim preference and maintain the declared 0% duty rate. By reference to the skeleton arguments the parties appeared to agree that inherent within this issue were two questions:

(1) Is amendment permitted under Article 78 CCC and Article 173 UCC as relevant? and

(2) What is the significance of the lack of an A.TR?

16. As the hearing unfolded however, it was clear that there was a more fundamental issue between them which underpinned the above questions, namely whether the Vehicles were eligible for preference under the Turkey Decision at all.

17. It is appropriate at this point to note that the submissions of the parties on this antecedent and critical question were not addressed in their skeleton arguments. During the course of the hearing and, as I was addressed on the evidence, the Appellant contended that I could draw an inference from the evidence that the Vehicles had been manufactured in Turkey and the only impediment to being entitled to clear the goods under the customs procedure code for Turkish preference was the lack of an A.TR which could and should be remedied by reference to alternative evidence. HMRC's submission in response was that the evidence available from FordO most clearly indicated that they were ineligible to issue A.TRs because the Vehicles were produced using parts which were subject to inward processing relief (i.e. they were not cleared into free circulation in Turkey because they were intended to be incorporated into a finished product destined for a third county).

FINDINGS OF FACT

18. There are certain facts which are agreed between the parties. They agree that:

(1) The Vehicles were manufactured in Turkey i.e. they were assembled in Turkey from parts imported from both the EU and third countries.

(2) The Vehicles were imported into the UK incorrectly using RGR.

(3) The Vehicles were accompanied by T1 documents evidencing the relevant duty suspended movement of them between Turkey, Spain, Gibraltar and the UK.

(4) There were no A.TR documents issued by FordO either under the simplified procedure and/or endorsed by the Turkish customs authorities as relevant.

(5) The Appellant has exhausted all attempts to obtain A.TRs for the Vehicles.

(6) There was no claim (or evidence) that the Vehicles were of Turkish origin.

19. In relation to 18(6) above it is to be noted that the question of determining origin of a complex product comprised of many parts which have been imported from the EU and third countries is a complex matter to determine both as a matter of law and fact. It would have been impossible for these parties, without the assistance of FordO to ascertain the origin in a customs law sense.

20. There was a principal and a subsidiary factual dispute. The principal dispute concerned whether there is evidence from which it is permissible for me to infer that, to the extent that the Vehicles were produced from third country parts, those parts were in free circulation at the point at which the Vehicles were exported. The secondary one concerned whether the evidence provided was sufficient to represent alternative evidence of preference. This latter dispute is relevant only if I: (a) conclude that the Vehicles are eligible for preference and (b) determine I am able, under the statutory framework, to accept alternative evidence.

21. There was limited evidence available to me to determine the question of eligibility for preference. The evidence consisted of a series of correspondence exchanges between the Appellant's representatives and FordO, LIM, HMRC and the shipping and clearing agent Premiership.

22. The dispute as to eligibility of preference arises because in the course of correspondence FordO has used a series of explanations for refusing to issue retrospective A.TRs.

23. It appears that following HMRC's visit LIM sought to obtain A.TRs from FordO. Although I have not seen the original request or the response I glean from the documents that I have seen that FordO refused to issue the A.TRs on the basis that it was unable to issue retrospective A.TRs. The Appellant contends that this, of itself, is sufficient for me to infer that there is no substantive question of eligibility to preference as it would have been expected that had the requirement for preference not been met FordO would have said so immediately.

24. Aiming to meet FordO's articulated concern that they were not entitled to issue retrospective A.TRs, LIM sent an email to FordO on 12 February 2018 attaching an email chain dating back to early April 2011 concerning what was indicated to be the process by reference to which retrospective A.TRs had previously been issued.

25. The April 2011 email chain did not concern the Appellant but one of LIM's customers in Belgium. It appears that LIM were looking to FordO in that instance to issue a retrospective A.TR document. As here, initially FordO refused to issue the A.TR, it was stated that it was unable to do so as LIM was established in Gibraltar and outside the territory of the EU with the consequence that there was no basis for the issue of the A.TR. FordO indicated that they could however, "issue with other name of country". In response LIM explained that the 24 listed vehicles for which the A.TR was sought had been "presold to a leasing company in Belgium". LIM also confirmed that "in future when we are in need of this documentation we will advise you before the vehicles are manufactured. We only became aware that these certificates were required when the vehicles arrived in Belgium. We now find ourselves where these Transits are stranded at the port awaiting documentation. Name of country on the document would thus be Belgium." FordO's response was: "I am not able to do nothing for invoiced vehicles we made since customs clearance but in future if you informed before production with order number or if possible, with vin number, we can of course issue an ATR with the name of Belgium as final destination".

26. Pausing there, and contrary to the Appellant's interpretation of this document, it is my view that FordO's position in respect of the 2011 request for a retrospective A.TR was no more than that they considered that they could not issue an A.TR postproduction where the goods in question had been produced for a customer established in Gibraltar. It does not say why that was the case but as there is a reference to needing to know prior to production it cannot be assumed that it was simply because on a shipment to Gibraltar an A.TR is an irrelevance because Gibraltar is not part of the EU. It may, in my view, be inferred that they needed to know prior to production in order that the vehicle produced complied with the Turkey Decision.

27. The Appellant relies, before me, and by LIM in the 2018 correspondence with FordO on an A.TR dated 16 May 2011 which it was said (by LIM in the correspondence with FordO and by the Appellant before me) that the A.TR was a retrospective A.TR and that I could therefore be satisfied that FordO both could and should have issued a retrospective A.TR in respect of the Vehicles.

28. I note that the A.TR in question had been issued under the simplified procedure but was not marked as retrospective, it is dated 16 May 2011 and related to 21 (not 24) transit vans exported to Belgium. The accompanying copy transit document T1 references 21 vehicles and does not provide the chassis numbers for the vehicles to which it relates, it is dated 14 May 2011. Having carefully considered this A.TR I am not satisfied that it was a retrospectively issued A.TR in respect of the vehicles to which the April 2011 emails relate. The emails reference 24 vans which, by 6 April 2011, had arrived in Belgium and were "stranded" there. It would therefore be highly unlikely (or indeed impossible) that they are the vehicles to which the movement on 14 May 2011 referenced in the T1 and A.TR relate. Further, the A.TR is not marked as retrospective as would have been required under Article 15 Turkey Decision.

29. Further, FordO had stated (in somewhat fractured English in the emails) that they could not issue the A.TRs for the 24 listed vehicles but could and would do so in the future if notified, "in advance of production", that an A.TR was required. I acknowledge that they do also state that they can issue an A.TR if provided with the vin number, which I assume to be the vehicle identification/chassis number which, again I assume, cannot be known until after production. However, all I can fairly conclude from the document is that, subsequently to the April 2011 emails FordO, who was plainly authorised by the Turkish customs authorities under the simplified procedure provided for in Article 11 of the Turkish Decision, issued a A.TR in respect of 21 vehicles demonstrating that there was no impediment to their issuing A.TRs for exports to the EU, at least if provided with the ultimate destination of the goods prior to production/export.

30. The next piece of evidence to which I was referred was an undated letter issued by FordO stating that A.TRs could only be issued manually and prior to production, on condition that the final destination country was in the EU. It was further stated that the A.TR could only be issued "if prior notice was given before Gate Release – this means that it is not possible to issue [A.TR] documents retrospectively." However, it was also indicated that the manual process for issue of A.TRs to a dealer in Gibraltar which was available in 2011 was no longer available following the introduction of a digital automated system. The letter confirms that 702 identified chassis (including the 85 which are the subject of this appeal) were manufactured in Turkey.

31. It appears to me that this letter was issued to LIM after LIM had sent FordO the April 2011 correspondence. It does not confirm that a retrospective A.TR had previously been issued. Taken with the previous correspondence I consider that the undated letter is consistent with what had previously been said i.e. that in order to issue an A.TR FordO needed to know that the goods were destined for use and free circulation the EU prior to production. I infer,

though with less certainly, that the change from a manual to a digital system required that notification of destination could not occur after "gate release".

32. Frustrated that little progress was being made with FordO, and in view of HMRC's position in this appeal that an A.TR was an essential document if Turkish preference was to be claimed, in August 2020 the Appellant's representative appointed a Turkish firm of lawyers to explore the options for obtaining A.TRs for the Vehicles. The Turkish lawyers met with the Turkish customs authorities on 24 August 2020. The customs authorities indicated that provided that FordO issued the retrospective A.TR it was likely that they would approve it (though approval was not guaranteed). The procedure adopted by the Turkish authorities was explained: first, the exporter must prepare the draft A.TR (which may be retrospective); second, the A.TR is passed to the Turkish Chamber of Commerce which approves it if prepared in accordance with the Turkish Decision; and third the customs authority stamps it.

33. The Turkish lawyers then entered into communication with the Chamber of Commerce which confirmed that retrospective issue and approval of an A.TR was at least theoretically possible, but the Chamber indicated that they had not experienced it occurring 3-5 years after the relevant export.

34. The Turkish lawyers essentially established that all roads lead back to FordO. Without a draft A.TR from FordO the apparent willingness of the relevant authorities to progress and approve it was irrelevant. FordO's customs team continued to state that they would not issue the retrospective A.TRs but, from the correspondence I have (which I accept is complete) it was not clear precisely on what basis. As a consequence, the matter was escalated to the FordO legal team. Through the FordO legal team it was indicated that: a) FordO had not previously issued retrospective A.TRs and it was not their business "way" to do so but that if there was no legal obstacle to retrospective issue they would be prepared to issue them; but b) they were concerned that the transactions may be assessed as a "parallel trade" with the consequence that the official dealer for Ford in the UK may object to the issue of the A.TR.

35. I note that FordO's continuing position that they had not issued retrospective A.TRs previously is consistent with the finding at paragraph 26 that the A.TR dated 16 May 2011 was not a retrospective A.TR. Further, the legal team had stated if there was no legal obstacle to the issue of an A.TR they were prepared to do so. There was no elucidation of the scope of any legal obstacle or how and in what circumstance it might arise.

36. A potential solution (at least to the issue identified regarding the parallel trade) was suggested through seeking confirmation from Ford in the UK that FordO should issue the retrospective A.TR. The Appellant's representative instructed the Turkish lawyers to invite FordO to obtain the instruction from Ford in the UK. It appears that FordO failed to do so claiming that they had no point of contact with Ford in the UK as FordO was a joint venture operated by the Turkish party in the venture.

37. It appears that LIM then determined to communicate directly with Ford UK, emailing them in December 2020. It was explained to the UK Ford team that it had been established that retrospective A.TRs could be issued (both under EU law and as a matter of procedure in Turkey) and that all that was required was the draft A.TR from FordO but that FordO wanted or needed an instruction from the official UK dealer of Ford Transit vans in order to be prepared to do so.

38. LIM were unsuccessful in securing the required instruction and on 13 April 2021 the Appellant's representatives wrote to Ford in the UK. The letter indicated that FordO was prepared to issue the retrospective A.TRs if Ford UK (as official dealer of Ford Transits in the UK) indicated they had no objection. Ford UK were invited to confirm they were happy for the retrospective A.TRs to be issued.

39. I note that this letter does not fully reflect what the Turkish lawyers recorded FordO as indicating (I intend no criticism of the writer, as the narrative reflects their understanding, and they did not benefit from the hindsight I can now provide). FordO had indicated that provided there was no legal obstacle to issuing the retrospective A.TRs and if the UK did not object they would issue the A.TRs. It appears to me that LIM, the Appellant's representative and therefore the Appellant interpreted "no legal obstacle" as having been limited to a procedural inhibit on retrospective issue and not more widely.

40. Correspondence ensued with LIM and the Appellant's representatives continuing to press Ford UK to issue the confirmation which they believed to be the only impediment to the issue of the retrospective A.TRs. The correspondence from the Appellant's representative was entirely focused on establishing that there had been a direct sale from Turkey to the UK.

41. On 13 October 2021 Ford UK sent an email to FordO confirming they were "happy" for FordO to provide the A.TRs. On the following day FordO, now acting through a representative, responded to Ford UK (copying the Appellant's representative) as follows by reference to Article 6(2) Turkey Decision:

> "According to the above article the customs union agreement between the European Union and Turkey, the direct shipping rule is essential in the trade between the EU and TR. The products here are in free circulation in Gibraltar and then sold to another company and selling to the United Kingdom in that company breaks the direct shipping rule. In addition, since Gibraltar is the 3rd country for Turkey, vehicles sold to Gibraltar may contain materials originating from the 3rd country, imported without paying customs duty, using the inward processing regime. However, if these vehicles are exported to the EU, we would not use the inward processing regime for the produces originating from the 3rd country, pay customs duty or pay compensatory taxes during export.
>
> For the reasons explained above, in my opinion that it is not possible for us or Ford EU (Spain) to arrange A.TR for these vehicles."

42. The Appellant's representative immediately addressed the issue as to whether the direct shipping rule had been met explaining that the Vehicles had not entered free circulation in Gibraltar but had been held under customs supervision throughout the period of transit. The response did not address the second issue raised by FordO concerning third country materials.

43. On 2 November 2021, through their representative, FordO responded:

> "[FordO's] stock includes materials that are in free circulation as defined in the Customs Union agreement and that come from third countries without paying customs duty within the scope of Inward processing regime. [FordO] looks at the order given while exporting and if the country to be exported is the 3rd country (for example Gibraltar), it produces the vehicle using the materials coming from the 3rd countries in its stock without paying customs duty within the scope of the inward processing regime and cannot issue an A.TR document for this vehicle. The tools you mentioned are within this scope. If we were told that these vehicles would be sent to the UK market before the vehicle was produced; we used to manufacture the vehicles using materials in free circulation in our stock and export the vehicles by issuing A.TR stating in the customs declaration that the final destination country would be the UK. This information should have been given to us at the time of ordering. Unfortunately, I would like to inform you that we will not be able to organize A.TR for these vehicles."

44. In response the Appellant's representative advanced the position that A.TRs could nevertheless be provided as all the Council Decision required was that the goods were

manufactured in Turkey (which was accepted) and that they were directly shipped to the UK (which had been demonstrated). No legal analysis was provided for the statement that all that was required was that the good be manufactured in Turkey. A.TRs were invited indicating that some reassurance could be derived from the fact that once issued they would need to be approved by the Chamber of Commerce and the customs authorities.

45. FordO, through their representatives, responded:

> "In the order given to [FordO], it was stated that the vehicles should be sent to Gibraltar, and accordingly, [FordO] cannot issue A.TR for these vehicles, since [FordO] produced the vehicles using materials that are not in free circulation and exported them to Gibraltar.
>
> Since [FordO] sends these vehicles by ship, the T1 document you mentioned was not issued by [FordO] or a transporter in Turkey."

46. The Appellant's representative sought to establish the basis on which FordO considered, at production, that the Vehicles were destined for the market in Gibraltar rather than in the UK, particularly in light of the fact that the Vehicles were right hand drive and, by reference to the T1 documents that Ford UK was shown as the exporter with movement via Spain. Despite many chasing emails no response was ever received from FordO on this issue.

47. I have considered whether, because the Vehicles were right hand drive FordO should have concluded that they were ultimately destined for home use in the UK but, in the end, concluded that there are sufficient African territories which are sufficiently close to Gibraltar that drive on the left to conclude that being right hand drive, on its own, is not to be equated with a conclusion that the goods were destined for the UK home market; they may have been destined for any of the African countries who also drive on the left. I was provided with no evidence that LIM had informed FordO at the point of order that the customer was the Appellant and that the Vehicles were being transported directly to the UK. On the T1 documents I was shown the destination of the goods is shown as Gibraltar. In correspondence FordO say that they did not know and were not informed that the Vehicles were to be directly imported into the UK and from the evidence I have seen there is no evidence to indicate that FordO's assumption in this regard was wrong.

48. As indicated an antecedent question to be answered before I can consider whether the legislative framework permits amendment of the customs declaration retrospectively and by reference to alternative evidence is whether the Vehicles meet the provisions of the Council Decision. The Appellant bears the burden of proving that they do.

49. Having carefully considered the limited material available to me I am unable to conclude even on the balance of probabilities that the Vehicles are eligible for Turkish preference. I bear in mind that FordO, throughout, was communicating in English. I consider that it is tolerably clear that FordO's production policy was driven by their understanding of where the vehicles purchased were destined. Where production was known to be for home use in the EU parts imported using inward processing relief were cleared for free circulation in Turkey prior to manufacture or, at the very latest when the manufactured vehicle was exported (gate release). Where the goods were destined for a third country the parts imported under inward processing relief were not cleared (to have done so would unnecessarily increase the raw material cost of the manufactured vehicle).

50. It appears, as far back as 2011, that FordO considered all vehicles manufactured and sold to LIM were destined for a third country unless they were expressly notified otherwise with the consequence that they used parts subject to inward processing relief and not cleared for free circulation in Turkey. FordO were consistently clear that they needed to know before production/by the time of gate release (by which I understand them to mean the point at which

they are declared for export) that the goods were destined for the EU and would require an A.TR.

51. I find as a fact that as FordO had not been informed at the relevant time that the Vehicles were to be sold by LIM to the Appellant and shipped directly to the UK. I infer from this that FordO did not clear third country parts to free circulation prior to incorporation into the Vehicles or prior to declaring the Vehicles for export.

DECISION ON THE QUESTION OF ELIGIBILITY FOR PREFERENCE

52. The Council Decision (Article 3) requires that in order for Turkish preference to apply in respect of goods exported to the EU that the goods in question be in free circulation in Turkey. Where the goods in question have been manufactured from parts imported from third countries those too parts must have been cleared into free circulation prior to the export of the manufactured goods into which they have been incorporated in order to meet the free circulation requirement.

53. The parties appeared to agree that legal analysis but, as indicated in paragraphs 17 and 20 the parties each took a different view of the evidence and asked me to make opposing inferences from the evidence in determining the facts.

54. I have concluded that there is insufficient evidence to conclude that the parts used to manufacture the Vehicles were in free circulation. FordO has stated (consistently) that they must know prior to production that the finished goods will be exported to the EU in order that parts imported under inward processing relief may be cleared (or alternatives already in free circulation used) in order to them meet the requirements of Article 3 Council Decision. The Appellant has therefore failed to meet the burden of proof on it – despite its best endeavours to do so.

55. It is plain that something has gone very wrong. The Appellant ordered the Vehicles for home use in the UK and believed that 0% duty would be payable when the Vehicles were imported. It is apparent that from 2011 LIM knew that FordO needed to be notified prior to production when LIM were ordering vehicles for use in the EU but, for reasons unknown, had not, it appears, made FordO aware that the Vehicles were destined for the UK.

56. However, as I cannot be satisfied that the terms of Article 3 are met the appeal must fail.

COMMENT ON THE OTHER ISSUES IN THE APPEAL

57. On the basis of the conclusion reached it is unnecessary for me to address the questions identified in paragraph 15 or to make any finding on the question of alternative evidence. However, as these were the issues on which the case was put I provide a summary of the arguments and an indication of my view on each.

Is amendment permitted under Article 78 CCC and Article 173 UCC as relevant?

58. The Appellant's case, in summary, on this issue was:

(1) By reference to the judgment of the CJEU in *Terex Equipment Limited* (C-430/08) (***Terex***) and *Overland Footware* (C-468/03) the Appellant was entitled to amend the declarations incorrectly made declaring the goods to RGR on the basis that Article 78(3) CCC provides for the mandatory regularisation of incorrect declarations where it is established that the declarations have been made by reference to the wrong procedure code.

(2) Relying on *VAEX Varkens-en Veehandel* (C-387/13) it was contended that the error giving rise to the use of the wrong procedure code could be either a clerical error (not relevant here) or an error of interpretation of the applicable law.

(3) I was invited to determine what the "actual situation" was vis a vis the status of the imports in question and, on the basis that the Vehicles qualified for preference the declarations should be regularised so as to reflect the actual situation – in this case 0% duty.

(4) The same principles applied for periods covered by Article 173(3) UCC despite the terms of Article 173(2) because the UCC was a recast of the CCC such that Article 173(2) must be interpreted through the same "mandatory" lens identified in *Terex*.

59. HMRC contended that this question arose only were I to conclude, in connection with the second question, that there was any basis for determining that an alternative procedure code justifying 0% duty (i.e. preference) without an A.TR. As set out below HMRC contended that there was no possibility of amendment as the Appellant had no A.TRs for the Vehicles. However, HMRC noted that for imports post 1 May 2016 Article 173(2) UCC precluded an amendment to the declaration because the request for amendment post dated HMRC's visit. For the earlier period HMRC contended, by reference to *Antiono Capalso SpA v Agenzia delle dogane e deo monololi* (C-496/19) (***Capalso***) that *Terex* was authority only for mandatory amendment being made prior to the goods in question being released into free circulation; where goods had been released it was contended that there is a "margin of discretion" afforded to HMRC such margin of discretion being exercised by reference to whether it is materially possible to establish whether the application for amendment is well founded and that the error has led to the incorrect payment of duties.

60. I note that HMRC's submissions were made despite it having been accepted within HMRC during the course of the enquiry and prior to the issue of the demand that amendment to the declarations would have been possible had the Appellant obtained retrospective A.TRs. Indeed it was accepted that even after the issue of the clearance demand amendment to it could be made in respect of retrospective A.TRs produced.

61. Having briefly considered the arguments of the parties I tend to the view that **if** the Appellant had established that the Vehicles were entitled to preference **and** had been able to obtain retrospective A.TRs for the imports I agree with the officers of HMRC considering the issue that amendment would have been required or at least that the margin of discretion if reasonable exercise should have been exercised in the Appellant's favour in respect of periods prior to 1 May 2016 under Article 78(3) CCC.

62. As regards Article 173(3) UCC I would have wanted to hear further submission on the effect of codification. It appears that Article 173(2) UCC has introduced a restriction on the circumstances in which the "margin of discretion" may be exercised. However, I would have tended to the view that had A.TRs been obtained retrospectively that regularisation was possible on the basis that the position post receipt of an A.TR was so materially different to the situation before its receipt that it would have been reasonable and proportionate to regularise the declarations.

What is the significance of the lack of an A.TR?

63. In essence the Appellant contends that there is no significance in the absence of A.TRs provided that they can, by alternative evidence, establish an entitlement to preference. They contend that to require proof of preference by reference to a single document which, in this case through no fault of their own had provided impossible to obtain, is disproportionate. They contended that the terms of Article 78 CCC was predicated on bringing the customs procedure declared in line with the real situation for all types of error (support was derived for this proposition from the Advocate General's opinion in *Pfeifer & Langen* (C-97/19) paragraphs 41 and 48 – 53).

64. The Appellant drew an analogy to the position taken by the CJEU and domestic courts in connection with the right to deduct input tax which generally requires the taxpayer to hold a VAT invoice but in respect of which alternative evidence may be used.

65. HMRC contend that the terms of the Turkey Decision are plain and provide a coherent infrastructure for the basis on which preference may be claimed and it requires an A.TR. HMRC pointed to each of the instances under the Turkey Decision in which mandatory language such as "shall" or "must" was used in connection with the holding of and A.TR. It was further contended that the Tribunal had already accepted in *DSG Retail v HMRC* [2010] UKFTT 413 that the A.TR was the sole means for establishing entitlement to preference (see paragraph [30]).

66. HMRC contend that there is no comparable analogy to input tax as the provisions of the Principal VAT Directive (and consequently the domestic legislation) expressly provide for alternative evidence to claim input tax. The Turkey Decision contains no comparable provision.

67. On this issue I agree with HMRC. The Turkey Decision represents the detailed rules laid down by the Co-operation Committee on the implementation of the Council Decision. Article 5 states that proof that the necessary conditions for implementation of the provisions on free circulation laid down in the Council Decision "are met shall" be provided by an A.TR. There is no ambiguity in that requirement. Article 5 is to be contrasted with Article 6 concerning evidence that the goods were directly shipped from Turkey to the EU where physically the goods are transported under customs supervision through third countries. Article 6 lays down the evidence required to demonstrate direct shipping as a single transport document, a certificate containing identifying information from the third county or "failing these any substantiating documents". It would be surprising that alternative substantiating documents would be specified under Article 6 and simply permitted without a similar provision for the A.TR. Further, there is express provision for duplicate and retrospective A.TRs to be produced where either the first A.TR is lost or where eligible goods are, in error, transported without and A.TR. The Turkey Decision has comprehensively covered all bases to ensure that proportionality is met despite a requirement that every eligible export is supported by an A.TR. It is therefore right to conclude that without an A.TR there is no procedural basis for claiming preference.

68. For these reasons I would have rejected the Appellant's appeal for want of an A.TR even had I concluded that preference had been evidenced.

DISPOSITION

69. The appeal is dismissed. The Appellant is not entitled to input the Vehicles under preference.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE
Release date: 07th SEPTEMBER 2023