Neutral Citation: [2023] UKFTT 00889 (TC)

Case Number: TC08964

FIRST-TIER TRIBUNAL
TAX CHAMBER

Alexandra House, Manchester

Appeal reference: TC/2022/02219

CUSTOMS DUTY AND IMPORT VAT – C18 post clearance demand note - export of gold and import of gold jewellery – outward processing relief – whether Customs Duty and import VAT payable only on processing costs or on the full value of the imported jewellery –Articles 86(5), 211 and 259 of the Union Customs Code (Regulation (EU) 952/2013) – Regulation 126 Value Added Tax Regulations 1995 – possible remission of Customs Duty under Articles 116 – 120 Union Customs Code – ability of the Tribunal to take into account arguments based on EU and/or domestic principles of legitimate expectation – Appeal allowed in relation to import VAT but refused in respect of Customs Duty

Heard on: 8 September 2023
Judgment date: 11 October 2023

Before

TRIBUNAL JUDGE ROBIN VOS
MS SHAMEEM AKHTAR

Between

FATIMA JEWELLERS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Devshi Chothani of DBF Associates, Accountants

For the Respondents: Mr James Abernethy of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Since approximately 2012, the appellant, Fatima Jewellers Limited has been exporting gold to Dubai and importing gold jewellery from Dubai.

2. Where gold is temporarily exported from the UK in order to be made into jewellery, it is possible, subject to certain conditions, for Customs Duty and import VAT to be paid only on the cost of the work carried on outside the UK when the jewellery is imported into the UK and not on the full value of the jewellery.

3. Following an investigation, HMRC concluded that Fatima Jewellers did not satisfy the relevant conditions. As a result of this, on 17 November 2020, they issued Fatima Jewellers with a post clearance demand note (C18) for Customs Duty of £151,427.95 and for import VAT of £1,241,709.48 in respect of 18 importations of gold jewellery made by Fatima Jewellers between September 2017 and July 2018.

4. Fatima Jewellers appeals against the assessment both in relation to Customs Duty and import VAT. The appeal does not take issue with HMRC's calculations but Fatima Jewellers believes that it was entitled to pay the duty and the VAT only on the processing costs incurred outside the UK and not on the full value of the gold jewellery imported.

5. As far as Customs Duty is concerned, the appeal is based primarily on arguments relating to legitimate expectation resulting from letters written to Fatima Jewellers by HMRC and by the Border Force in 2014 and from the fact that the Border Force never raised any issues in relation to the way in which its Customs declarations were made in respect of the 18 occasions of import.

6. In relation to import VAT, Fatima Jewellers relies not only on arguments relating to legitimate expectation but also on the fact that the relevant requirements of the VAT regulations have been satisfied.

LATE APPEAL

7. HMRC's review conclusion letter was issued on 17 March 2021. A valid appeal was only made to the Tribunal on 15 March 2022. It is however apparent that Fatima Jewellers attempted to appeal to the Tribunal within the relevant time limit but was unable to do so due to confusion about the need to apply for consent from HMRC to notify the appeal to the Tribunal without the VAT and Customs Duty having been paid. HMRC do not object to the late appeal and we gave consent for the appeal to be notified outside the statutory time limit.

THE EVIDENCE

8. We had before us a bundle of documents and correspondence prepared by HMRC which included all of the documents which both Fatima Jewellers and HMRC had indicated they wished to rely on in support of their respective cases. In hindsight, it would have been helpful if both parties had provided additional documents to the Tribunal. However, they chose not to do so and so we have had to reach our decision based on the limited evidence available to us.

9. Witness evidence was provided by Fatima Jewellers' director, Mr Kamran Atta and by the HMRC officer who took over the case in June 2020 and issued the assessment in October 2020, Ms Kay Curtis.

10. English is not Mr Atta's first language. However, no interpreter had been requested. There were one or two occasions where Mr Atta did not initially fully understand the question which was put to him. However, on these occasions the question was either re-phrased or we permitted him to clarify matters through Fatima Jewellers' representative, Mr Chothani.

Overall, we were satisfied that Mr Atta was able to understand the questions put to him and to respond appropriately.

11. We found Mr Atta's evidence to be clear and concise in most respects. However, it was apparent from his evidence that he had little detailed understanding of the relevant Customs procedures and that in respect of this, Fatima Jewellers relied on a consultant, Mr Andy Spragg. Indeed, in his witness statement, Mr Atta quotes the text of an email from Mr Spragg relating to the use of particular Customs Codes and the acceptance of particular procedures by the Border Force at the relevant time as well as what appeared to be a subsequent change of practice.

12. During cross-examination, Mr Atta gave evidence in relation to the Customs Codes used on the relevant declarations which was clearly contrary to the documentary evidence available. It was suggested at this stage by Mr Chothani that Mr Spragg should give evidence about this aspect as he had been asked by Fatima Jewellers to attend the hearing for this purpose.

13. However, Mr Spragg had not provided his own witness statement and had not addressed this particular issue in his email which Mr Atta quoted in his own witness statement. The position taken by Mr Atta was not only contrary to the documentary evidence but was also the first time that what he was asserting had been suggested by Fatima Jewellers and/or its representative during the review process and the appeal to the Tribunal.

14. Although we bear in mind the starting point that all the relevant evidence should be admitted unless there is a compelling reason of contrary (see *Mobile Export 365 Limited v HMRC* [2009] EWHC 797 (Ch) at [20]), we did not consider that it would be in accordance with the overriding objective of dealing with cases fairly and justly to allow Mr Spragg to give evidence in circumstances where he had not provided a witness statement and where the particular point in respect of which he was being asked to give evidence was sufficiently dealt with by the documentary evidence. We did not therefore hear from Mr Spragg.

15. Ms Curtis' evidence was short and to the point. Mr Chothani did not wish to cross-examine Ms Curtis although the Tribunal did have a small number of questions for her arising out of her witness statement. Although we have no hesitation in accepting Ms Curtis' evidence, we bear in mind that she was not the investigating officer and that she only took over after the decision to raise the assessment had been made. Any knowledge she had was therefore based on her review of HMRC's file rather than on first-hand knowledge.

16. Mr Abernethy asked for permission for Ms Curtis to give further evidence in chief in relation to matters connected with HMRC's investigation such as statements which Mr Atta is said to have made when HMRC visited Fatima Jewellers' premises during their investigation. However, we did not allow Ms Curtis to give this further evidence, essentially for the following reasons:

> (1) It would have been open to HMRC to provide evidence surrounding their investigation, including copies of correspondence and interview notes, had they wished to do so.
>
> (2) Ms Curtis did not participate in the investigation and so any evidence she could give would be based solely on her recollection of what was on HMRC's file and might not therefore be reliable in the absence of the documentary evidence.
>
> (3) As with Mr Spragg's evidence, it would not be fair to Fatima Jewellers for this evidence to be given only at the hearing with no advance notice and no opportunity to deal with it.

FACTS

17. The facts are fairly straightforward and, with the exception of a couple of points which we will come onto, are not in dispute.

18. Mr Atta has been the sole director of Fatima Jewellers since 2012. The company's main business is crafting gold jewellery.

19. Fatima Jewellers obtains jewellery by purchasing it as stock or receiving jewellery from customers who want the jewellery to be made into new pieces. The gold is melted down and is then taken to Dubai in the form of gold bars. New jewellery is made by skilled craftsmen in Dubai. Mr Atta takes the gold to Dubai himself and waits there (typically for five or six days) for the new jewellery to be ready. He then brings the new jewellery into the UK on behalf of Fatima Jewellers.

20. One factual issue which we have had to determine is whether the gold which Mr Atta takes out of the UK is the same gold as is used to make the jewellery which he brings back to the UK. We will discuss this when addressing the question of liability to import VAT but, for the reasons explained in that section, we accept that it is.

21. Fatima Jewellers had engaged Mr Spragg to deal with the relevant customers' formalities. He prepared the Customs declarations. On export, he provided the relevant declaration to Mr Atta. On import, Mr Spragg attended the airport when Mr Atta arrived back in the UK and provided the relevant declaration to the Border Force officer dealing with the import.

22. In 2014, Fatima Jewellers applied for authorisation to operate what is known as Outward Processing Relief for Customs Duty purposes. This application was rejected by HMRC on the basis that they could identify no benefit to Fatima Jewellers in using Outward Processing Relief. The reason for this appears to be related to the need to show that the gold which was exported had an EU origin. HMRC did however go on to note that Outward Processing Relief authorisation was not needed in order to pay import VAT only on the processing costs and referred Fatima Jewellers to the relevant sections of HMRC Public Notice 235 ("PN235") relating to Outward Processing Relief.

23. At around the same time, Fatima Jewellers received a letter from the Border Force relating to a particular export. The letter noted that Fatima Jewellers was proposing to use an incorrect Customs Code and suggested that, as Fatima Jewellers was not authorised to operate Outward Processing Relief, it should use different codes. They explained that this would allow relief from import VAT but warned that Customs Duty would still be payable unless Fatima Jewellers could produce an appropriate certificate of origin. There is no suggestion that Fatima Jewellers ever had such a certificate of origin. We find as a fact that it did not.

24. The import declarations provided by Fatima Jewellers for the 18 importations in question in fact contained two items. The first was described as "gold" or "gold bars" using Commodity Code 71081310 (relevant to semi manufactured gold) and the Customs Procedure Code 4000065. The second item was described as "gold jewellery" using Commodity Code 71131900 and Customs Procedure Code 4000000.

25. The weights of the gold given for the two items on the Customs declaration were identical. The Customs value declared was however only the processing costs incurred outside the UK and not the full value of the gold jewellery that was imported. The net effect of all of this was that Fatima Jewellers only paid Customs Duty and import VAT on the processing costs of the gold jewellery which it imported.

26. Mr Atta confirms that he only imported gold jewellery into the UK and did not import gold or gold bars. His evidence in cross-examination was that the Customs declarations on

import referred only to gold jewellery and did not have any entry for gold or gold bars. It is however clear from the documentary evidence that he was mistaken in relation to this.

27. Although Mr Atta was adamant in his evidence on this point, we do not accept it. By his own admission, Mr Atta did not understand the Customs procedure codes. He is therefore simply mistaken in his evidence on this point. In our view, the most likely explanation is that, without authorisation to operate Outward Processing Relief, Mr Spragg considered, based on his dealings with HMRC and the Border Force, that the use of these codes would ensure that Fatima Jewellers only paid import VAT and Customs Duty on the processing costs and not on the full value of the jewellery which was imported.

28. These procedures for the import of the gold jewellery were not queried by the Border Force. This was the case not only for the 18 imports in question but a total of at least 68 imports starting in October 2016. HMRC originally intended to assess all of these imports but, by the time they came to make their assessment, they were out of time to do so in relation to all but the last 18.

29. At some point after July 2018, the Border Force rejected the procedures being used by Fatima Jewellers as it did not have authorisation to operate Outward Processing Relief. As a result of this, Fatima Jewellers made a further application for authorisation which was granted by HMRC in August 2019.

THE LAW

30. As will be apparent, the appeal relates to both Customs Duty and import VAT. The rules are different for each. As far as import VAT is concerned, the law is contained in the Value Added Tax Act 1994 ("VATA") and the Value Added Tax Regulations 1995 ("VATR"). In relation to Customs Duty, the UK was, at the relevant time, a member of the EU. The provisions which are relevant are contained in Regulation (EU) 952/2013 which is generally known as the Union Customs Code or UCC.

Customs Duty

31. Subject to the availability of Outward Processing Relief, Customs Duty on the import of gold jewellery from outside the UK is normally payable on the value of that jewellery at a rate of 2.5%. This is set out in Article 56 of the UCC and various implementing regulations which we do not need to go into as there is no dispute in relation to this aspect.

32. There are also specific provisions contained in the UCC (Articles 70 and 74) for determining the Customs value of goods imported to the EU. Again, we do not need to go into the detail of this as HMRC's calculation of the value of the jewellery is not disputed.

33. The availability of Outward Processing Relief is provided for in Article 86(5) of the UCC which confirms that where the Outward Processing procedure has been adopted, the amount of Customs Duty is to be calculated on the basis of the cost of the processing operation undertaken outside the EU.

34. However, Article 211 of the UCC imposes a requirement for authorisation from the relevant Customs authorities for the use of the Outward Processing procedure. It is common ground that, during the period in question, Fatima Jewellers was not authorised to operate the Outward Processing procedure.

35. Indeed, Mr Chothani did not identify any basis on which, under the UCC, Fatima Jewellers was entitled to pay Customs Duty only on the processing costs rather than the full value of the gold jewellery imported. Instead, he relied on the letters written to Fatima Jewellers in 2014 by HMRC (when it rejected the application for authorisation to operate Outward Processing Relief) and by the Border Force as well as the fact that the procedures

operated by Fatima Jewellers went unchallenged by the Border Force throughout the period in question.

36. Although Mr Chothani did not use these specific words, in essence he is suggesting that Fatima Jewellers had a legitimate expectation that Customs Duty (and import VAT) would only be charged on the processing costs and not on the full value of the jewellery.

37. There are separate principles of legitimate expectation under EU law and English domestic law and we consider each in turn.

Legitimate Expectation Under Domestic Law

38. As explained by the Upper Tribunal in *Caerdav Limited v HMRC* [2023] UKUT 00179 (TCC) at [162], for a representation or assurance to give rise to a legitimate expectation under English law it must be "clear, unambiguous and devoid of relevant qualification" (see *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Limited* [1990] 1 WLR 1455 at [1569G]).

39. A threshold question is whether the Tribunal has any jurisdiction to consider arguments based on legitimate expectation under domestic law. In the context of Customs Duty and import VAT, this was dealt with by the Upper Tribunal in *Caerdav Limited v HMRC* [2023] UKUT 00179 (TCC).

40. Referring to the decision of the Court of Appeal in *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 and the decision of the Upper Tribunal in *Henryk Zeman PP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) the Upper Tribunal in *Caerdav* noted at [152-153] that the starting point is that grounds of appeal which concern public law arguments (such as legitimate expectation) should be pursued in judicial review proceedings rather than before the First-tier Tribunal but accepted that the question as to whether or not the First-tier Tribunal has jurisdiction to consider public law arguments depends on the statutory provisions in question.

41. In looking at the relevant statutory provisions, the distinction drawn by the Upper Tribunal in *Caerdav* at [156-158] is whether or not the decision made by HMRC entailed some element of discretion (as was the case in *Henryk*) or whether the decision was mandatory. Public law arguments cannot be deployed where the decision relates to a mandatory application of the law to the facts but may be available where HMRC has exercised a discretion.

42. In *Caerdav*, the Upper Tribunal was specifically concerned with an appeal under s 83(1)(b) VATA (which is not relevant in this case) but also to an appeal under s 16 Finance Act 1994 ("FA94") against a "relevant decision" which is defined in s 13A FA94.

43. In this case, as far as Customs Duty is concerned, HMRC's decision that Fatima Jewellers is liable to Customs Duty and the amount of that duty is a "relevant decision" within s 13A(2)(a) FA94 which provides as follows:

> "(2) A reference to a relevant decision is a reference to any of the following decisions -
>
> (a) any decision by HMRC, in relation to any Customs Duty or to any agricultural levy of the European Union, as to -
>
> (i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
>
> (ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
>
> (iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."

44. The Upper Tribunal in *Caerdav* described at [157] all of these decisions as "mandatory provisions" and concluded at [158] that arguments relating to domestic principles of legitimate interest could not be entertained by the First-tier Tribunal in respect of such matters.

45. Clearly this is correct as far as Fatima Jewellers' liability to Customs Duty is concerned and the amount of that duty. If the relevant conditions are satisfied, a liability arises and the application of the relevant legislation to the facts of the case determines the amount of the liability.

46. It might, at first glance, seem surprising that a decision of HMRC as to whether or not to grant remission of any duty (as provided for in s 13A(2)(a)(iv) FA94 – see paragraph 43 above) should be described as mandatory rather than the exercise by HMRC of a discretion. However, the possibility of remission was one of the key issues considered by the Upper Tribunal in *Caerdav* and there cannot be any doubt that the Upper Tribunal concluded that domestic law principles of legitimate expectation were not engaged in relation to this aspect. In our view, the Upper Tribunal was right in relation to this point.

47. We should note at this point that the possibility of remission of Fatima Jewellers' liability to Customs Duty had not in fact been raised by it prior to the hearing and it has made no application for remission. However, Mr Abernethy mentions the possibility in his skeleton argument (although submits that, as no application for remission has been made, no appealable decision has been taken by HMRC and so the Tribunal has no jurisdiction to consider the point).

48. Remission of Customs Duty is specifically provided for in Articles 116-121 of the UCC. On the face of it, these provisions are mandatory. Article 116 provides that Customs Duty "shall be repaid or remitted" if any of four specific grounds are satisfied.

49. One of those grounds is contained in Article 119 of the UCC and applies where the Customs authorities have made a mistake which the importer could not reasonably have detected and where the importer was acting in good faith. The second ground which is potentially relevant to this appeal (described as "equity") is contained in Article 120 of the UCC which applies where there are special circumstances and there has been no deception or obvious negligence on the part of the importer. Again, both of these provisions state that Customs Duty "shall be repaid or remitted" if the relevant conditions are satisfied.

50. Although it might be said that there is an element of discretion on the part of HMRC in determining whether an importer was acting in good faith or whether special circumstances exist, we agree with the Upper Tribunal that these are in fact mandatory provisions. The reason for this is that HMRC are required to assess objectively whether the conditions are satisfied. There is no element of discretion.

51. Our conclusion therefore is that the Tribunal has no jurisdiction to consider arguments based on the domestic principles of legitimate expectation in any appeal against the decisions made by HMRC in relation to the liability of Fatima Jewellers to Customs Duty. Had they made a decision in relation to the remission of Customs Duty, there would also be no room for the application of domestic law principles of legitimate expectation in respect of that aspect either.

EU Principle of Legitimate Expectation

52. The Court of Appeal explained in *R (Drax Power Limited) v HM Treasury* [2017] EWCA Civ 1030 at [62] by reference to the decisions of the European Court of Justice (ECJ) in

Plantanol [2009] ECR I-8343 and in *Accorinti v European Central Bank* (Case T-79/13) that the EU principle of legitimate expectation can only be relied on if three conditions are satisfied:

> (1) precise, unconditional and consistent assurances originating from an authorised and reliable source have been given to the person concerned by the EU authorities;
>
> (2) the assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed; and
>
> (3) the assurances given must be consistent with the applicable rules.

53. The Court of Appeal in *Drax* notes at [45] that the assurance may be given by words or conduct.

54. In *Caerdav*, the Upper Tribunal considered whether the EU principle of legitimate expectation could be relied on by the appellant in that case when considering whether HMRC should have remitted the Customs Duty in question. It concluded at [118] that it could although, on the facts, it concluded that no legitimate expectation arose.

55. The Upper Tribunal did not however reach any definitive conclusion as to whether the EU principle of legitimate expectation could be deployed as a freestanding principle separate from the provisions in the UCC relating to remission of Customs Duty.

56. Mr Abernethy on behalf of HMRC submitted that, in the context of Customs Duty, the EU principle of legitimate expectation could only be taken into account in determining whether there were special circumstances for the purposes of remission on the grounds of equity under Article 120 of the UCC.

57. As a matter of principle, it seems to us that, if the Upper Tribunal is right that account can be taken of the EU principle of legitimate expectation in the context of remission of Customs Duty, there is no reason why it cannot be taken into account by the First-tier Tribunal as a self-standing principle.

58. This could make a difference since, in order for there to be remission on the grounds of equity, there must not only be special circumstances (which could be provided by a legitimate expectation – see *Caerdav* at [118-119]) but there must also be no "obvious negligence" on the part of the taxpayer. One possible answer to this is that it is hard to conceive of circumstances where the EU principle of legitimate expectation is engaged if there has been obvious negligence.

59. However, we note that this point was not fully argued by the parties in this case and we do not wish to make any decision in relation to this point since, as we explain below, we do not in any event consider that the EU principle of legitimate expectation is engaged on the facts of this case.

IMPORT VAT

60. Unlike Customs Duty, there is no requirement for an importer to be authorised to operate Outward Processing Relief in order to be entitled to pay import VAT only on the cost of the services provided outside the UK. Instead, regulation 126 VATR provides two conditions which must be satisfied:

> "(a) at the time of exportation the goods were intended to be reimported after completion of the treatment or process outside the Member States, and
>
> (b) the ownership in the goods was not transferred to any other person at exportation or during the time they were abroad."

61. There is no suggestion that the ownership of the gold exported by Fatima Jewellers was transferred to any other person whilst it was abroad. The only question therefore is whether, when the gold was exported, it was intended to be reimported after being made into gold jewellery.

62. Assuming the relevant conditions are satisfied, the effect is that VAT is payable as if the work had been carried out in the UK. As explained in PN235 (paragraph 2.8), the result is that VAT is payable on the aggregate of the processing costs, any transport costs and the amount of any Customs Duty.

63. Although Regulation 126 VATR requires HMRC to be satisfied that the relevant conditions apply, Mr Abernethy accepts that, on an appeal to the Tribunal, the question is whether the Tribunal is satisfied that this is the case.

64. The reason for this is that the VAT legislation imports the appeals process which applies to Customs Duty (this is the combined effect of ss 1(4) and 16(1) VATA and is confirmed by the wording of s 84(9) VATA). In relation to Customs Duty (and therefore import VAT), s 16(5) FA94 gives the Tribunal power on an appeal to quash the relevant decision and to substitute its own decision.

65. As far as legitimate expectation is concerned, it is clear from the principles set out in *Caerdav* that the Tribunal cannot consider arguments based on the domestic principle of legitimate expectation. There is no discretion being exercised by HMRC. The question is simply whether the conditions set out in Regulation 126 VAT are satisfied. If they are, the result (that VAT is payable on a lower amount) is mandatory.

66. As far the EU principle of legitimate expectation is concerned, we heard no submissions from either party as to whether the Tribunal had jurisdiction to apply this principle in the context of import VAT. We therefore express no view on this as we do not need to do so given our conclusion, explained below, that Fatima Jewellers is in any event entitled to rely on Regulation 126 VATR.

ISSUES TO BE DETERMINED

67. Based on the above, as far as Customs Duty is concerned, the questions we need to determine are as follows:

> (1) Did Fatima Jewellers have a legitimate expectation in accordance with EU law principles that it would only have to pay Customs Duty on the relevant imports based on the processing costs rather than the full value of the gold jewellery which was imported?
>
> (2) Whether or not there was any such legitimate expectation, can Fatima Jewellers obtain remission of any Customs Duty either on the basis of a mistake by HMRC or on the basis of equity? This will involve considering whether, on the facts of this case, the Tribunal has any jurisdiction to determine the question of remission in the first place.

68. As far as VAT is concerned, the only question we need to determine is whether the gold which was exported was intended to be reimported after it had been made into jewellery.

CUSTOMS DUTY – EXISTENCE OF LEGITIMATE EXPECTATION

69. Mr Chotani relies on HMRC's 2014 letter in response to Fatima Jewellers' original application for authorisation to operate Outward Processing Relief. He suggests that this letter advises explicitly that there was no need for Fatima Jewellers to operate Outward Processing Relief and that Customs Duty would only be due on the processing costs and not on the value of the new jewellery. He also relies, to similar effect, on the letter from the Border Force received at around the same time.

70. In addition, Mr Chotani submits that Fatima Jewellers were entitled to rely on the fact that the import procedures were accepted by the Border Force officers on each relevant occasion.

71. Mr Abernethy, on behalf of HMRC, submits that, as far as the letters are concerned, any assurances given were insufficiently precise to give rise to any legitimate expectation under EU law principles.

72. In relation to the failure of the Border Force to take issue with the Customs declarations at the time of import, Mr Abernethy draws attention to the comments of the European Court of Justice in *Heuschen & Schrouff Oriental Foods Trading BV v Commission of the European Communities* (Case-38/07 P). In that case, following a change to the classification of certain goods, Heuschen continued to import goods using the wrong classification. The relevant Customs authorities accepted 29 declarations using the incorrect classification.

73. The Customs authorities subsequently sought to recover import duties based on the correct classification. Heuschen sought remission on the grounds of equity under the provision which was the predecessor to Article 120 of the UCC.

74. The key question which the Court had to determine is whether there was "obvious negligence" on the part of Heuschen. The Court observed at [60] that the remission of Customs Duty is an exception to the normal procedure and that the provisions which provide for remission should therefore be interpreted strictly and in such a way that the number of cases of remission remains limited. It is also noted at [61] that the relevant legislative provisions are published in the Official Journal of the European Communities and that everyone is deemed to be aware of that law.

75. Based on this, the Court concluded at [64] that Heuschen could not simply continue to import the goods under the incorrect classification on the sole ground that the classification had been accepted by the relevant authorities, as allowing "such negligence would be tantamount to encouraging operators to benefit from the errors of their Customs authorities".

76. It is perhaps relevant to note that, in that case, it was accepted that, for the purposes of remission, there was a "special situation" as a result of what the Court described as the error on the part of the Customs authorities.

77. Based on the decision in *Heuschen*, Mr Abernethy nevertheless submits that Fatima Jewellers cannot rely on the failure of the Border Force to challenge the declarations made when the gold jewellery was imported in order to establish the existence of a legitimate expectation under EU law.

The letters from HMRC and Border Force

78. We accept Mr Abernethy's submission that these letters do not give any precise assurances in relation to Customs Duty and cannot therefore be relied on as the basis for any legitimate expectation.

79. Looking first at the letter from HMRC dated 2 October 2014, this explains why, in the view of the writer, there would be no benefit to Fatima Jewellers in operating Outward Processing Relief. The conclusion is that, in the absence of evidence of EU origin for the gold which is exported, there would not be any duty paid on that gold which can then be offset against the duty which is due on the jewellery which is imported. Whilst this conclusion may or may not be right, there is clearly no suggestion that any Customs Duty payable on the gold jewellery which is imported should be limited to the processing costs incurred outside the UK.

80. The letter then goes on to refer to the fact that "you do not need to use the OPR arrangements to pay VAT on a reduced value on exported goods that are free of duty". The

letter suggests that if certain Customs procedures are operated, when the gold jewellery is imported, VAT would only be due on the processing costs, associated transport costs and the amount of any Customs Duty payable on the import. This section of the letter however clearly only deals with import VAT. There is no suggestion that Customs Duty would also be payable on a reduced value.

81. The letter from the Border Force similarly focusses primarily on the VAT position. The opening paragraph notes that Fatima Jewellers has presented a Customs declaration which states that the intention is to reimport the processed gold (i.e. the gold jewellery) "seeking VAT exemption on the value of the exported goods".

82. Border Force took the view that the proposed Customs code was incorrect and that, if the Customs declaration was presented in the form which it had been drafted, on return to the UK, VAT and import duty would be due on the full value of the gold plus any processing charges.

83. The advice from Border Force was that, if Fatima Jewellers was not approved to operate Outward Processing Relief, it should use a different Customs procedure code ("CPC"). They explained that the effect of this is that it "would afford you VAT relief on the value of the exported gold" so that the import VAT would be calculated on the processing costs, transport costs and the amount of any Customs or excise duties payable in the UK. In effect, the advice was the same as that given by HMRC in their letter of 2 October 2014.

84. Far from suggesting that Customs Duty would also be payable on the reduced amount, the letter goes on to note that "import duty is liable using this CPC" although does also state that "an accompanying GSP certificate will mean no duty is payable". A GSP (Generalised System of Preference) certificate is a certificate which identifies the origin of goods imported to the UK. Fatima Jewellers have at no point suggested that any GSP certificate was in existence in relation to any of the gold jewellery imported from Dubai.

85. It is therefore absolutely clear that neither of the letters relied on by Fatima Jewellers gave any assurances that Customs Duty would be payable on a reduced amount when the gold jewellery was imported into the UK and, as we have said, cannot therefore be relied on as forming the basis for any legitimate expectation that Customs Duty would only be payable on this reduced amount.

The actions of the Border Force

86. As mentioned above, the Border Force officers who dealt with the imports of gold jewellery in question did not raise any queries in relation to the Customs declarations made by Fatima Jewellers, nor did they make any suggestion that Customs Duty should be paid on the full value of the gold jewellery and not just on the processing costs.

87. The value shown for the goods on the Customs declarations was only the processing costs. We think it is right to infer from the discrepancy between the amount of processing costs and the actual value of the jewellery that any Border Force officer would have been well aware that Customs Duty was only being paid on the processing costs (the processing costs in each case being a few thousand pounds whilst the value of the gold contained in the jewellery was several hundred thousand pounds).

88. In these circumstances, we consider that the first requirement for reliance on the EU law concept of legitimate expectation explained by the Court of Appeal in *Drax* is satisfied. Through their conduct in accepting the declarations made by Fatima Jewellers, successive Border Force officers gave precise, unconditional and consistent assurances that, based on the Customs procedures used by Fatima Jewellers, Customs Duty was only payable in respect of the import of the gold jewellery on the processing costs and not on the full value of the jewellery.

89. In reaching this conclusion, we take account of the fact that, as is clear from the documentary evidence, not only were the 18 imports in question made without any concerns being raised but at least 50 earlier imports had been made on the same basis without being questioned.

90. In our view, the second requirement, that the assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed, is linked with the third requirement that the assurances must be consistent with the applicable rules. As the Court of Appeal in *Drax* notes at [45], what is required for a protected legitimate expectation to arise is "the promotion by the public authority in question … of an expectation as to how it will behave in the future".

91. The question in *Drax* was whether the replacement of one regime (in that case, relating to the climate change levy) with another regime with limited transitional provisions could be challenged on the basis of legitimate expectation. The issue in that case was therefore somewhat different as the conclusion of the Court of Appeal (at [79]) was that there was no clear or precise assurance that the regime would not be changed at short notice.

92. The question here is whether the assurances given by the actions of the Border Force are capable of creating a protected legitimate expectation in circumstances where, what appears to have been the practice of the Border Force, was not in conformity with the law which contained a clear requirement that, in order to pay Customs Duty only on the processing costs, the importer had to be authorised to operate Outward Processing Relief.

93. In our view, the cumulative effect of the second and third requirements explained in *Drax* is that a person cannot rely on assurances made by a public body, even if they are precise, unconditional and consistent, where those assurances are contrary to the requirements of the relevant legislation. As Mr Abernethy submitted, this is the effect of the third requirement that the assurances must be consistent with the applicable rules. If they are not, the result is that the second requirement is also not satisfied as the person to whom the assurances are addressed cannot have a legitimate expectation that the authority in question will act in a way which is contrary to the relevant rules.

94. As we have observed, the summary of the requirements for the existence of a protected legitimate expectation under EU law was taken from the decision of the ECJ in *Accorinti* at [75]. By way of authority for these three propositions, the Court in *Accorinti* referred to a number of cases. These cases included the decision of the ECJ in *Luxembourg v Commission*, T-549/08 at [71] which in turn refers to other decisions. Following through the chain of authorities, the relevant cases include *Branco v Commission*, T-347/03 at [102], *Forvass v Commission*, T-203/97 at [70] and *Vlashou v Court of Auditors of the European Communities*, Case 162/84 at [6].

95. In *Vlashou*, the applicant complained about a decision not to admit her to a competition for a particular vacancy with the Court of Auditors of the European Communities. She relied on the principle of legitimate expectation on the basis of an assertion that senior officials of the Court of Auditors had promised that she would be admitted to the competition.

96. Whilst the Court did not accept that the relevant assurances had been given, it noted that the regulations dealing with the competition process did not allow a person in Mrs Vlashou's position to be appointed. It concluded at [6] that "promises which do not take account of those provisions cannot therefore give rise to a legitimate expectation on the part of the person concerned, even if it is proved that they were made…"

97. In our view, the position here is no different. Whilst the various Border Force officers may have given implicit assurances by not challenging the procedures used by Fatima

Jewellers, any assurance given was in conflict with the clear requirement that a person had to be authorised by HMRC in order to benefit from Outward Processing Relief for Customs Duty purposes. Such assurances cannot therefore give rise to a protected legitimate expectation under EU law.

98. Although the provisions relating to remission of Customs Duty in Article 120 of the UCC do not refer specifically to the concept of legitimate expectation, we consider that those provisions are consistent with the conclusion which we have come to.

99. As noted above, the ECJ observed in *Heusehen* at [61] that any relevant EU legislative provisions are published in the Official Journal of the European Communities and that everyone is deemed to be aware of the law. As such, a failure to comply with the law (notwithstanding assurances from the relevant authorities) constitutes "obvious negligence" for the purposes of Article 120 of the UCC so that remission of Customs Duty is not available.

100. Although worded differently, in substance, this has the same effect as the requirement that, in order for a protected legitimate expectation to arise, the assurances given must be consistent with the applicable rules which, taking into account the comments made in *Heusehen,* are deemed to be known by the taxpayer as a result of being published in the Official Journal.

101. Our conclusion therefore is that, although implicit assurances were given by the relevant Border Force officials, these could not give rise to a protected legitimate expectation on the part of Fatima Jewellers that Customs Duty would only be payable on the processing costs incurred outside the UK as this was contrary to the requirement that, in order to benefit from Outward Processing Relief, the trader had to be authorised by HMRC to operate those procedures in accordance with Article 211 of the UCC.

REMISSION OF CUSTOMS DUTY

102. Mr Abernethy's position is that the Tribunal has no jurisdiction to consider remission of Customs Duty as no application for remission has been made by Fatima Jewellers in accordance with Article 121 of the UCC. HMRC has not therefore made any decision in relation to remission and there is nothing to appeal against.

103. Although, during the course of the hearing, Mr Chothani indicated that Fatima Jewellers wished to apply for remission, it is in our view clear that Mr Abernethy is right and that HMRC have not made any decision in relation to remission against which an appeal can be made. There is therefore no appealable decision in respect of which the Tribunal has jurisdiction.

104. Having said that, even if such a decision had been made by HMRC refusing an application for remission of Customs Duty, we do not consider that Fatima Jewellers would succeed in any appeal.

105. There are two possible bases for remission. The first is contained in Article 119 of the UCC which applies where a lower amount of Customs Duty has been paid as a result of an error on the part of the relevant authorities and the taxpayer was acting in good faith and could not reasonably have detected the error.

106. In relation to this, Mr Abernethy submits that the mistake was on the part of Fatima Jewellers and not the Customs authorities. This is because the value given for the goods imported was the processing costs and not the actual value of the jewellery. Customs Duty was therefore charged in accordance with what had been declared on the Customs forms.

107. Whilst, as we have noted, we infer that the Border Force officials would have known that Customs Duty was only being paid on the processing costs and not on the full value of the jewellery imported, we accept Mr Abernethy's submission that the authorities cannot be said

to have made a mistake where Customs Duty was charged in accordance with the Customs declaration made by the importer. As noted by Mr Abernethy, Article 15(2)(a) of the UCC makes it clear that the person lodging the Customs declaration is responsible for the accuracy and completeness of the information given in the declaration. The mistake was therefore made by Fatima Jewellers and not by the Border Force officials.

108. In any event, given that, as far as EU law is concerned, a person is deemed to be aware of the relevant legislative provisions, it cannot be said that Fatima Jewellers could not reasonably have detected any error on the part of the Border Force officials if it could be said that the error had been made by them rather than by Fatima Jewellers. The requirement to be authorised in order to operate out of the processing relief is clear from Article 211 of UCC and the error could therefore have reasonably been detected.

109. Turning to Article 120 of the UCC, we have already observed that, for essentially the same reason, Fatima Jewellers cannot satisfy the requirement that there is no "obvious negligence" attributable to them. They are deemed to know of the requirement to be authorised before operating Outward Processing Relief and that there is no other basis on which, on the import of gold jewellery, Customs Duty would only be payable on the processing costs incurred outside the UK.

110. Therefore, although the assurances implicitly given by the Border Force officers may constitute "special circumstances", the fact that there is "obvious negligence" on the part of Fatima Jewellers precludes the remission of the Customs Duty.

111. The result of this is that, despite the circumstances of this case, HMRC are entitled to assess Customs Duty on the full value of the jewellery imported.

112. We accept that, in some ways, this conclusion is harsh as it is clear that, as Mr Chothani was at pains to stress in his submissions, as was Mr Atta in his evidence, Fatima Jewellers feels that it did everything it could to do things right. It initially applied for authorisation to operate Outward Processing Relief, but this was refused. Following that, even though it was not authorised, it was for a number of years effectively allowed the benefit of Outward Processing Relief as a result of using Customs procedures which were, to some extent, suggested by the relevant authorities and were clearly accepted by the Border Force officials when the goods were imported.

113. It also seems clear to us that, in late 2018 or early 2019, there was a change of approach by HMRC/the Border Force as a result of which Fatima Jewellers made a further application for authorisation to operate Outward Processing Relief and were granted such authorisation. In such circumstances, it is difficult to say that there has been any real negligence on the part of Fatima Jewellers. However, despite this, EU law is clear that a legitimate expectation will not arise where the assurances given are inconsistent with the relevant rules and that, even where the rules are not known to the relevant person, they will still be treated as being negligent if they fail to follow those rules as they are deemed to be aware of them.

IMPORT VAT

114. The only point we need to determine is whether, in accordance with Regulation 126 VATR, at the time of the export of the gold bars, the same gold was intended to be reimported after completion of the process of converting that gold into gold jewellery.

115. Mr Abernethy notes that the burden is on Fatima Jewellers to establish that the gold which was exported is the same gold which was then reimported in the form of gold jewellery. He rightly observes that there is no documentary evidence to confirm this. He refers in particular to paragraph 13 of PN 235 (relating to Outward Processing Relief) which contains requirements about conducting an assay of the gold prior to export as well as holding

documentation at reimport from the jewellery manufacturer showing that the same gold has been made into the jewellery which is being imported.

116. Mr Abernethy suggests that, in the absence of any such documentation, the mere fact that there has been an export of gold and an import of gold jewellery is not sufficient to give rise to an inference that, when it was exported, the gold bars were intended to be reimported after being made into jewellery.

117. Having considered all of the evidence, we are however satisfied that, at the time the gold was exported, Fatima Jewellers intended to reimport that same gold after it was made into jewellery. This is based on the following:

(1) In her witness statement, Ms Curtis notes, we infer following her review of HMRC's papers dealing with the investigation, that "the caseworker had established that Fatima Jewellers Limited exported gold to the United Arab Emirates as "Merchandise in baggage", the gold was processed into items of jewellery in the United Arab Emirates and then imported into the UK." This appears to us to be a clear indication that the caseworker had concluded that it was more likely than not that the jewellery which was imported into the UK was made out of the same gold which was exported.

(2) Whilst Ms Curtis notes in her witness statement that Fatima Jewellers did not produce any evidence "such as assay certificates" that the gold which was exported was the same gold contained in the jewellery which was imported, there is no positive suggestion that it was not the same gold. In answer to a question asked by the Tribunal, Ms Curtis simply confirmed that the issue could not be proved either way.

(3) Although we must come to our own conclusion based on the evidence, taking this into account with the other evidence mentioned below, we think it is more likely that it was the same gold.

(4) Mr Atta's own evidence is that he would travel to Dubai carrying the gold, would wait in Dubai whilst the gold was made into jewellery and then travel back to the UK with the jewellery. Each trip would involve five or six days outside the UK while he waited for the gold to be made into the jewellery.

(5) We have no reason to disbelieve Mr Atta's evidence. As we have said, he came across as a straightforward witness. There was only one area where his evidence was clearly contrary to what was shown by the documentary evidence. However, as we have said, our view is that this was simply caused by a misunderstanding on his part of the relevant Customs codes and declarations, an area in which, by his own admission, he had no expertise and relied instead on Mr Spragg.

(6) We also note that Mr Atta's explanation is one that has been consistently put forward by him and his representatives during the HMRC investigation and the appeal to the Tribunal. In this respect, there has been no inconsistency in what has been said by him and on his behalf throughout this period.

(7) HMRC have not suggested any other possible explanation for the fact that, as is accepted by them, Mr Atta took gold bars out of the UK and then returned to the UK with gold jewellery. There is, in our view, a strong inference from this and from the fact that Mr Atta waited for a number of days in Dubai before returning to the UK with the jewellery that the gold which he exported from the UK was the same gold as that which was contained in the jewellery which he then imported. There is no other plausible explanation for his actions.

(8) We also consider that Mr Atta's explanation of his activities on behalf of Fatima Jewellers is supported by the fact that an application was made to HMRC in 2014 for authorisation to operate Outward Processing Relief, that a further application was made in 2019 and that authorisation was ultimately granted.

(9) Had it been the case that the gold which was exported from the UK was not the gold which was used to make the jewellery which was subsequently imported, Outward Processing Relief would not of course have been available. The consequence of being authorised to operate Outward Processing Relief is that Fatima Jewellers would be required to retain records and documentation confirming compliance with the relevant rules including assay certificates and the confirmations from the manufacturer of the jewellery which we have already mentioned.

(10) It seems unlikely that Fatima Jewellers would have applied for authorisation if it knew it could not satisfy these requirements because the gold which was exported was not in fact used to make the jewellery. Whilst Fatima Jewellers may not have kept such detailed records and, as accepted by Mr Atta, did not carry out any assay of the gold which was exported, it was not at the relevant time required to do so.

(11) In his evidence, Mr Atta stated that Fatima Jewellers had receipts and invoices confirming the quality and weight of the gold which was exported and the gold which was contained in the jewellery which was imported. He also gave evidence that relevant documents were produced to HMRC during the course of their investigation when they visited the premises of Fatima Jewellers.

(12) This evidence is to some extent contradicted by Ms Curtis' witness statement which, as we have observed, notes that Fatima Jewellers did not provide any evidence that the gold which was exported was the same gold imported as jewellery. However, the only evidence mentioned in Ms Curtis' witness statement is assay certificates. It says nothing about whether any invoices were produced.

(13) On balance, we think it is more likely than not that some documents exist in the form of receipts given by the manufacturers for the gold delivered to them and invoices from the manufacturers to Fatima Jewellers for the work carried out. It seems to us extremely unlikely that possession of gold worth many millions of pounds would pass from Fatima Jewellers to the manufacturers and back again without any documents coming into existence.

(14) In addition, in answer to a question put by the Tribunal to Mr Atta about the process followed when Mr Atta arrived at the airport in the UK with the gold jewellery, he explained that the Border Force officer would be provided with the relevant Customs declaration as well as supporting invoices. The question which was put to him was not concerned with the existence (or otherwise) of any invoices. The reference made by Mr Atta to the invoices in this context was unprompted and supports our conclusion that such invoices are likely to exist.

(15) It was clear to us (and accepted by Mr Chothani) that Mr Chothani had little experience of the Tribunal process. In our view, the most likely explanation for the fact that these documents were not before the Tribunal was that Mr Chothani perhaps did not appreciate the need for documentary evidence to back up the appellant's case.

(16) Having said that, in the absence of the documents, we can place little weight on their existence as we do not know what they would reveal. However, we note only that the existence of the documents is, at least, consistent with Mr Atta's version of events.

(17) The final factor which leads us to the conclusion that the gold which was exported was the same gold as was contained in the jewellery which was later imported is that this is no doubt something which the Border Force officers dealing with the import would want to be satisfied about. At no time has it been suggested that any of the Border Force officers had any concerns in relation to this aspect. Whatever documents and explanations were provided to them must therefore have been sufficient for them to be satisfied on this point.

118. Our conclusion therefore is that the requirements of Regulation 126 VATR have been satisfied and that, in accordance with that Regulation, VAT on the import of the gold jewellery is payable as if the manufacturing had been carried out in the UK. Our understanding of the effect of this, in accordance with the letters provided in 2014 by HMRC and by the Border Force and paragraph 2.8 of PN 235 is that VAT on the import was therefore only chargeable on the aggregate of:

(1) the processing costs incurred outside the UK;

(2) transport costs incurred in relation to the imports;

(3) any Customs or Excise duty payable in respect of the imports.

119. Given our conclusion that Customs Duty should have been paid on the full value of the jewellery imported, we anticipate that this will lead to a modest increase in the VAT which should have been paid in respect of the imports.

CONCLUSION

120. Fatima Jewellers' appeal against HMRC's decisions resulting in the C18 post clearance demand note dated 17 November 2020 is allowed in part.

121. The Customs Duty of £151,427.95 is payable in full as Fatima Jewellers was not authorised to operate Outward Processing Relief and had no legitimate expectation that it would only be required to pay Customs Duty on the processing costs incurred outside the UK.

122. The import VAT should however be limited as set out in paragraph [118] above. We leave it to the parties to agree the amount of VAT payable based on our conclusions but with liberty for either party to make an application to the Tribunal for a determination on this aspect should it not be possible to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

123. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 11th OCTOBER 2023