[2017] UKFTT 014 (TC)

# TC05580

**Appeal number:TC/2014/03241**

***CUSTOMS DUTY – inward processing relief – transfer of goods to another authorised trader – conditions for relief – requirement to obtain a commercial receipt – whether self-billed invoice produced by the recipient on delivery amounted to a commercial receipt – appeal allowed in principle, subject to agreement between the parties and/or further findings as to quantum***

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

**C W FLETCHER & SONS LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**
**MR PETER SHEPPARD FCIS FCIB CTA AIIT**

**Sitting in public in Manchester on 13 and 14 April 2016 and 3 August 2016**

**Mr Tim Brown of counsel instructed by BHP Chartered Accountants for the Appellant**

**Mr Simon Charles of counsel instructed by the Solicitor's and Legal Services Office of HM Revenue & Customs for the Respondents**

## DECISION

*Background*

1. This an appeal against demands for customs duty and VAT made by HMRC against the Appellant in 2014. It concerns the operation by the Appellant of a customs procedure known as Inward Processing Relief ("IPR"). Pursuant to IPR payment of customs import duties and import VAT may be suspended when goods are imported from outside the EU for processing and then exported from the EU. IPR is subject to detailed requirements and procedures which we set out below.

2. In order to obtain the benefit of IPR the importer must hold an authorisation for IPR generally known as an "IP Authorisation". The rules also make provision for the transfer of goods imported under IPR ("IP Goods") to be transferred to other IP Authorised traders in the UK and EU without payment of duty prior to being exported.

3. The Appellant manufactures high value machined and fabricated components from a range of specialist materials such as titanium and nickel alloys. It supplies components to major manufacturers in the aerospace and nuclear industries. The transactions relevant to this appeal involve supplies of components made by the Appellant to Rolls-Royce Plc. The Appellant and Rolls-Royce both had IP Authorisations at the time of the transactions. The Appellant imported materials to produce the components under IPR and intended the onward supply of components to Rolls-Royce to continue to have the benefit of IPR.

4. HMRC carried out s customs duty assurance audit in January 2014 and concluded that supplies by the Appellant to Rolls-Royce had not complied with the conditions for IPR. They issued two demands to the Appellant for outstanding customs duty and import VAT known as C18s. We understand that the amounts in dispute in relation to those demands comprise customs duty of £324,912 and import VAT of £990,106. Further, we understand that irrespective of the outcome of this appeal the Appellant will be entitled to credit for any liability it might have for import VAT. In financial terms therefore the appeal is concerned with demands for customs duty of £324,912. HMRC also imposed a civil penalty of £2,500 for what was treated as a serious error to account for customs duty. This appeal also covers the civil penalty.

5. It was common ground that any liability for import VAT and for the civil penalty would stand or fall with the outcome of the appeal against the demand for customs duty.

6. We set out below the legal framework for IPR and the circumstances in which an importer can be liable for customs duty. We then set out our findings of fact. The evidence before us included witness statements served on behalf of the Appellant from Mr Michael Wilkinson, who is the Appellant's Contracts and Export Compliance Manager and from Mr Mark Sowerby who is the UK Customs Manager of Rolls-Royce Plc. We also had witness statements served on behalf of HMRC from

Ms Laura Crook, a Higher Officer of HMRC who issued the C18 demands and from Ms Daphne Park, also a Higher Officer of HMRC who issued the civil penalty notice. Mr Wilkinson, Mr Sowerby and Ms Crook all gave oral evidence before us. We also heard oral evidence from Ms Rebecca Willis, an accountant employed by the Appellant at the material times and now a director of the Appellant. Ms Park's evidence was not challenged.

*Inward Processing Relief*

7. The law in relation to IPR is contained in Council Regulation EEC 2913/92 which establishes the Community Customs Code ("the Customs Code") and Commission Regulation EEC 2454/93 which lays down provisions for implementation of the Customs Code ("the Implementing Regulation").

8. Articles 114-129 of the Customs Code make provision for IPR including the requirement for IP Authorisation. Various provisions of the Implementing Regulation set out requirements in relation to customs procedures generally and in relation to IPR specifically. In particular Article 511 provides that the IP Authorisation shall specify under what conditions the movement of goods under a customs procedure shall take place.

9. In broad terms, customs duties on IP Goods imported by an IP Authorised trader are suspended under IPR. Where the IP Goods are re-exported in accordance with the conditions of IPR no duty becomes payable. The IP Goods must be declared to specific customs procedure codes on importation and on re-export. The goods must be processed and discharged from IPR within a "throughput period" which in general is 6 months from the date of import. Discharge of any potential liability to customs duty occurs when an IP Authorised trader re-exports the goods or transfers them to another IP Authorised trader and lodges a "Bill of Discharge" with HMRC.

10. For certain traders, including the Appellant, the requirement to lodge a Bill of Discharge is satisfied where the trader lodges a quarterly return in form C&E 812.

11. HMRC's view of the law is set out in Notice 221 Inward Processing Relief ("Notice 221"). The version released in September 2007 is the relevant version for present purposes. The conditions on which IP Authorisations are granted generally require compliance with certain sections of Notice 221 and to that extent the Notice is binding on importers.

12. For present purposes paragraphs [5] and [28] of Notice 221 are relevant. At the material time paragraph [5.1] provided that goods entered into the EU under an IP Authorisation could be transferred to another IP Authorised trader provided the receiving trader had approval to receive the goods in question. The Notice set out various procedures available for the transfer of IP Goods. The Appellant was approved to use "commercial documentation" to transfer IP Goods to another IP Authorised trader. In that regard Notice 221 provided as follows:

" **5.15 Using commercial documents (suspension goods only)**

Except for transfers involving drawback goods, commercial documents can be used if approved. The commercial document used must be notated **"IP/S goods"** and contain the information detailed in Section 28;

Movement of documents will normally follow those outlined paragraph 5.11. However, where the requirement to notify the supervising office of each individual transfer has been waived, the supplier should retain a copy of the commercial document and the original sent with the goods retained by the customer. The customer will be responsible for the goods when they have received and entered the goods in their records. A commercial receipt should be issued which should be retained in the supplier's records as evidence that the duty liability has been discharged."

13. It can be seen that there is a distinction between commercial documents which effect the transfer and the requirement for the supplier to obtain and retain a commercial receipt for the goods from the recipient

14. Section 28 of Notice 221 sets out the information to be included in the transfer documents when IP Goods are transferred another IP Authorised trader whatever procedure is used to transfer the goods.

15. There are two provisions of the Customs Code which provide for the circumstances in which a customs debt will arise and which are particularly relevant for present purposes.

16. Article 203 provides as follows:

" 1. A customs debt on importation shall be incurred through:

- the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision."

17. Article 204 provides as follows:

" 1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

> 2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled."

18. Both provisions set out who the debtor shall be where a customs debt arises and we shall return to that point below.

19. It was common ground that Articles 203 and 204 are mutually exclusive. Article 203 applies where there is an unlawful removal of goods from customs supervision and Article 204 applies where there is no unlawful removal from customs supervision but there is a failure to comply with an obligation or a condition of a customs procedure (See *Hamann International GmbH v Hauptzollamt Hamburg Case C-337/01*).

20. For the purposes of Article 204, IPR is a customs procedure. Article 204 expressly excludes liability in a case where the failure to fulfil of comply with an obligation or condition has no significant effect on the correct operation of the customs procedure. For that purpose, Article 859 of the Implementing Regulations sets out what failures shall be considered to have no such effect as follows:

> "The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the Code, provided:
>
> - they do not constitute an attempt to remove the goods unlawfully from customs supervision,
>
> - they do not imply obvious negligence on the part of the person concerned, and
>
> - all the formalities necessary to regularise the situation of the goods are subsequently carried out: ..."

21. The Article goes on to identify 10 specific failures which fall within the scope of the Article. For present purposes the failures set out in the following paragraphs are relevant:

> "1. exceeding the time-limit allowed for assignment of the goods to one of the customs-approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time-limit would have been extended had an extension been applied for in time;
>
> …
>
> 7. in the case of goods or products physically transferred within the meaning of Articles 296, 297 or 511, failure to fulfil one of the conditions under which the transfer takes place, where the following conditions are fulfilled:

> (a) the person concerned can demonstrate, to the satisfaction of the customs authorities, that the goods or products arrived at the specified premises or destination and, in cases of transfer based on Articles 296, 297, 512(2) or 513, that the goods or products have been duly entered in the records of the specified premises or destination, where those Articles require such entry in the records;
>
> (b) where a time limit set in the authorisation was not observed, the goods or products nevertheless arrived at the specified premises or destination within a reasonable time…"

22. The reference to goods transferred within the meaning of Article 511 of the Implementing Regulation is to the requirement that an IP Authorisation must specify under what conditions the movement of goods between different places or to another IP Authorised person may take place.

23. Article 860 provides that the burden is on the Appellant in the present circumstances to establish that the conditions set out in Article 859 are satisfied.

24. It can be seen that Article 859 of the Implementing Regulation sets out three pre-conditions which any of the specified failures must satisfy before it can be treated as having no significant effect on the correct operation of a customs procedure.

25. The first condition requires that the failure does not amount to an attempt to remove the goods unlawfully from customs supervision. The same phrase is used in Article 203(1) of the Customs Code. Article 865 of the Implementing regulations sets out what is meant by a removal of goods from customs supervision as follows:

> " The presentation of a customs declaration for the goods in question, or any other act having the same legal effects, and the production of a document for endorsement by the competent authorities, shall be considered as removal of goods from customs supervision within the meaning of Article 203 (1) of the Code, where these acts have the effect of wrongly conferring on them the customs status of Community goods …"

26. In *Terex Equipment Ltd v Commissioners for Her Majesty's Revenue & Customs Case C-430/08* an IP Authorised trader used incorrect customs procedure codes on re-export of IP Goods which indicated that Community goods were being exported rather than duty suspended goods. HMRC considered that this had the effect of conferring on the goods the status of "Community goods" and led to a customs debt under Article 203. In the alternative they contended that a customs debt arose under Article 204. Terex sought to revise its export declarations to regularise the situation but HMRC refused to amend the declarations on the basis that it was impossible to present a prior notification of re-export after the event.

27. The CJEU was called upon to consider whether use of the incorrect code on export should be regarded as a removal of the goods from customs supervision. It observed that Article 865 does not provide a definition, but contains examples of acts which are to be regarded as constituting removal from customs supervision for the purposes of Article 203(1) of the Customs Code. It is instructive to quote at length from the decision, both in relation to IPR generally and specifically in relation to what constitutes a removal from customs supervision:

" 35. According to the case-law of the Court, removal from customs supervision must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation (see Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 47; Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55; Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 31; and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47).

36. Since that term is not defined by the Community legislation, Article 865 of the Implementing Regulation contains examples of acts which are to be regarded as constituting removal from customs supervision for the purposes of Article 203(1) of the Customs Code (see *D. Wandel*, paragraph 46).

37. Pursuant to the first paragraph of Article 865 of the Implementing Regulation, the presentation of a customs declaration for goods, or any other act having the same legal effects, are to be regarded as removal of those goods from customs supervision within the meaning of Article 203(1) of the Customs Code, where those acts have the effect of wrongly conferring the customs status of Community goods on the goods concerned.

…

40. Article 865 of the Implementing Regulation covers a situation in which declarations confer on goods the status of Community goods which they cannot be deemed to have, so that non-Community goods are removed from the customs supervision which the Customs Code, and in particular Article 37 thereof, imposes on them.

41. In that regard, emphasis must be placed on the particular characteristics of the inward processing procedure and the role played, in particular, in that context by the use of the correct customs code for the purposes of assessing whether or not the use of a code indicating the export of Community goods affects the monitoring abilities of the customs authorities.

42. It must be observed, first of all, as the Commission of the European Communities maintains, that the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying out of certain economic activities. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom. Similarly, the consequences of non-compliance with their obligations must be strictly interpreted.

43. The obligation under Article 182(3) of the Customs Code to lodge a customs declaration bearing the correct customs code indicating that there is a re-export of goods that were under the inward processing procedure is of particular importance for customs supervision in the framework of that customs procedure.

44. The objective of the use of the customs code indicating the re-export of goods under the inward processing procedure is to ensure effective monitoring by the customs authorities and to give them the power to identify, solely on the basis of the customs declaration, the status of the goods concerned without the need for subsequent assessments and findings. That objective is particularly important since the goods

which are introduced into the customs territory of the Community remain under customs supervision, pursuant to Article 37(2) of the Customs Code, only until such time as they are re-exported.

45. Therefore, the objective of the use of the customs code indicating the re-export of Community goods under the inward processing procedure is to permit the customs authorities to decide at the last minute to carry out a customs check pursuant to Article 37(1) of the Customs Code, namely to check whether the re-exported goods in fact correspond to the goods placed under the inward processing procedure.

46. Consequently, the use of customs code 10 00 in the export declarations at issue in the main proceedings erroneously conferred the status of Community goods on the goods concerned and therefore directly affected the ability of the customs authorities to carry out controls pursuant to Article 37(1) of the Customs Code.

47. In these circumstances, the use in the export declarations of customs code 10 00 indicating the export of Community goods instead of code 31 51 used for the re-export of goods under the inward processing procedure must be classified as 'removal' of those goods from customs supervision (see, by way of analogy, *British American Tobacco*, paragraph 53).

48. Furthermore, as regards the possible lack of customs supervision during the period concerned, such a situation is not a factor excluding the application of the concept of removal from customs supervision. According to the case-law, for there to be removal from customs supervision, it is sufficient that the goods in question have been objectively removed from possible controls, whether or not such controls have actually been carried out by the competent authority (see *British American Tobacco*, paragraph 55).

…

50. As pointed out in paragraph 42 of this judgment, the beneficiaries of the inward processing procedure are required to comply strictly with their obligations under that procedure. Moreover, since the goods at issue were exported as Community goods, they might potentially be re-imported into the Community as returned goods within the meaning of Article 185 of the Customs Code without import duties being due.

51. In view of the foregoing, the answer to the second and third questions in Case C-430/08 and the first and second questions in Case C-431/08 is that the use in the export declarations at issue of customs code 10 00 indicating the export of Community goods, instead of code 31 51 used for goods on which duties have been suspended under the inward processing procedure, gives rise to a customs debt pursuant to Article 203(1) of the Customs Code and the first paragraph of Article 865 of the Implementing Regulation."

28. The second condition for the application of Article 859 is that the failure does not imply obvious negligence on the part of the person concerned. It was common ground that in assessing whether there was obvious negligence we should have regard to the decision of the CJEU in *Firma Sohl & Sohlke v Hauptzollamt Bremen* Case C-48/98 at [56]-[59] where it stated as follows in relation to the same phrase albeit in the context of a different Article:

" 56. … in order to determine whether or not there is 'obvious negligence within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.

57. As regards the professional experience of the trader, it is necessary to examine whether or not he is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions.

58. As regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions.

59. It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader."

29. The third condition for the application of Article 859 is that all formalities necessary to regularise the situation of the goods are subsequently carried out. In Terex the CJEU also considered whether the export codes could be regularised retrospectively. It held as follows:

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

30. We now turn to our findings of fact.

*Findings of Fact*

31. We have briefly referred above to the nature of the Appellant's business. It has manufacturing premises in Sheffield. In mid-2010 the Appellant won a contract to supply a range of 8 components for Rolls-Royce's programme to build a civil aircraft engine known as the V2500. The Appellant imports the materials used to manufacture these components. The materials have a very restricted supply base. All materials used and parts manufactured must be fully traceable because the end use is in civil aviation.

32. Mr Wilkinson worked for Rolls-Royce for many years prior to joining the Appellant He was the Appellant's Commercial and Supply Chain Manager from 2001

until 2012 when he became Head of Operations within the business. In May 2014 he became Contracts and Export Compliance Manager.

33. Mr Wilkinson took us through the record keeping processes from an import entry through to transfer of finished components to Rolls-Royce. The records are maintained electronically but also include manual documentation.

34. Each item of material used in the manufacturing process has a unique serial number and generates a unique goods received number when it arrives in the Appellant's stores. When the material is released for production a unique works order number is automatically allocated. Once a component is manufactured a delivery advice note, certificate of conformity and an internal invoice are produced by the Appellant

35. The Appellant sends a purchase order to a supplier, identifying the Rolls-Royce part number. We followed an example for the purchase of 243 complicated castings from a supplier in Oregon, United States. The order was supplied and an import entry under IPR was accepted on 3 November 2011. The goods were received at the Appellant's premises on 7 November 2011 and the Appellant generated a goods received note including a unique number and barcode. The supplier also provided a certificate that the castings supplied had been tested and conformed to the required specifications.

36. The materials were released to the Appellant's shop floor on 8 November 2011 and a works order was generated, again with a unique reference and barcode. The works order was an 8 page document. Each operation in the manufacturing process was separately identified and signed for in the works order. On 15 November 2011 the component was completed and a Finished Parts Control Card ("the Control Card") was produced. Various inspections and despatch processes are evidenced on the Control Card and confirmed by signatures dated 15 November 2011. By this stage the finished components are in store ready for collection by Rolls-Royce. A "Release Note" number has been allocated to the boxed component, in this case 105961. However there was no evidence that a separate Release Note document was produced. The only document produced with that reference is the Appellant's invoice.

37. On 17 November 2011 the Appellant produced a certificate confirming that the parts had been manufactured, inspected and tested in accordance with all drawings and specifications and the contract requirements. At this stage the goods are ready for collection by Rolls-Royce and the Appellant produces an invoice to Rolls-Royce, in this case for three specific parts. The invoice is given the same number as the "Release Note" referred to above and is in the form of a VAT invoice. It was dated 18 November 2011. On the same date Rolls-Royce produced a self-billed invoice. Neither invoice identified a date of collection or delivery, however the Control Card was signed to confirm that the goods with Release Note number 105961 were "issued from stores", in other words released, on 18 November 2011.

38. The records show what part numbers and quantities are ready for collection by Rolls-Royce on a daily basis. The finished components are collected by a third party

courier employed by Rolls-Royce. When the components are collected the courier uses a scanner to download a unique bar code which appears on each individually boxed component.

39. The Appellant also produces an advice note identifying by reference to release note numbers what parts are ready for collection. We were told by Mr Wilkinson that when the courier collects the goods a copy of the advice note goes with the goods. We accept that evidence. In the example we looked at we see that the advice note was dated 25 November 2011. The discrepancy between the date of collection and the date of the advice note was not dealt with in evidence and we therefore read nothing into it.

40. The Appellant had two relevant IP Authorisations contained in letters from HMRC dated 4 May 2010 and 18 April 2013 which covered periods 1 May 2010 to 30 April 2013 and 1 May 2013 to 30 April 2016 respectively. Paragraph 13 of each authorisation set out various conditions in relation to the transfer of goods, in particular:

> "You are approved to use commercial documentation to send/receive IPR suspension goods to/from another IPR suspension C&E 810 Authorisation holder. See notice 221 for details to be included on the commercial documentation.
>
> - If you supply IPR goods you must notify the supervising office at (1) on a schedule with your suspension return. Retain details in your commercial records and send copy with the goods to the receiving authorisation holder. You must ensure the receiving IPR authorisation holder issues you a receipt for the consignment and keep this with your records."

41. The IP Authorisation required the Appellant to make quarterly suspension returns on form C&E 812. These are the Bills of Discharge. The Appellant made quarterly returns to its supervising office at HMRC in accordance with its IP Authorisation. The Appellant attached its own schedule of goods entered into IPR and goods disposed of. We were shown the form and schedule for the period October 2011 to December 2011. The throughput period was 6 months and the form was due for submission by 31 July 2012. It was submitted on 10 July 2012 and included suspended duty of £8,687 entered into IPR which was the duty on importation of material used in the example described above.

42. The two C18 demands under appeal were issued by Ms Crook in February 2014 and June 2014. They covered importations in the periods April 2012 to March 2013 and September 2011 to June 2013 respectively. These followed a desk audit commenced by Ms Crook in January 2014 in which she identified differences or anomalies when comparing goods declared to IPR on importation and/or export to the Bills of Discharge submitted by the Appellant. She asked for further information from the Appellant including transfer paperwork for goods transferred to another IP Authorised trader, namely Rolls-Royce.

43. It appears from Ms Crook's correspondence that at the time the C18 demands were issued she was not satisfied that the commercial documents retained by the

Appellant on transfers to Rolls-Royce complied with Notice 221, or that the Appellant had obtained and retained commercial receipts in relation to those transfers.

44. On 26 March 2014 the Appellant's representative requested a formal review of the decision to issue the first demand. Then, in April 2014 the Appellant produced 4 documents from Rolls-Royce dated 7 March 2014, 28 March 2014 (two) and 17 April 2014 which on the Appellant's case are commercial receipts for the purposes of Notice 221. They were purportedly produced to regularise the absence of commercial receipts at the time the Bills of Discharge were submitted by the Appellant.

45. These documents are on Rolls-Royce notepaper and signed on behalf of Rolls-Royce. They are headed "Inward Processing Relief (Suspension)", and purport to confirm transfers by the Appellant to Rolls-Royce for various periods covering 4 July 2010 to 28 December 2013. Two refer to periods of a quarter and two refer to periods of a year, 2012 and 2013 respectively. They identify the IP Authorisation references of both Rolls-Royce and the Appellant. Each document includes confirmation that Rolls-Royce has received parts from the Appellant through IP transfer arrangements for the periods identified "as per [the Appellant's] supplied spreadsheet". They also state:

> " We have verified the receipt of these parts into our system and confirm acceptance of such Duty and VAT liability. This constitutes discharge of C.W.Fletcher & Sons Limited Duty and VAT liability."

46. Ms Crook identified certain discrepancies in these documents, as follows:

(1) All four quote the Appellant's original IP Authorisation reference which was superseded for supplies after 30 April 2013.

(2) There was an overlap in dates in two of the documents. One covers a quarter ended 28 December 2013 and another covers the year ended 28 December 2013.

(3) They were not in existence at the time the Bills of Discharge were submitted.

47. In June 2014 Ms Crook took issue with another Bill of Discharge, identifying a lack of commercial receipts. She did not consider the receipts issued by Rolls-Royce in 2014 as effective as such because of the discrepancies referred to above. Ms Crook therefore issued the second C18 demand.

48. On 27 June 2014 Rolls-Royce produced another document in similar form to those just described covering the period 4 July 2010 to 28 September 2013.attaching a quarterly breakdown of the duty on parts transferred by the Appellant to Rolls-Royce. It was not clear why this document had been produced.

49. In fact no formal review of the decision to issue the first demand was carried out by HMRC with the result that the demand was deemed to be upheld. There was no request for a review of the second demand. Both demands were then appealed to the tribunal.

50. We heard evidence from Mr Sowerby of Rolls-Royce. He was responsible for compliance by Rolls-Royce with all customs related matters with effect from 23 July 2012. He had previously been employed by HMRC. The nature and scale of Rolls-Royce's business involves it receiving a large volume of IP goods from many UK based suppliers. Rolls-Royce is authorised to use commercial documentation for the purposes of IPR when receiving IP Goods from other IP Authorised traders.

51. The Appellant's dealings with Rolls-Royce in relation to IPR transfers were governed by standard procedures and documentation insisted upon by Rolls-Royce's Corporate Taxation Department. Those procedures were set out in a letter to the Appellant dated 25 May 2010 and made provision for commercial transfer documentation which Rolls-Royce would produce on a quarterly basis and which they stated complied with Notice 221. Rolls-Royce would not accept any other transfer document for the purposes of IPR.

52. The system operated by Rolls-Royce involved them sending to the Appellant a commercial transfer document before the end of each quarter. The quarterly periods were those agreed between Rolls-Royce and HMRC. The document was to be returned to Rolls-Royce within one month of the quarter end. It was headed "Inward Processing Relief – Suspension, Transfer Document (in lieu of form C&E 811)". Part A of the document contained undertakings and declarations to be signed by Rolls-Royce and the supplier. Rolls-Royce undertook that it would comply with the conditions of Notice 221 The supplier declared that the goods identified in Part B had been held by it under IPR duty suspension. The Appellant was required to complete Part B of the document which showed the goods invoiced in the period for which the Appellant wished to transfer duty liability to Rolls-Royce. Goods were to be identified using the Rolls-Royce part number only. The Appellant was requested to sign and date the document and also retain a copy for its own records and for HMRC. When the goods are eventually exported Rolls-Royce submits its own Bill of Discharge to HMRC.

53. At the time of the transfers relevant to the present appeal Rolls-Royce issued a "self-billed invoice" which they felt was sufficient to comply with Notice 221 and in particular the requirement for a commercial receipt. When Rolls-Royce became aware that there were issues in relation to transfers of IP Goods from the Appellant they changed their system. We understand that they still issue self-billed invoices but they now also issue a letter confirming acceptance of customs duty liability for IP Goods which they take into stock. The evidence was unclear as to when these letters are sent out, but that does not affect the issues we must decide.

54. The goods would be collected by a third party courier working for Rolls-Royce. The courier would scan the goods on collection to ensure that the right goods were being collected. Mr Wilkinson stated that the Appellant would receive a print out from the courier's scanner identifying the goods collected but he was not sure what happened to the print out. We accept that evidence. The courier would then take the goods to the Rolls-Royce logistics hub near Castle Donnington where they would be scanned again and accepted into stock by Rolls-Royce. A large volume of goods would be received each day at the Rolls-Royce logistics hub from many suppliers.

Couriers would tend to do routes collecting goods from various suppliers on the same day. Goods received at Castle Donnington would be sent to various Rolls-Royce sites around the country. The Appellant's goods were bound for Derby, which was close by and which was a site falling within Rolls-Royce's IP Authorisation for storing IP Goods. There would be 6 deliveries a day from the logistics hub to Derby. No packaging was opened at the logistics hub. When the goods were received at Derby they would be checked and entered into Rolls-Royce's Enterprise Resourcing and Planning ("ERP") system. This is a sophisticated electronic tool which enables every part used by Rolls-Royce to be traced to a supplier. The ERP System also provides data for Rolls-Royce's billing systems. The ERP system knows exactly what has been ordered and delivered and this information is used to produce the self-billed invoices which were automatically sent to suppliers such as the Appellant.

55. It was not clear exactly when a self-billed invoice would be produced. There was evidence from Ms Willis that it was generated from the barcode scan by the courier. She understood from her role as the Appellant's accountant that when the courier was within a certain distance from the logistics hub and about to deliver the goods the scanned data would be downloaded to Rolls-Royce's systems and the self-billed invoice would be produced before the goods arrived at the logistics hub. The alternative canvassed by Mr Sowerby was that it might be produced when the barcodes were scanned for a second time on arrival at the logistics hub. He was sure however that it was generated on the same day the goods were collected. In the light of closing submissions we do not need to make any finding as to the exact point at which it would be generated.

56. We were shown an example of a self-billed invoice addressed to the Appellant dated 18 November 2011. It was on Rolls-Royce headed paper and described itself as a self-billed invoice. It stated:

> "As agreed, we have settled the following goods and services and credited the amounts to your account in our company:"

57. This was followed by a description of the goods including the Appellant's reference number, the price payable and VAT. Terms of payment were described as "within 75 days" of the invoice date. At the bottom it stated "The VAT shown is your output tax due to Customs & Excise" (sic). For the transaction described above the Appellant's Release Note/Invoice number was 105961. On the self-billed invoice this was described as "Deliv note/Ref./of".

58. When the Appellant received the self-billed invoice it was checked to the invoice their own system had generated. Any inconsistencies would be investigated. In fact the evidence was that the Appellant would be paid within 7-10 days of delivery. As a result it was important to investigate discrepancies quite quickly.

59. Rolls-Royce has never been challenged by HMRC on the operation of their system for transfers of IP Goods between IP Authorised traders. Having said that there was no evidence to suggest that HMRC had ever considered their system.

60. The evidence before us included a critical examination of the commercial documents signed by the Appellant and Rolls-Royce. Not all were seen by Ms Crook prior to issuing the C18 demands. They covered the period of the C18 demands from October 2011 to June 2013 although the transfer document for January 2013 to March 2013 did not appear to be present. No point was taken on the absence of that transfer document.

61. It was apparent from the evidence given that these documents included some internal inconsistencies, for example in relation to the total duty suspended. Mr Sowerby explained that from an accounting view Rolls-Royce simply wanted to ensure that all parts sold to it under IPR were taken into stock by them. In 99.9% of cases that stock would be exported or would have the benefit of end-user relief meaning that the duty would be discharged.

62. Ms Crook was also concerned during the course of her audit that there was no clear audit trail from the transfer documents to the Appellant's Bills of Discharge.

63. In the light of closing submissions the relevance of this evidence as to commercial documents is not apparent to us. The Respondents take no issue as to any deficiencies in the commercial documentation other than the absence of commercial receipts from Rolls-Royce. We shall not therefore make any findings in relation to the commercial documentation generally.

*The Issues*

64. The C18 demands issued by Ms Crook were, according to her own evidence, based on a liability to customs duty which she considered arose under Article 204 Customs Code. That would imply she considered that there had been no removal from customs supervision, but that the Appellant had failed to fulfil its obligations under IPR or to comply with the conditions governing IPR. In parts of her evidence however Ms Crook stated that she considered there had been an unlawful removal from customs supervision. This confusion flowed through into the Respondents' Statement of Case mentioned below.

65. The Appellant's grounds of appeal were contained in amended grounds of appeal dated 21 May 2015. Broadly the grounds were as follows:

(1) Liability did not arise under Article 204 because the failures relied on by HMRC had no significant effect on the correct operation of IPR.

(2) Alternatively, even if the failures did have a significant effect the goods were never released to free circulation in the EU or removed from customs' control. As such the charge to customs duty was contrary to the EU law principle of fiscal neutrality.

66. The Appellant withdrew the second ground based on fiscal neutrality shortly prior to the hearing.

67. The Respondents' Statement of Case was, in our view, equivocal as to the basis on which HMRC sought to justify the liability to customs duty. In particular, it was confused as to whether HMRC were relying solely on Article 204 or whether, in the alternative they were also relying on Article 203. Further the witness statements in support of the Respondents' case referred only to Article 204. In those circumstances Mr Brown on behalf of the Appellant objected to the Respondents raising arguments based on Article 203.

68. In the event we gave permission during the course of the hearing for HMRC to raise an argument that the demands for customs duty were supported by Article 203 or, in the alternative by Article 204. We were satisfied that both parties would be in a position to adduce all evidence relevant to the Article 203 argument. Indeed it did not seem that any additional evidence would be required over and above that which had been adduced in relation to the Article 204 argument. We were also satisfied that provision could be made for the Appellant to raise certain additional legal arguments arising out of HMRC's reliance on Article 203. In the circumstances there was no prejudice to the Appellant and we considered it just and fair that HMRC should be entitled to raise all reasonable arguments in support of the demands.

69. Accordingly, we also permitted the Appellant to amend its grounds of appeal in order to contend that even if there was an unlawful removal from customs supervision within Article 203, Article 203 could not support a demand for customs duty which was actually made pursuant to Article 204. Further, that the Appellant did not fall within the category of debtors identified by Article 203.

70. During the course of the hearing the Appellant also applied to amend its grounds of appeal in order to assert that in fact there was no breach of the conditions associated with its IP Authorisation. The Appellant alleged that the self-billed invoices issued by Rolls-Royce constituted a commercial receipt for the purposes of section 5.15 Notice 221. As such there was no unlawful removal from customs' supervision within Article 203 and no failure within Article 204. We permitted the Appellant to raise this ground of appeal. We were satisfied that very little new evidence would be necessary, there was no prejudice to HMRC and it was just and reasonable that the Appellant should be entitled to raise all reasonable arguments in support of its appeal.

71. By the time of closing submissions the issues arising for determination may be broadly stated as follows:

**In relation to liability under Article 203**

(1) Did the Appellant fail to comply with the requirements of IPR such that the goods were unlawfully removed from customs supervision within Article 203?

(2) If there was an unlawful removal within Article 203, can HMRC rely on demands for duty issued by an officer on the basis of liability under Article 204?

(3) If there was an unlawful removal within Article 203, does the Appellant fall within the category of debtors identified in Article 203?

**In the alternative to liability under Article 203**

(4) Did the Appellant fail to comply with the requirements of IPR such that, even if there was no unlawful removal of goods from customs supervision, a customs debt arose under Article 204?

(5) If so, has the Appellant established that any such failure had no significant effect on the correct operation of IPR within Article 859 of the Implementing Regulation?

72. We deal with these issues below, albeit in a slightly different order and by reference to the way in which the parties' approached their closing submissions.

*Reasons*

73. Having stated the issues arising for determination, it is first necessary to consider what amounts to a removal from customs supervision. The Respondents' case was that the failure to obtain commercial receipts meant that the Appellant's IP Goods were unlawfully removed from customs supervision. Mr Brown submitted that this was essentially a question of whether the customs authority was physically prevented from gaining access to the goods, even if only for a short time.

74. The position is summarised in the decision of the CJEU in *Wandel GmbH v Hauptzollamt Bremen Case C-66/99* at [47]:

> " 47. …it is apparent that the scope of Article 203(1) extends well beyond the acts referred to in Article 865 of the implementing regulation and that removal must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code.
>
> 48. It should also be noted that, for the purposes of Article 203(1) of the Customs Code, removal of goods from customs supervision does not require intent: it is sufficient if certain objective conditions are met, including, in particular, the absence of the goods from the approved place of storage at the time when the customs authorities intend to carry out an examination of them."

75. Mr Charles submitted that Mr Brown had mis-articulated the test in Wandel. He emphasised that Wandel referred to any act or omission, which could include doing nothing. He also emphasised that the test was concerned with both access to the goods and the ability to monitor the goods. In the present context he submitted that a "break in the chain of supervision" could amount to a removal from customs supervision even if the goods were subsequently returned to customs supervision.

76. We do not consider that there is much if anything between the parties in relation to the relevant test. The question is whether HMRC were able to access the goods and

monitor the goods. The Customs Code includes various definitions which are relevant to customs supervision of goods:

> Article 4(13) defines "supervision by the customs authorities" as "action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed".
>
> Article 4(14) defines "control by the customs authorities" as "specific acts such as examining the goods, verifying the existence and authenticity of documents, examining the accounts of undertakings and other records, inspecting means of transport … and other similar acts with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed".

77. Mr Charles relied on the fact that in Terex the removal from customs control did not hinge on a physical control test. We accept that was the case. In Terex, what caused the goods to fall outside customs control was the fact that they had been declared to an incorrect procedure on export and were thus incorrectly identified as Community goods. We can see why that would affect customs supervision. The CJEU considered that the use of an incorrect export code in relation to IP Goods affected the ability of the customs authority to check at the time of export whether the re-exported goods corresponded to the IP Goods.

78. Both parties appeared to accept that customs supervision requires the availability of a document trail to identify the location and status of IP Goods at any time. Further, there must be physical access to those goods for the customs authority and it must be possible to identify the physical goods as the IP Goods.

79. We also bear in mind, as set out in Terex at [42] that IPR is an exceptional measure and that the obligations under IPR are to be strictly complied with. Having said that we note that there is no requirement to notify the customs authority in advance that IP Goods are being transported either for export or to another IP Authorised trader. Customs authorities are however entitled to make unannounced visits and to inspect goods including IP Goods to ensure that customs procedures are being correctly applied. The question therefore is whether any failure by the Appellant in the present case would have prejudiced the ability of HMRC to control the goods in question in the manner set out in Article 4(14).

80. In Hamann the CJEU was concerned with a trader importing goods from Canada which were subject to a customs warehousing procedure. The goods were then moved for re-export to the customs office at the point of exit without first having been placed under an external transit procedure. The Court held that because the customs authorities were unable to ensure customs supervision of those goods, if only for a short period of time, they had been removed from customs supervision.

81. In *X BV Case C-480/12* the CJEU was concerned with movement of goods in temporary storage with duty suspended. This required presentation of the goods to the customs office of destination within a prescribed time limit. The goods were

presented 17 days late. The CJEU considered whether there had been a removal from custom supervision. Having quoted Wandel and Hamann, the CJEU stated:

> "35. …even though the location of the goods at issue in the main proceedings remained unknown for more than two weeks, which may mean that the inability to give access to those goods is more than merely temporary, nonetheless, according to case-law, the application of Article 203 of the Customs Code is justified where the disappearance of the goods entailed a risk of entry into the economic networks of the European Union (see, to that effect, *Liberexim* EU:C:2002:433, paragraph 56, and Case C-300/03 *Honeywell Aerospace* EU:C:2005:43, paragraph 20).
>
> 36 The presence, on the customs territory of the European Union, of non-Community goods carries the risk that those goods will end up forming part of the economic networks of the Member States without having been cleared through customs, a risk which Article 203 of the Customs Code contributes to preventing (see, by analogy, Case C-234/09 *DSV Road* EU:C:2010:435, paragraph 31).
>
> 37 As is clear from the order for reference, the goods in question were indeed presented to the office of destination 17 days late. Therefore, it is undisputed that those goods have not entered the economic networks without having been cleared through customs. It follows that, subject to verification by the referring court, it seems inconceivable that Article 203 of the Customs Code could apply to the facts at issue in the main proceedings."

82. These were both case involving what Mr Charles described as a break in the chain of supervision, which is an apt description. Mr Brown relied on the decision in X BV whereas Mr Charles relied on the decision in Hamann. It is difficult to see how the two decisions can be reconciled in the sense that X BV appears to place considerable emphasis on the fact that the goods did not enter the economic networks without having been cleared through customs, notwithstanding that the location of the goods was unknown for more than two weeks.

83. Mr Charles submitted that the decision in X BV could only properly be understood by reference to the fact that it concerned the breach of a time limit rather than any more general failure to fulfil obligations. He noted that it was concerned with a failure falling within Article 859 Item [1] which we have quoted above and which expressly provides that exceeding a time limit in certain circumstances is not treated as having a significant effect on the correct operation of a customs procedure. The CJEU referred to the significance of that provision as follows:

> " 42. In addition, as the Advocate General observed at point 46 of his Opinion, since exceeding the time-limit is expressly provided for in Article 859 of the Implementing Regulation, which does not apply to the cases referred to in Article 204 of the Customs Code, that provision would be ineffective if exceeding that time-limit had to be caught by the concept of 'removal', referred to in Article 203 of Customs Code."

84. However, what was said at [42] based on construing Article 203 and 204 in the context of the Implementing Regulation appears to us to be more by way of confirmation of a conclusion reached by reference to the more general statements of

principle at [35] to [37]. Given the decision we reach below in relation to the status of the self-billed invoices it is not necessary for us to reconcile these two cases, at least at this stage.

85. We turn now to consider the obligations and conditions attaching to IPR, and whether and to what extent the Appellant failed to comply with those obligations and conditions. In particular we must consider whether on the facts of the present appeal there was a removal from customs supervision.

86. There was no documentation in the present case which wrongly described the goods so as to prejudice the ability of HMRC to access or monitor the goods. We are concerned with whether the self-billed invoices issued by Rolls-Royce were "commercial receipts" for the purposes of Notice 221.

87. Mr Charles submitted that there must be an audit trail establishing where the goods were at any particular time and the commercial receipt would be part of that audit trail. It was not sufficient that if an officer turned up at the Appellant's premises he could be told where the goods were. We agree that is the case. There must be a document trail and that is the reason the Appellant's IP Authorisation incorporates the requirement of Notice 221 for a commercial receipt. We must construe the reference to a "commercial receipt" accordingly.

88. Mr Charles did not rely on any other failure to fulfil obligations in support of his argument that there was an unlawful removal from customs supervision. In particular he accepted that if a self-billed invoice was a commercial receipt then there was no failure to fulfil any obligation in connection with the period of time the goods were with the third party courier. It is not relevant therefore whether the self-billed invoices were issued just before or just after the courier arrived at the Rolls-Royce logistics hub.

89. At this stage we note that Mr Charles did not initially accept on the basis of the evidence that the IP Goods in question had been received by Rolls-Royce. In the course of closing submissions Mr Charles did accept that it was highly likely that they had. For the avoidance of doubt we find that the goods in the specific transaction described above were received by Rolls-Royce. In making that finding we take into account our findings as to the system for issuing self-billed invoices and the existence of a self-billed invoice for the specific transaction. To the extent that self-billed invoices exist in relation to the other IP Goods then we would accept that those goods were also received by Rolls-Royce.

90. Mr Charles criticised the Appellant for not having put the self-billed invoices before the tribunal. We were only referred to one self-billed invoice during the course of the hearing, although we note that there were several others included in the bundles. Given the way in which the issue in relation to self-billed invoices was raised it does not appear that HMRC have had an opportunity to verify the existence of self-billed invoices in relation to all the transfers of IP Goods. We take that into account below in the way in which the appeal should be dealt with following this decision.

91. Mr Charles relied on various arguments that the self-billed invoices were not commercial receipts. A goods receipt and an invoice have different purposes. An invoice is a demand for money. A self-billed invoice is an acknowledgment that money is due. Neither provides any information as to the whereabouts of the goods. Mr Charles submitted that this was not simply a matter of semantics, or form over substance. The existence of a commercial receipt enabled the location of the goods to be identified which in turn enabled supervision by HMRC to take place. He gave an example of goods being sold several times over whilst remaining in the same warehouse. Similarly, where a buyer requires goods to be delivered to a third party. In those circumstances the issuing of a self-billed invoice would not inform HMRC about the location of the goods.

92. Mr Brown submitted that Notice 221 gave no definition of the term "commercial receipt". He submitted that the purpose of a commercial receipt was to ensure that the customs authority can identify from the importer's records who has physical custody of goods under customs supervision at any time in order to gain access to the goods. He submitted that the self-billed invoices issued by Rolls-Royce fulfilled that purpose in that they:

(1) were issued by Rolls-Royce as recipient of goods,

(2) contained sufficient detail to clearly identify the goods,

(3) were issued a short time after collection of the goods, and

(4) were only issued once the goods had been received by Rolls-Royce.

93. Mr Brown relied on the fact that the self-billed invoices were issued by Rolls-Royce at least primarily for VAT purposes, in accordance with paragraph 2B Schedule 11 Value Added Tax Act 1994. Essentially a self-billed invoice must include all the details of a standard VAT invoice produced by a supplier. It also has the effect of defining the time of supply for VAT purposes. We do not consider that the VAT provisions help resolve the question of whether the self-billed invoices were commercial receipts. The VAT provisions simply provide part of the context in which Rolls-Royce issued self-billed invoices. The existence of a supply for VAT purposes does not necessarily mean that the goods have been delivered to the purchaser.

94. Mr Charles is right that the document on its face only evidences that Rolls-Royce has acknowledged that payment is due and that a supply has been made for VAT purposes. However the self-billed invoice is only issued on receipt of the goods. It quotes the Appellant's "Release Note" reference, in the example above this was 105961. The Control Card identifying that those goods have been "issued from stores" refers to that Release Note number which is also the Appellant's invoice number produced at the same time. The fact that the self-billed invoice identifies the "Release Note" number is significant. So too is the fact that on the self-billed invoice this is equated to a delivery note reference.

95. In the light of our findings of fact we consider that the self-billed invoice acts as a receipt. Anyone looking at the Appellant's records would identify from the Control Card that specific goods had been released from the Appellant's stores on 18 November 2011. On the same date Rolls-Royce issued the self-billed invoice bearing the "Release Note" number. We are entitled to take into account the context in which the self-billed invoice is issued in determining whether it satisfies the description of a commercial receipt. Looked at in its context it acts as a receipt and confirms receipt of the goods by Rolls-Royce and/or its courier.

96. On that basis the Appellant complied with the obligation to obtain and retain a commercial receipt in the single transaction described above. There was no unlawful removal of those goods from customs supervision or any failure to fulfil an obligation imposed by Notice 221. We consider that it is appropriate to give the Appellant an opportunity to provide self-billed invoices for all other movements of goods relevant to the C18 demands.

97. Even if there was no commercial receipt, Mr Brown submitted that the goods in the present appeal did not disappear. They were never in a position that their physical location could not be identified should HMRC have wished to inspect them at any time. They had been entered into Rolls-Royce's IPR records and they had not entered the economic networks of the EU. On that basis he submitted that the IP Goods were not unlawfully removed from customs supervision. The audit trail provided by the records of the Appellant demonstrated where the goods were at any particular time.

98. We have found that the self-billed invoice we have looked at did constitute a commercial receipt. It may not therefore be necessary for us to deal with this submission. In the light of what we have said about the decisions in Hamann and X BV we prefer not to do so at this stage.

99. In case we are wrong and there was an unlawful removal from customs supervision, we now deal with Mr Brown's argument that the C18 demands are invalid because they were issued pursuant to Article 204 and not Article 203. In support of that submission he points to the provisions which identify the debtor, which differ according to the Article under which liability arises. He drew our attention to Article 218(3) Customs Code which in so far as relevant provides as follows:

> " 218(3) Where a customs debt is incurred … the relevant amount of duty shall be entered in the accounts within two days of the date on which the customs authorities are in a position to:
>
> (a) calculate the amount of duty in question, and
>
> (b) determine the debtor."

100. Mr Brown inferred from this provision that the customs authority must determine the debtor in accordance with the Article allegedly breached. He pointed

out that under Article 204 there can only be one debtor whereas under Article 203 there could be a number of possible debtors. In relation to debtors, those provisions read as follows:

**Article 203**

" 3. The debtors shall be:

– the person who removed the goods from customs supervision,

– any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

– any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

– where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed."

**Article 204**

"3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

101. Article 213 also provides that where several persons are liable for the payment of a customs debt then they shall be jointly and severally liable for that debt.

102. Mr Brown also relied on HMRC's internal guidance to officers in the case of an unlawful removal from customs supervision under Article 203 (INCHP06450). He pointed out that this requires C18 demands to be issued to each debtor who is jointly and severally liable with no priority to be shown as to the order in which they are pursued.

103. From these submissions Mr Brown submits that the failure of HMRC to identify the debtors in accordance with Article 203 and to issue C18 demands to all the debtors leads to a conclusion that the demand issued to the Appellant was invalid in so far as HMRC now seeks to justify it under Article 203. In this respect Mr Brown placed some reliance on the opinion of Advocate General Jaaskinen in X BV at [35] and [37]. We do not consider that the opinion of the Advocate General in X BV provides any support for the Appellant's argument.

104. Mr Charles submitted that the C18 was simply a demand for payment of a customs debt. HMRC were entitled to say that the debt arose either pursuant to Article

203 or in the alternative pursuant to Article 204. Further, he submitted that there was nothing to stop the Appellant from seeking a contribution from any person it considered to be jointly and severally liable for the customs debt, irrespective of whether HMRC had issued a demand to that person. He also pointed to the fact that the Tribunal has a full appellate jurisdiction under section 16(5) Finance Act 1994. If the reasoning of the decision maker as to the Article under which liability arises is wrong, the Tribunal can replace any decision made by HMRC under Article 203 with a decision that liability properly arises Article 204 and vice versa.

105. Mr Charles also relied on the fact that there could be many different potential debtors under Article 203. If the Appellant's argument were correct HMRC would have to identify or seek to identify all relevant debtors which would be impractical.

106. We accept Mr Charles' submissions. It seems to us that the C18 demand is simply a means of enforcing a customs debt. The C18 can only be challenged on the basis that there was no customs debt or that the debt is overstated. The demand will be justified if HMRC can make out a case that there is a customs debt. There is no express requirement that a demand must be tied to any particular Article of the Customs Code and we do not consider that there is any basis to read such a requirement into the provisions.

107. Mr Brown also argued that the C18 demands were invalid because the Appellant does not fall into any of the categories of debtors in Article 203(3). We do not consider that argument is tenable. The Appellant plainly fell within the fourth category of a person required to fulfil the obligations arising from temporary storage. This category is similar to that in Article 204(3) which the Appellant accepts would apply if there was a failure to fulfil an obligation not amounting to removal from customs supervision. We cannot see why it would not also fall within the fourth category of debtors in Article 203(3). Mr Brown pointed to use of the words "if appropriate" in Article 203(3). He submitted that it was not "appropriate" to make the Appellant a debtor when goods were outside customs control for such a short period of time. We do not consider that the words "if appropriate" are intended to give the customs authority a discretion whether to treat as a debtor a person who was required to fulfil the obligations arising from the use of a customs procedure. It seems to us that the words used simply identify a fourth category of debtors in cases where the reason the goods were removed from customs supervision was because of a failure to fulfil an obligation arising from use of the customs procedure. If those are the circumstances in which a customs debt arises then the person who was required to fulfil the obligation will be a debtor. The Appellant therefore falls within the fourth category of debtors.

108. The extent to which Rolls-Royce might also be a debtor under Article 203 with joint and several liability is not a matter for our decision.

109. If there had been a failure to obtain a commercial receipt which did not fall within Article 203, both parties accept that Article 204 would have been engaged. In those circumstances the question is whether that failure had a significant effect on the operation of IPR in the light of Article 859. It was also accepted that in those

circumstances the situation of the Appellant would have fallen within Item 7 of the failures to which Article 859 applies. We have already found where there was a self-billed invoice that the IP Goods arrived at Rolls-Royce and were entered into the records of Rolls-Royce as required by Item 7.

110. The Respondents did not positively assert that the Appellant was attempting to remove goods from customs supervision. We think they were right not to do so. We are satisfied that there was no such attempt and that the Appellant was attempting to comply with its obligations under IPR. The first bullet point of Article 859 is therefore satisfied.

111. The second bullet point of Article 859 is whether the failure implies obvious negligence on the part of the Appellant. Both parties agreed that we must have regard to the test of obvious negligence outlined by the CJEU in Firma Sohl. The Appellant accepted that the provisions were not complex. The Respondents suggested that little care was taken by the Appellant. We agree. The Appellant simply seems to have taken Rolls-Royce's system at face value without any consideration of its own. In doing so it seems to us that the Appellant failed to address the detailed requirements of IPR, including the requirement for a commercial receipt. There is no guidance on what amounts to a commercial receipt. If the Appellant had addressed its mind to the question and concluded that the self-billed invoice was a commercial receipt then that would have been understandable. But that is not what happened. In failing to address the question it lost the opportunity to resolve any doubts by seeking clarification from HMRC. In that sense the Appellant is fortunate that we have found that the self-billed invoice was a commercial receipt. If we had not made that finding, then the Appellant would only have itself to blame for not considering the requirements of Notice 221 more carefully. We would have found that there was obvious negligence on the part of the Appellant with the result that the failure to obtain a commercial receipt would have had a significant effect on the correct operation of IPR.

112. In the light of that finding we do not need to consider the third bullet point, namely whether all the formalities necessary to regularise the situation have been subsequently carried out.

*Conclusion*

113. We are satisfied that the Appellant did obtain and retain a commercial receipt for the single transaction described in detail in our findings of fact. As such there was no removal of those goods from customs supervision within Article 203. Similarly there was no failure to fulfil an obligation for the purposes of Article 204. To that extent therefore the appeal is allowed and the C18 demands shall be reduced accordingly.

114. The circumstances in which the Appellant's argument was raised meant that very few of the self-billed invoices were in evidence before us and only one of those was referred to during the course of the hearing. In relation to all other transfers of goods comprised in the C18 demands we allow the appeal in principle. If the parties are unable to agree the extent to which the C18 demands should be further reduced or

the impact of our decision on the civil penalty then either party may apply to restore the appeal for further findings in that regard. Any such application and/or any application for further directions consequential on this decision should be made within 90 days of its release.

115. 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.

**JONATHAN CANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 29 DECEMBER 2016**