C00131

CUSTOMS DUTY - external Community transit procedure - two movements - consignments not presented at office of destination - place where the offence or irregularity occurred not established - whether customs debt incurred in the United Kingdom - yes - whether defects in notifications to Appellant mean that duty was not recoverable - no - whether obvious negligence by Appellant - yes - whether evidence of a special situation - no - appeal dismissed - Council Regulation (EEC) No. 2913/92 Arts 215 and 239; Commission Regulation (EEC) No. 2454/93 Arts 378, 379 and 905

VALUE ADDED TAX - goods imported from a place outside the member states - whether customs debt incurred on removal of goods to United Kingdom or while goods in the United Kingdom - no - whether goods exported and so zero-rated - no - appeal allowed - VATA 1994 s15(1)(c) and s30(6) and(8)

LONDON TRIBUNAL CENTRE

P S L FREIGHT LIMITED

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: DR A N BRICE (Chairman)

MR J CLARK FTII, Solicitor

MR A MCLOUGHLIN

Sitting in London on 15, 16 and 17 February 2000

and 28 September 2000

Mr M Cornwell-Kelly with Ms R Taylor of Messrs Titmuss Sainer Dechert Solicitors for the Appellant on 15, 16 and 17 February 2000

Mrs Sally Saltissi of Messrs Decherts Solicitors for the Appellant on 28 September 2000

Mr H Keith of Counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

The appeals

1. PSL Freight Limited (the Appellant) appeals against:

(1) an original decision dated 9 January 1998 that, because consignment TI 000367, in respect of which the Appellant had acted as principal, had not been presented at the office of destination, the irregularity was deemed to have occurred in the United Kingdom under Article 378 of Commission Regulation (EEC) No. 2454/93; that the total customs duty due was £176,159.56; that the total value added tax due was £67,267.55; and thus that the total charges due were £243,427.11. This decision was confirmed on review on 6 March 1998;

(2) a second original decision also dated 9 January 1998 that, because consignment TI 000524, in respect of which the Appellant had acted as principal, had not been presented at the office of destination, the irregularity was deemed to have occurred in the United Kingdom under Article 378 of Commission Regulation (EEC) No 2454/93; that the total customs duty due was £174,887.65; that the total value added tax due was £66,781.86; and thus that the total charges due were £241,669.51. This decision was confirmed on review on 6 March 1998; and

(3) an original decision dated 21 August 1998 that duty on both consignments TI 000367 and TI 000524 would not be remitted under Article 239 of Council Regulation (EEC) No 2913/92 because the application was not supported by evidence which might constitute a special situation for the purposes of Article 905 of Commission Regulation (EEC) No 2454/93. This decision was confirmed on review on 21 October 1998.

2. The appeal was first heard on 15, 16 and 17 February 2000. After the hearing had ended but before the Decision of the tribunal was released the parties became aware of the Judgement of the European Court of Justice in Case C-233/98 Hauptzollamt Neubrandenburg v Lensing & Brockhausen GmbH delivered on 21 October 1999. The Appellant applied for a further hearing to enable representations to be made on the subject of that decision. The further hearing took place on 28 September 2000.

The legislation

3. Council Regulation (EEC) No 2913/92 is the Community Customs Code and we refer to Articles of that Regulation by their number followed by CCC. That Regulation was amended in 1999 after the events the subject of this appeal. Accordingly, we refer to its text as it was before the 1999 amendments. Commission Regulation (EEC) No. 2454/93 contains the implementing provisions for the Community Customs Code and so we refer to Articles of that Regulation by their number followed by IPC. We set out the relevant legislation in full later in this Decision within the context of the issues to which it relates. Here we give a very brief outline only so far as is relevant to the issues in the appeal.

4. The place where a customs debt is incurred is relevant because that is the place where the tax liability is incurred. Article 215 CCC contains the general provisions. Article 215.1 provides that a customs debt is incurred at the place where the events from which it arises occur. Article 215.3 provides that, where a customs procedure is not discharged for goods, the customs debt is deemed to have been incurred at the place where the goods were placed under that procedure. Article 378 IPC applies to the external Community transit procedure and provides that, where a consignment has not been presented at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed in the member state to which the office of departure belongs.

5. Article 379.1 IPC provides that, in such a case, the office of departure shall notify the principal as soon as possible and in any case within eleven months of the date of registration of the transit declaration. Article 379.2 IPC provides that the notification shall indicate the time limit of three months by which proof of the regularity of the transit operation, or of the place where the offence or irregularity was actually committed, must be furnished to the office of departure.

6. Article 239 CCC provides that duties may be remitted in situations to be determined resulting from circumstances in which no deception or obvious negligence may be attributable to the person concerned. The situations referred to in Article 239 CCC are contained in Articles 899 to 905 IPC. Article 905 IPC provides that, if an application for the remission of duties is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the case shall be transmitted to the Commission.

7. Section 1(1)(c) of the Value Added Tax Act 1994 (the 1994 Act) provides that tax is charged on the importation of goods from places outside the member states. Section 15(1) describes when, for the purposes of the Act, goods are imported from a place outside the member states and sets out three cumulative conditions one of which is in section 15(1)(c). Section 15(1)(c) provides that the circumstances must be such that it is on the removal of the goods to the United Kingdom, or subsequently while they are in the United Kingdom, that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred.

8. Section 30(6) of the 1994 Act provides that a supply of goods is zero-rated if they are exported outside the member states and section 30(8) provides that a supply of goods is zero-rated if they are removed from the United Kingdom and acquired in another member state by a person who is liable for value added tax on the acquisition.

The issues

9. The Appellant is a freight forwarder and in January 1995 it acted as principal in connection with the despatch of two consignments of cigarettes from Ramsgate to Algeciras. The cigarettes originated in the United States of America. One consignment was said to be ultimately destined for Morocco. The transit movements were not completed and the places where the irregularities occurred were not established. Accordingly, duty and value added tax demands were made on the Appellant. It was accepted on behalf of the Appellant that it was the declared principal for both transit movements.

10. The issues for determination in the appeal were:

(1) whether the customs debt was incurred in the United Kingdom and, specifically, whether it was incurred at the place where the events from which it arose occurred as provided by Article 215.1 CCC (as argued by the Appellant) or in the member state to which the office of departure belonged as provided by Article 378.1 IPC (as argued by Customs and Excise);

(2) whether the fact that the notifications to the Appellant did not comply with all the provisions of Article 379 IPC meant that the duty was not recoverable;

(3) whether there was no deception or obvious negligence attributable to the Appellant within the meaning of Article 239 CCC and whether there was evidence which might constitute a special situation within the meaning of Article 905 IPC;

(4) whether value added tax was chargeable on the importation of the goods into the United Kingdom and, in particular, whether a customs debt in respect of duty on the entry of the goods into the Community had been incurred on the removal of the goods to the United Kingdom or while the goods were in the United Kingdom within the meaning of section 15(1)(c) of the 1994 Act; and, if such tax were chargeable

(5) whether the supplies of the goods were zero-rated for value added tax purposes on the grounds either that they had been exported to a place outside the member states within the meaning of section 30(6) of the 1994 Act or that they had been removed from the United Kingdom and acquired in another member state by a person liable for value added tax on the acquisition within the meaning of section 30(8).

The evidence

11. A bundle of documents was produced by the Appellant and oral evidence was given on behalf of the Appellant by Mr Richard John Catt, the shipping manager of the Appellant. Mr Catt has been with the Appellant since 1988 and has been in the shipping industry for nearly 30 years.

12. Another bundle of documents was produced by Customs and Excise. Witness statements containing evidence on behalf of Customs and Excise had been signed by:

Mr Richard Brennan, an Assistant Officer of HM Customs and Excise employed at the Central Community Transit Office in Harwich. Mr Brennan had signed three statements one dated 1 February 1998 about movement 000367; one dated 1 December 1998 about movement 000524; and one dated 3 June 1999 about movement 000524; and

Mr John Howard, a team leader in the Central Community Transit Office.

13. These statements were not objected to by the Appellant and were read at the hearing of the appeal as evidence of the facts stated in them under the provisions of Rule 21(3) of the Value Added Tax Tribunals Rules 1986 SI 1986 No. 590.

14. Oral evidence was given on behalf of Customs and Excise by:

Mr Peter George Hook, an officer of HM Customs and Excise; and

Mr Jason Peter Pelling, an Officer of HM Customs and Excise in the National Investigation Service.

The facts

15. We have approached our findings of fact in the following way. First we give an outline of the external Community transit procedure as that is essential to an understanding of the two transit movements the subject of this appeal. Next we find the facts relating to the state of knowledge about fraud in the transit of highly taxed goods as this is a necessary background to some of the events relating to the two transit movements. Finally, we find the facts relating to those two movements and to the events consequent upon them, including the notifications from Customs and Excise.

(1) - An outline of the external Community transit procedure

16. The external Community transit procedure enables goods destined for destinations outside the Community to cross the territory of the Community without paying duties or taxes which would otherwise be due when goods enter or leave that territory. During the external transit procedure the goods are not in free circulation and are not to be released on to the market. The procedure provides for guarantees to be given for the payment of duties and taxes if the goods are lost during the transit procedure. The system is a paper controlled system and the relevant document is the T1 declaration.

17. The specific provisions are found in Articles 91 to 97 CCC which deal with external transit. Article 91 provides that the external transit procedure shall allow the movement from one point to another within the customs territory of the Community of non-Community goods without such goods being subject to import duties and other charges. Article 92 provides that the external transit procedure ends, and the obligations of the holder are met, when the goods and the required documents are produced at the customs office of destination. Article 94 provides that the principal shall provide a guarantee in order to ensure payment of any customs debt or other charges. The guarantee can be either an individual guarantee covering a single transit operation or a comprehensive guarantee covering a number of transit operations where the principal has been authorised to use such a guarantee by the customs authorities of his member state. Alternatively, it is possible to have a guarantee waiver but that does not apply to external Community transit operations involving goods which are considered to present increased risks. (The list of goods presenting increased risks to which the guarantee waiver does not apply is set out in Annex 52 IPC and includes some alcohol and more than 35,000 cigarettes.) Article 96 provides that the principal shall be the holder of the external Community transit procedure and that he is responsible for the production of the goods intact at the customs office of destination by the prescribed time limit and for the observance of the provisions relating to the Community transit procedure.

18. There are additional provisions about the external transit procedure in Chapter 4 IPC. Article 341.1 provides that all goods which are to move under the external transit procedure shall be the subject of a TI declaration. A TI declaration is a declaration on a form corresponding to the specimens in Annexes 31 to 34. A number of copies of the TI declaration are required as detailed in Annex 37. Copy 1 is retained by the customs authorities in the member state of departure; copy 3 is retained by the exporter after being stamped by the customs authorities; copy 4 is kept by the office of destination; copy 5 is returned by the office of destination to the office of departure; and copy 8 is returned to the

consignee after being stamped by the customs authorities at the office of destination. Other copies are used for statistical purposes. Article 348 provides that the office of departure shall accept and register the TI declaration and prescribe the period within which the goods must be presented at the office of destination. Article 356 provides that the goods and the TI document shall be presented at the office of destination which shall send one copy to the office of departure and retain the other copy. Article 357 provides that the person presenting a transit document to the office of destination, together with the consignment to which that document relates, may obtain a receipt on request. Articles 378 to 380 deal with irregularities and proof of regularity and those are the Articles which are most directly relevant to the issues in this appeal.

19. In the United Kingdom the TI declaration is registered at the customs office of departure and the top copy (copy 1) is sent to the Central Community Transit Office (CCTO) at Harwich where it is entered onto a database and then filed. When the consignment has been presented to the customs office of destination that office endorses the reverse of copies 4 and 5 of the TI document and returns the copy 5 to the CCTO. At that stage the principal's liability for the movement is discharged. The computer generates at intervals a list of undischarged TI documents and enquiries are then made by the CCTO.

20. On 10 February 2000 the European Commission published an Interim Report on Transit. Page 15 of Annex II of that Report contains a description of the inquiry procedure. It indicates that, if the copy 5 of a TI document has not been returned to the office of departure within ten weeks of the date of registration, the office of departure should contact the principal for information. If the information obtained from the principal is not sufficient to permit discharge of the TI document then, within four months of the date of registration, the office of departure should send an enquiry notice to the office of destination who should advise the office of departure. The office of departure should then either discharge the TI document or notify the principal as required by Article 379 IPC. If the office of destination does not respond to the enquiry notice within four months of its despatch then the office of departure should send a reminder. If no response is received from the office of destination within three months of the reminder then the office of departure should notify the principal as required by Article 379 IPC. This timetable enables the eleven month period in Article 379.1 IPC to be complied with.

21. Mr Hook gave evidence which we accept that, normally, Customs and Excise would expect to receive a TI document from the office of destination within ten weeks of the date of registration.

22. With that outline of the external Community transit procedure in mind we turn to find the facts relating to the state of knowledge about fraud in the transit of highly taxed goods before the two transit movements the subject of this appeal took place.

(2) Knowledge about fraud in the transit of highly taxed goods

23. There has been fraud in the Community transit system since 1990, according to a Report published by the European Commission in March 1995 entitled "Fraud in the Transit Procedure, Solutions Foreseen and Perspectives for the Future". Customs and Excise investigated some diversions in 1991. There were two operations involving cigarettes in 1993; two in 1994; and four in 1995. Each operation might comprise a number of different transit movements. We were not told of the dates of the operations in 1995 but they most probably occurred after

the two transit movements the subject of this appeal, both of which commenced in January 1995. In all the cases investigated the movements originated in the United Kingdom.

24. Customs and Excise did not issue a general warning to United Kingdom principals about the potential risks associated with the transit movements of highly taxed goods. They relied on the fact that both the Community Customs Code and Public Notice 750 set out the principal's responsibilities, and his obligation to ensure that the goods were presented at the office of destination, and described the consequences and penalties for failure to comply. Also it was widely known that cigarettes and alcohol were highly taxed and thus represented an increased risk. Mr Hook's evidence was that Customs and Excise took the view that any commercially astute principal ought to have been aware of the risks associated with the movements of these goods. Also, warnings were not issued where suspected frauds were under investigation for fear of prejudicing the criminal investigation. Mr Hook thought it likely that the first warning to United Kingdom traders about fraud in the Community transit system was the publication of the Commission's report in March 1995. Mr Hook confirmed that Customs and Excise had no knowledge of any risk involved in the two movements the subject of this appeal before they took place. We accept the evidence of Mr Hook.

25. Since the publication of the Commission's Report in March 1995 further action has been taken at Community level. In January 1996 the European Parliament established a Committee to consider transit fraud. That Committee published a Report in February 1997. In April 1997 the Commission published a plan for reform to improve the legislation; to improve the operations by the member states; and to computerise the return of transit documents.

26. However, all that was after the two transit movements the subject of this appeal to which we now turn.

(3) - The two transit movements

27. The Appellant is a customs clearance and freight-forwarding company and has offices in Dover, Kent. At the relevant time the Appellant had a guarantee from Barclays Bank Plc which was a comprehensive Community transit guarantee. It was suggested at the hearing that the guarantee might not be enforceable but as we received no evidence on that matter we make no findings of fact about it.

28. In the late 1980s the Appellant transacted business with East Kent Shipping (EKS) in Ramsgate. EKS was a port clearance agent and handled all the customs documentation for the Appellant's movements through Ramsgate. In return the Appellant arranged movements through Dover for EKS. Neither the Appellant nor EKS handled cigarettes or spirits. After January 1993 EKS was purchased by Sally Line and became incorporated as Orbit Shipping and Trading Co Ltd (Orbit). Orbit did not have a comprehensive Community transit guarantee but instead relied upon a guarantee waiver which could not be used for external Community transit movements involving high risk goods. Accordingly, the Appellant agreed with Orbit that, for movements requiring a full comprehensive Community transit guarantee, Orbit could use the Appellant's guarantee. Two of Orbit's employees were added to the Appellant's guarantee so that Orbit could raise guaranteed documentation both for itself and for the Appellant from Ramsgate. Following each shipment Orbit would fax to the Appellant a copy of the TI declaration raised on the Appellant's guarantee and one of the Appellant's clerks would open a file and invoice Orbit for the use of the guarantee.

29. Towards the end of 1994 a member of the Appellant's staff drew Mr Catt's attention to the fact that Orbit was using the Appellant's comprehensive Community transit guarantee for high risk transit movements. Mr Catt spoke to Orbit but was reassured that such guarantees were only used for prominent traders. Cigarettes were not mentioned. Mr Catt accepted that, had closer inspection of the relevant faxed TI declarations been made by the Appellant, the movements at issue in the appeal would have attracted attention earlier because the TI declarations made it clear that the consignments were of cigarettes. However, the routine was that the faxed TI declarations were simply collated and booked in by a clerk and not called for again unless there was a problem.

The two consignments - January 1995

30. There were two consignments at issue in the appeal which were referred to by their TI declaration numbers, namely TI 000367 and TI 000524. Consignment TI 000524 originated in the United States of America and entered the territory of the Community in the Netherlands from which it was transported in bond to Ramsgate and discharged there. Consignment TI 000367 also originated in the United States of America but it was not known how it entered the territory of the Community nor how it entered the United Kingdom. However, it was not disputed that both transit movements commenced at Ramsgate.

31. On 18 January 1995 Orbit received a message from a haulier to say that one of its vehicles was loading 1108 cartons of cigarettes for delivery to, and clearance at, Algeciras in Spain. 970 of the cartons were of Winston cigarettes, the remainder being either Lucky Strike or Marlborough. The haulier asked Orbit to prepare a TI declaration. This was prepared by Orbit and stamped on the same day (18 January 1995) by the Customs Office at Ramsgate. The TI declaration was numbered 000367 and showed the consignee as being in Algeciras, the principal as the Appellant represented by an employee of Orbit; the intended office of transit as Dunkirk in France; the office of destination as Algeciras; and the country of destination as Spain. The consignment left Ramsgate for Dunkirk on 18 January 1995 in the "Sally Star".

32. Consignment TI 000524 followed a similar pattern. There were 1100 cartons of Winston cigarettes. The TI declaration was numbered 000524 and was stamped by the Customs Office in Ramsgate on 25 January 1995. It showed the consignee as being in Morocco; the principal as the Appellant represented by an employee of Orbit; the intended office of transit and country as Dunkirk, France and Adinkerke Belgium; the office of destination as Algeciras; and the country of destination as Morocco.The consignment left Ramsgate for Dunkirk on 25 January 1995 in the "Sally Star".

33. Thus, for the purposes of the eleven month time limit in Article 379.1 IPC, 18 January 1995 was the date of registration of consignment TI 000367 and 25 January 1995 was the date of registration of consignment TI 000524.

The Appellant withdraws authority to use its guarantee - February 1995

34. On 2 February 1995 Mr Catt received a telephone call from Customs and Excise about an export of whisky that was about to be moved through the Channel Tunnel using the Appellant's comprehensive Community transit guarantee. Mr Catt forbade the movement and checked through the other faxed TI declarations discovering those for consignments TI 000367 and TI 000524. On the same day the Appellant withdrew its authority from Orbit to use its comprehensive Community transit guarantee and also sought confirmation from

Orbit that the receipts for each consignment would be provided as soon as they were received.

35. Some time later (no date was given) the Appellant received receipted copies of the TI declarations apparently stamped at Algeciras confirming discharge of both movements. The receipt for consignment TO 000367 was dated 21 January 1995 and that for consignment 000524 was dated 30 January 1995. These receipts subsequently proved to have been forged.

36. From time to time the Appellant asked Customs and Excise about any undischarged movements as it wished to know its outstanding liability under its guarantee. These two movements kept appearing in the list of undischarged movements produced by Customs and Excise.

Customs learn of the forgeries - October 1995

37. On 24 October 1995 the Netherlands customs authorities requested the Spanish customs authorities to verify the stamps on the reverse of the copy 5 of document TI 000524 and also to verify a letter purportedly coming from the customs authorities in Algeciras. On 26 October 1995 a Customs Officer in the CCTO spoke to a customs officer in the Netherlands and was told that the TI document 000524 had not been registered at the Algeciras customs office; that the stamps had been falsified; and that the accompanying letter was forged. The information was faxed through to the CCTO on the same day (26 October 1995). That was the first time that Customs and Excise became aware of any specific irregularities in connection with either of these transit movements.

38. In December 1995 a letter was received by the CCTO (but not through the usual channels). It was dated 1 February 1995 and purported to come from the customs office in Algeciras. It said that four transit movements, including TI 000367 and TI 000524, had been discharged. Customs and Excise also received what purported to be the four copy 5s of the relevant TI documents with stamps dated January 1995 impressed at the Customs Office at Algeciras. On 20 December 1995 the CCTO sent copies of the copy 5s of the TI documents to Algeciras for verification. They were returned on 26 January 1996 with the comment that the documents had not been presented to the customs office and that the stamps appeared to have been forged or falsified.

The first notifications - December 1995

39. Meanwhile on 15 December 1995 Customs and Excise sent a document C1341 to Barclays Bank Plc about consignment TI 000524 and a similar document was sent on 20 December 1995 about consignment TI 000367. Each notification stated that Customs and Excise had not yet received advice that the transit operation had been completed satisfactorily. For that reason the relevant Community transit operation could not be discharged and the bank as guarantor could be liable to pay any amounts due. Copies of these documents were sent to the Appellant.

40. Thus, for consignment TI 000367 the first notification on 20 December 1995 was eleven months and two days after the date of registration which was 18 January 1995. For consignment TI 000524 the first notification on 15 December 1995 was less than eleven months after the registration date which was 25 January 1995. However, neither notification contained the information required by Article 379.2 IPC because neither indicated the time limit of three months by

which proof of the regularity of the transit operation, or proof of the place where the irregularity was committed, had to be furnished to Customs and Excise.

41. When he received the copies of the documents C1341 Mr Catt sent to Customs and Excise copies of the TI documents which he had received, which purported to have been stamped at Algeciras. Mr Catt did not then know that these documents had been forged. However, Mr Catt did not receive notification of the discharge of the transit movements and they continued to appear in the list of undischarged movements. On 16 July 1996 Mr Catt wrote to a firm called European Express Haulage asking them to look into the consignments which remained undischarged with Customs. On 17 October 1996 European Express Haulage sent Mr Catt what purported to be four TI documents including TI 000376 and TI 000524 received from agents in Spain and stamped by the customs office in Algeciras.

42. On 21 October 1996 Mr Catt sent these documents to Customs and Excise with the request that the Appellant's liabilities be lifted. However, the documents sent by the Appellant were the same as those which had been received by Customs and Excise in December 1995 and which were forgeries. On 28 November 1996 Customs and Excise wrote to the Spanish Customs Office in Madrid sending them the documents received from the Appellant and asking them to confirm that they were genuine so that enquiries could be concluded. On 26 December 1996 the Spanish customs office confirmed the information given on 26 January 1996 and said that the forms had not been presented; that the stamps were forged or falsified; and that the signatures were not genuine.

43. Here we leave the progress of the two movements the subject of this appeal to record the facts relating to a criminal investigation conducted by Customs and Excise in 1996. That investigation is relevant as it provides some background to the facts of this appeal and also because some documents relating to consignment TI 000367 came to light during that investigation.

Customs' criminal investigation - 1996 - 1997

44. Some time before May 1996 Customs and Excise had commenced a criminal investigation into the alleged diversion of American cigarettes onto the Spanish market by United Kingdom nationals.

45. On 3 May 1996 Kent Police Officers entered a warehouse in Sittingbourne, Kent. They found two trailers containing Winston cigarettes. The cigarettes had been moved to Sittingbourne from a bonded warehouse in Kent for export out of the United Kingdom. The police also discovered some TI documents which appeared to show that the two loads of cigarettes had been exported from Dover on 2 May 1996. Other documents were found which purported to indicate that the cigarettes had already been exported to other member states under the guise of photocopier or machine parts. Six people were arrested and three were charged with fraudulent evasion of duty contrary to section 170(1) of the Customs and Excise Management Act 1979. Further enquiries were made and later a further five people were arrested of whom three were charged.

46. The police contacted Customs and Excise who took over the investigation. Initially it was thought that the cigarettes were being diverted to the United Kingdom market but it then became clear that the diversion had not taken place in the United Kingdom as there is no market in the United Kingdom for Winston cigarettes. Also, as the investigation progressed, a number of TI documents were discovered which had been prepared by the same organisation. The consignors,

consignees, and hauliers were all the same. Most of the paperwork related to American cigarettes being despatched to Spain. The cigarettes did not arrive at their destination and were not declared to the Spanish customs authorities. However, the TI documents were stamped with forged Spanish customs stamps and then returned to the United Kingdom.

47. Enquiries were then made into the copy 5s of these TI documents. They all related to movements of cigarettes to Spain from bonded warehouses in the United Kingdom. There were about 50 consignments over a two to three year period. The documents included a covering letter which related to four TI documents of which one was that relating to movement 000367. The focus of the investigation then switched to Spain. The enquiries in Spain revealed that, the day before the Kent police had entered the warehouse at Sittingbourne, the Guardia Civile in Spain had raided a farm outside Seville. There they found a United Kingdom registered lorry full of Winston cigarettes. A number of arrests were made.

48. In February 1997 Mr Pelling visited Spain and received confirmation that the four TI documents, including that relating to movement TI 000367, were forged. Only two of those four (and not including TI 000367) were relevant to the criminal investigation and so TI 000367 was not investigated further at that stage.

49. The criminal prosecution closed at the end of 1997.

50. The circumstances of the operations which were investigated during the criminal investigation differed from the circumstances relating to movement TI 000367. In the former the export of the goods was not notified to Customs and Excise whereas consignment TI 000367 was declared to Customs and Excise at Ramsgate. Also, the movements the subject of the criminal investigation purported to have been exported at Dover whereas consignment TI 000367 was exported at Ramsgate.

The events of 1997

51. We now return to the events relating to the two movements the subject of this appeal which we left at the end of 1996. On 21 October 1996 the Appellant had sent some copy TI documents to Customs and Excise who had been informed in December 1996 that the documents were forged.

52. After its letter of 21 October 1996 the Appellant heard nothing further from Customs and Excise but the movements remained in the list of movements which had not been discharged. Mr Catt made a number of telephone calls to Customs and Excise, in particular in July 1997, and was told that Customs and Excise were investigating irregularities and possible forgeries and that the documents he had sent were part of that investigation. That was the first occasion on which Mr Catt learnt of the possibility that the documents and stamps were forgeries. He was asked not to discuss the matter with anyone as the investigation was in progress. He offered his full assistance and co-operation.

53. On 10 October 1997 another form C1341 was sent to Barclays Bank and to the Appellant. Again, neither notification contained the information required by Article 379.2 IPC because neither indicated the time limit of three months by which proof of the regularity of the transit operation, or the place where the offence or irregularity was actually committed, had to be furnished to Customs and Excise.

54. On 15 October 1997 Barclays Bank advised the Appellant that it could expect charges on the two movements. Mr Catt wrote to Customs and Excise and said that Orbit had the original receipts and that these were available for inspection by Customs and Excise. Towards the end of October 1997 Orbit informed the Appellant that Customs and Excise had advised them that the receipts might be forgeries. Mr Catt made some telephone calls to Customs and Excise which did not lead very far.

The second notifications - November 1997

55. On 14 November 1997 Customs and Excise at Harwich wrote to the Appellant twice, once about movement TI 000367 and once about movement TI 000524. The letters said that the customs authorities at Algeciras were unable to confirm that the goods were presented and no information as to their whereabouts could be obtained. Each letter continued:

"You will be required to pay the charges due on the consignment unless you provide either:

a a copy entry or other document certified by the customs authorities establishing that the goods in question have been produced at the office of destination or at the premises of an authorised consignee, or

b a copy entry or other document issued in a third country showing that the goods have been released for consumption there. A photocopy of the entry or other document may be acceptable provided the relevant authorities have certified it as being a true copy.

This information must be sent to the address above within three months of the date of this letter. If no reply is received or if the documents provided are not acceptable ... a request for payment will be sent to you."

56. Each letter also asked for a copy invoice and the combined nomenclature code covering the consignment.

57. The notifications of 14 November 1997 contained some of the information required by Article 379.2 IPC because they indicated the time limit of three months by which proof of the regularity of the transit operations had to be furnished to Customs and Excise. The wording used followed that in Article 380 IPC which describes how proof of regularity is to be furnished. However, these notifications did not mention the other option in Article 379.2 IPC of providing proof of the place where the offence or irregularity was actually committed. Also they were approximately thirty-four months after each date of registration and not the eleven months provided in Article 379.1 IPC.

58. Upon receipt of the letters of 14 November 1997 the Appellant wrote to Orbit, sending copies of the letters and asking for the documents requested. Orbit made a number of enquiries of the customs office at Algeciras; of the consignees; and of the exporters of the two consignments. On 24 November 1997 the Appellant wrote to Customs and Excise saying that it would try to obtain copies of the customs entries from Spain but, as the request was made nearly three years after the shipment took place, that might be difficult. The Appellant went on to emphasise that it had presented copies of the stamped and signed receipts to Customs and the originals were available for them to collect; it said that those receipts were clear evidence that the TI documents had been discharged at Algeciras by the Spanish customs authorities.

The third notifications - the decision letters - January 1998

59. On 9 January 1998 Customs and Excise wrote to the Appellant twice, once about movement TI 000367 and once about movement TI 000524. The letters said that the Customs authorities in Algeciras had stated that the goods were not presented and no information about their whereabouts could be obtained. The irregularity was, therefore, deemed to have occurred in the United Kingdom and, in accordance with the provisions of Article 378 IPC, the Appellant was liable for the payment of the charges. Each letter continued:

"We wrote to you on 14 November 1997 to advise you that this movement had not been discharged and giving you the opportunity to provide alternative evidence which could be considered to discharge the movement. I am now writing to advise you of the Customs debt (VAT assessed at UK rates) which would be payable should you be unable to produce acceptable alternative evidence or proof of where the irregularity took place."

60. The letters went on to state that the duty and value added tax due amounted to £243,427.11 for movement TI 000367 and £241,669.51 for movement TI 000524. The charges were payable within ten working days of the letter but the Appellant could ask for a formal Departmental review and could then appeal to the tribunal. Those are the first and second decisions against which the Appellant appeals.

61. The letters of 8 January 1998 thus invited the Appellant to provide proof of the place where the offence or irregularity was actually committed as required by Article 379.2 IPC. However, these letters were nearly three years after the date of registration and so were not within the eleven months specified in Article 379.1 IPC.

62 On 8 September 1998 Customs and Excise sought further verification of the TI document relating to movement 000524. The Spanish customs office confirmed that the TI document had not been presented; that the stamp was false; and that the signature was not that of a customs officer.

The position of the Appellant

63. The Appellant only became involved in the two movements the subject of this appeal because it had authorised Orbit to use its comprehensive Community transit guarantee and the guarantee was used by Orbit to clear the two consignments through customs at Ramsgate. Mr Keith stated at the hearing that Customs and Excise did not doubt the integrity of Mr Catt or the Appellant and that he regarded Mr Catt as an honest, open and frank witness. We share those views.

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Reasons for decision

64. We consider separately each of the issues for determination in the appeal.

Issue (1) - Where was the customs debt incurred?

65. The first issue is whether the customs debt was incurred in the United Kingdom and, specifically, whether it was incurred at the place where the events

from which it arose occurred as provided by Article 215.1 CCC (as argued by the Appellant) or in the member state to which the office of departure belonged as provided by Article 378.1 IPC (as argued by Customs and Excise). The place where the customs debt is incurred is relevant because it establishes the place where the tax liabilities are incurred.

66. The legislation relating to this issue is contained in Article 215 CCC and Article 378 IPC.

67. Before 1999 the relevant parts of Article 215 CCC provided:

"Article 215

1. A customs debt shall be incurred at the place where the events from which it arises occur.

2. Where it is not possible to determine the place referred to in paragraph 1, the customs debt shall be deemed to have been incurred at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred.

3. Where a customs procedure is not discharged for goods, the customs debt shall be deemed to have been incurred at the place where the goods-

- were placed under that procedure, or

- enter the Community under that procedure."

68. Article 378 IPC provides:

"Article 378

1. Without prejudice to Article 215 of the Code, where the consignment has not been presented at the office of destination, and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed-

- in the Member State to which the office of departure belongs, or

- in the Member State to which the office of transit at the point of entry into the Community belongs, to which a transit advice note has been given,

unless within the period laid down in Article 379(2), to be determined, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.

2. Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State of departure or in the Member State of entry as referred to in the first paragraph, second indent, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.

3. If the Member State where the said offence or irregularity was actually committed is determined before expiry of a period of three years from the date of registration of the TI declaration, that Member state shall, in accordance with Community or national provisions, recover the duties and other charges (apart from those levied pursuant to the second subparagraph, as own resources of the Community) relating to the goods concerned. In this case, once proof of such recovery is provided, the duties and other charges initially levied (apart from those levied as own resources of the Community) shall be repaid."

69. The Appellant argued that Article 378.1 IPC could not apply as Customs and Excise had not proved that the place where the offence or irregularity occurred could not be established and so the provisions in Article 215.1 CCC applied instead. The Appellant also argued that the customs debt could not be recovered in the United Kingdom. Thus, the arguments of the parties on this issue raised three separate questions which were;

(a) was it the duty of Customs and Excise to establish the place where the offence or irregularity occurred?;

(b) does Article 215.1 CCC apply so that the customs debt was incurred at the place where the events from which it arose occurred?; and

(c) does Council Directive 76/308/EEC mean that the customs debt may not be recovered against the Appellant in the United Kingdom?

70. We consider each question separately.

Question (a) - Was it the duty of Customs and Excise to establish the place where the offence or irregularity occurred?

71. For the Appellant it was argued that, for Article 378.1 IPC to apply, it was the responsibility of Customs and Excise, and not the trader, to prove that the place of the offence or irregularity could not be established. Reference was made to Article 10EC of the Treaty and to Council Regulation (EEC) No.1468/81. It was argued that the evidence suggested that the cigarettes had been diverted in Spain but Customs and Excise had abandoned their investigation of movement TI 000367 at an early stage and had never investigated movement TI 000524. Accordingly, they could not rely on the fact that the place of the offence or irregularity could not be established.

72. For Customs and Excise it was argued that there was no obligation on Customs and Excise to make extensive enquiries. It was the principal who had the contact with the exporter and the haulier and who could make such enquiries as were required. That was consistent with the whole approach of the Community Customs Code (especially Articles 96 and 204) which placed the obligations on the principal. Reference was also made to Articles 220(2)(b) and 239 CCC which gave the trader a remedy if the customs authorities committed an error. Firma Sohl & Sohlke v Hauptzollamt Bremen Case C-48/98 Judgement 11 November 1999 was cited where, at paragraph 58 of its judgement, the Court of Justice upheld the principle that the onus was on the trader to ensure compliance. Friedrich Binder GmbH & Co KG v Hauptzollamt Bad Reichenhall Case 161/88 Judgement of 12 July 1989 was also cited where the principle was established that the trader was deemed to know the law. Reference was also made to Article 378.3 IPC which only applied if the member state where the offence or irregularity was actually committed was identified and that had to be determined. The trader had to provide proof to Customs and Excise and the offence or

irregularity had to have been committed in a member state so that the duty could be recovered. The fact was that in this appeal the place of the irregularity could not be established. All that was known was that the TI declarations had been stamped at Ramsgate. The irregularities could have occurred on board ship in United Kingdom waters, in France or in Spain or in Belgium for consignment TI 000524. Thus, although it was likely that the irregularity occurred in another member state, there was no evidence as to which.

73. In considering the arguments of the parties we begin with the legislation. First, we find nothing in either Article 215 CCC or in Article 378 IPC which states that it is the responsibility of the customs authorities to prove that the place of the offence or irregularity cannot be established. Article 215.3 CCC states that if, as a fact, the customs procedure is not discharged for goods, then the debt is deemed to have been incurred at the place where the goods were placed under the customs procedure. Article 378.1 IPC states that if, as a fact, the place of the offence or irregularity cannot be established, the offence or irregularity is deemed to have been committed in the member state of departure. Thus neither of these Articles supports the view that it is for the customs authorities to prove that the place of the offence or irregularity cannot be established.

74. We have also considered the context in which Article 378 IPC occurs. That Article appears in Chapter 4 IPC which deals with the external Community transit procedure. The Articles of the Community Customs Code which deal with such procedure are Articles 91 to 97. Article 92 provides that the external transit procedure ends, and the obligations of the holder are met, when the goods and the required documents are produced at the customs office of destination. Article 94 provides that the principal shall provide a guarantee in order to ensure payment of any customs debt or other charges. Article 96 provides that the principal shall be the holder of the external Community transit procedure and that he is responsible for the production of the goods intact at the customs office of destination by the prescribed time limit and for the observance of the provisions relating to the external Community transit procedure.

75. These provisions make it clear that it is the principal who has the obligations under the external Community transit procedure to produce the goods intact at the office of destination and to observe all the provisions relating to the Community transit procedure. Not only is the principal liable for payment of duties and taxes if the goods are lost during the transit procedure but he also has to provide a guarantee as a condition of using that procedure.

76. We have also referred to Article 204 CCC which provides that a customs debt on importation is incurred through the non-fulfilment of one of the obligations arising from the use of the customs procedure under which goods are placed. That also reinforces the view that, as far as the external Community transit procedure is concerned, the obligations are on the principal and not on the customs authorities.

77. Finally we have referred to Articles 379 and 380 IPC which follow Article 378. (We set out the provisions of these Articles in the context of the second issue in the appeal.) Article 379.2 provides that it is the principal who has to provide proof of the regularity of the transit operation, or of the place where the offence or irregularity was actually committed, to the office of departure. It also goes on to provide that, if such proof is not produced, then the competent member state shall take steps to recover the duties and charges involved. It does not say that the customs authorities have to undertake investigations. Article 380 contains provisions as to how proof of the regularity of a transit operation shall be

furnished to the satisfaction of the customs authorities. Both Articles 379 and 380 assume that it is the principal who furnishes the proof and not the customs authorities.

78. Accordingly, in our view, the whole scheme of the legislation points to the conclusion that it is for the principal, and not for the customs authorities, to prove either the regularity of the transit operation, or the place where the offence or irregularity was actually committed. It is in those cases where a principal can prove neither that the place where the offence or irregularity occurred cannot be established and so the provisions of Article 378.1 IPC apply.

79. Of course, the customs office of departure has to make some enquiries of the customs office of destination about undischarged transit movements and such enquiries were described in the Commission Report of 10 February 2000 referred to in paragraph 20 of this Decision. Such enquiries were made by Customs and Excise of the customs office at Algeciras, although not within the time limits mentioned in the Report. However, those enquiries are designed to find out if the transit movement had been presented to the office of departure and not to find out the place where an offence or irregularity was actually committed.

80. The Appellant referred us to Article 5 of the EC Treaty (now Article 10 EC) which provides:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

81. We were also referred to Council Regulation (EEC) No 1468/81 which provides for mutual assistance between the administration authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs matters. Title II is headed "Spontaneous assistance". Article 11 provides that the competent authorities of each Member State shall provide assistance to the competent authorities of the other Member States without prior request of the latter. Article 13 provides that the competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all information of use in connection with operations which are contrary to the law on customs matters. Council Regulation (EEC) 516/97 contains similar provisions.

82. In our view these general provisions are not sufficient to dislodge the specific obligations imposed on principals by the Community customs legislation.

83. We have been able to reach our conclusion on this question by considering the scheme of the legislation relating to the external Community transit procedure and we have not found it necessary to refer to the authorities cited on behalf of Customs and Excise. These concern Article 220(2)(b) CCC which provides for duty not to be entered into the accounts where there has been an error on the part of the customs authorities. That Article was not in issue in this appeal.

84. Our conclusion on the first question, therefore, is that it was not the duty of Customs and Excise, but it was the duty of the Appellant as principal, to establish the place where the offence or irregularity occurred. As the Appellant could not do that Article 378.1 IPC applies.

Question (b) Does Article 215.1 CCC apply so that the customs debt was incurred at the place where the events from which it arose occurred?

85. The second question which arises out of the first issue in the appeal is whether Article 215.1 CCC applies so that the customs debt was incurred at the place where the events from which it arose occurred.

86. For the Appellant it was argued that Article 378 IPC had to be read in the light of Article 215 CCC. Article 215.1 CCC established the basic principle which was that a customs debt was incurred at the place where the events from which it arose occurred. Article 215.3 CCC did not replace Article 215.1. It was argued that, in this appeal, Article 215.3 CCC (and Article 378 IPC) did not apply but Article 215.1 CCC did, so that recovery should be in the member state where the offence occurred. Reference was made to pages 21 to 23 of Annex II to the European Commission's Interim Report on Transit of 11 February 2000 which concluded that the provisions establishing the place where the customs debt is incurred deserved to be clarified. It was argued that this supported the view that, if it could be established that the irregularity did not occur in the member state of departure, then Article 378.1 IPC did not apply.

87. For Customs and Excise it was argued that Article 215 CCC was a general rule applicable to all procedures. Article 215.1 set out the general rule and Article 215.2 set out the rule if the place of the events could not be determined. Article 215.3 specifically related to transit procedures; it recognised that goods were supervised at entry and exit and, accordingly, a deeming provision was required if the destination were not known; in that case the debt was incurred at the point of entry. Article 378 IPC was contained in a Part dealing only with transit procedures. It also provided that, if the place of irregularity was established, and it was in another member state, then the general rule in Article 215.1 CCC applied and the place where the customs debt was incurred was the place where the events from which it arose occurred.

88. In considering the arguments of the parties we begin with the legislation. Article 215 CCC sets out three alternative ways of deciding where a customs debt is incurred. The first is the general rule and that is that the debt is incurred at the place where the events from which it arises occur. However, if that place cannot be determined then the second alternative applies and that is that the customs debt is deemed to have been incurred at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred. However, there are specific provisions where a customs procedure is not discharged for goods. There the customs debt is deemed to have been incurred at the place where the goods were placed under the procedure. Pausing there we would conclude that Article 215.3 applies in the present appeal because the external Community transit procedure has not been discharged in respect of the goods the subject of the two movements in the appeal.

89. If Article 215.1 were to apply then it would be necessary to identify the place where the events from which the customs debt arose occurred. Articles 201 to 211 CCC contain provisions about the incurrence of a customs debt. Article 204 provides that a customs debt on importation of goods shall be incurred through the non-fulfilment of one of the obligations arising from the use of a customs procedure under which they are placed or non-compliance with a condition governing the placing of the goods under that procedure. In the present appeal it is not known where the non-fulfilment of the obligation arising under the external Community transit procedure occurred and so it is not possible to apply Article 215.1. However, it is known that a customs procedure was not discharged for the

goods and so Article 215.3 applies and the customs debt is deemed to have been incurred at the place where the goods were placed under the procedure, that is at Ramsgate.

90. Article 378 IPC occurs in Part 4 of the IPC which concerns transit movements. Article 378.1 specifically provides that, where the consignment has not been presented at the office of destination, and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed in the member state to which the office of departure belongs. In the present appeal the place where the offence or irregularity was actually committed cannot be established and so the offence or irregularity is deemed to have been committed in the United Kingdom as that is where the office of departure at Ramsgate belongs. In our view that is entirely consistent with Article 215.3 CCC. We do not consider that it is possible to apply Article 215.1 CCC because it is not possible to identify the place where the events from which the customs debt arose occurred.

91. In any event, even if it were not possible to apply Article 378.1 IPC then the provisions of Article 215.3 CCC would apply and not the provisions of Article 215.1 CCC.

92 We have referred to the Commission Report mentioned on behalf of the Appellant. That Report points out that, whereas Articles 378 and 379 IPC provide that the provisions of Article 215.1 CCC can apply if proof is provided of the place of irregularity within the three year period, Article 215.3 CCC does not appear to permit that because it provides that the place where the customs debt is incurred is the place where the goods were placed under the customs procedure and contains no provisions for subsequent proof of another place. The Report concludes that, to that extent, Article 378 IPC is incompatible with the Code. We do not disagree with that conclusion but we do not see its relevance in this appeal. The three year time limit has already passed and the Appellant has not been able to bring forward any proof either of the regularity or of the place of irregularity. Accordingly, in this appeal, the application of both Article 215.3 CCC and Article 378.1 IPC leads to the conclusion that it is the place where the goods were placed under the customs procedure (that is Ramsgate) which is the place where the customs debt was incurred. The Report does conclude that the provisions establishing the place where the customs debt is incurred deserve to be clarified but we see no support in that Report for the view that, if it could be established that the irregularity did not occur in the member state of departure, then Article 378.1 IPC does not apply.

93. Our conclusion on the second question is that Article 215.1 CCC does not apply so that the customs debt was not incurred at the place where the events from which it arose occurred.

Question (c) - Does Council Directive 76/308/EEC mean that the customs debt may not be recovered against the Appellant in the United Kingdom?

94. The third question arising out of the first issue in the appeal is whether Council Directive 76/308/EEC means that the customs debt may not be recovered against the Appellant in the United Kingdom.

95. For the Appellant reference was made to Council Directive of 15 March 1976 (76/308/EEC) on mutual assistance for the recovery of certain claims and of customs duties and value added tax, as authority for the view that, if recovery was required in a member state other than the United Kingdom against a

principal in the United Kingdom, there had to be no contest and judgement had to have been tried to be enforced in the other country first.

96. Customs and Excise argued that the Directive provided for the transfer of assistance and information but not for the recovery of debts. It allowed recovery in another member state only if there were an uncontested debt. Reference was made to Articles 4, 5, 6 and 7 of the Directive which had been implemented in section 11 of the Finance Act 1977. As the Appellant was in the United Kingdom the debt could not be enforced in Spain.

97. Council Directive 76/308/EEC contains provisions for mutual assistance between member states. The preamble states that it had not previously been possible to enforce in one member state a claim for recovery substantiated by a document drawn up by another member state. Article 6 provides that the requested authority shall recover claims on behalf of an applicant authority but Article 7 provides that the applicant authority shall not make a request for recovery unless the claim is not contested in the member state in which it is situated and unless that member state had already applied the recovery procedure and the measures taken had not resulted in the payment in full of the claim. Section 11 of the Finance Act 1977 implements these provisions and provides that, if an authority in a member state makes a request for the recovery in the United Kingdom of any sum claimed by that authority, Customs and Excise may recover the sum specified in the request as if it were a debt due to the Crown.

98. We have already decided that, in the present appeal, the customs debt is deemed to have been incurred in the United Kingdom. Accordingly, there is no question of Customs and Excise enforcing a claim for recovery on behalf of another member state. For that reason, in our view, the provisions of Council Directive 76/308/EEC are not relevant in the present appeal.

99. Our conclusion on the third question is that Council Directive 76/308/EEC does not mean that the customs debt may not be recovered against the Appellant in the United Kingdom.

100. Our conclusion on the first issue in the appeal is that the customs debt was incurred in the United Kingdom and, specifically, that it was not incurred at the place where the events from which it arose occurred as provided by Article 215.1 CCC but that it was incurred at the place where the goods were placed under the customs procedure as provided in Article 215.3 CCC and in the member state to which the office of departure belonged as provided by Article 378.1 IPC.

Issue (2) - Do the defects in the notifications render the duty irrecoverable?

101. The second issue in the appeal is whether the fact that the notifications to the Appellant did not comply with all the provisions of Article 379 IPC means that the duty is not recoverable.

102. The legislation relevant to this issue is contained in Articles 379 and 380 IPC. Article 379 provides:

"Article 379

1. Where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the

office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 shall indicate, in particular, the time limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to the office of departure to the satisfaction of the customs authorities. That time limit shall be three months from the date of the notification referred to in paragraph 1. If the said proof has not been produced by the end of that period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where that Member State is not the one in which the office of departure is located, the latter shall immediately inform the said Member State.

103. Article 380 was amended in 1996, after the events the subject of this appeal. The Article before it was amended read:

"Article 380

Proof of the regularity of a transit operation within the meaning of Article 378(1) shall be furnished to the satisfaction of the customs authorities inter alia -

(a) by the production of a document certified by the customs authorities establishing that the goods in question were presented at the office of destination ... That document shall contain enough information to enable the said goods to be identified; or

(b) by the production of a customs document issued in a third country showing release for home use or by a copy or photocopy thereof; such copy or photocopy must be certified as being a true copy by the organisation which certified the original document, by the authorities of the third country concerned or by the authorities of one of the Member States. The document shall contain enough information to enable the goods in question to be identified."

104. We have already found as facts:

(1) that for consignment TI 000367 the first notification on 20 December 1995 was eleven months and two days after the date of registration which was 18 January 1995. For consignment TI 000524 the first notification on 15 December 1995 was less than eleven months after the registration date which was 25 January 1995. However, neither notification contained the information required by Article 379.2 IPC because neither indicated the time limit of three months by which proof of the regularity of the transit operation, or the place where the offence or irregularity was actually committed, had to be furnished to Customs and Excise;

(2) that the second notifications of 14 November 1997 contained some of the information required by Article 379.2 IPC because they indicated the time limit of three months by which proof of the regularity of the transit operation had to be furnished to Customs and Excise and they also mentioned the ways (in Article 380) in which that proof could be provided. However, they did not refer to proof of the place where the offence or irregularity was actually committed. Also they were approximately thirty-four months after each date of registration and not the eleven months provided in Article 379.1 IPC; and.

(3) that the third notifications in the letters of 8 January 1998 invited the Appellant to provide proof of the place where the offence or irregularity was actually committed as required by Article 379.2 IPC. However, these letters were nearly three years after the date of registration and so were not within the eleven months specified in Article 379.1 IPC.

105. The arguments of the parties on this issue raised two questions, namely:

(a) Does the failure to comply with the eleven month time limit in Article 379.1 mean that the duty cannot be recovered?

(b) Does the failure to indicate the three month time limit specified in Article 379.2 mean that the duty cannot be recovered?

106. We consider each question separately.

Question (a) Does the failure to comply with the eleven month time limit in Article 379.1 mean that the duty cannot be recovered?

107. For the Appellant it was argued that, even though the first notification of December 1995 for movement 000524 had been given within the eleven month time limit it had not been given "as soon as possible" as required by Article 379.1 IPC. It was also argued that all the defects of the notifications meant that the provisions of Article 378 IPC did not apply. The decision in Covita AVE v Greece Case C-370/96 Judgement 26 November 1998 (which concerned internal administrative requirements where there had been no duty on the duty payer and no protection for the duty payer) was distinguished. The decision in De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam Case C-61/98 Judgement 7 September 1999 was also distinguished as the time limits in Article 379 IPC had the purpose of protecting the duty payer and of giving an opportunity to the duty payer to provide proof of regularity. It was not argued that the debt had been extinguished, just that it was not recoverable.

108. For Customs and Excise it was accepted that there were defects in the notifications but it was argued that these did not preclude recovery. There was nothing in the legislation to suggest that breach of the eleven month time limit extinguished the debt. The circumstances of the extinction of a customs debt were set out in Article 233 CCC and did not include the failure to notify. A comparison could be made with Article 374 IPC which was specific and provided that a guarantor was released from his obligations upon expiry of a period of twelve months from the date of registration of the TI declaration where he had not been advised by the customs authorities of the member state of departure of the non-discharge of the TI document. There was no such provision in Article 379 IPC and that indicated that it was not intended to release the principal from his debt if the eleven month time limit was not complied with. Paragraph 36 of the judgement in Covita (1998) was cited where the Court of Justice held that the breach of time limits did not preclude recovery. Reference was also made to Written Question E-2705/96 of 15 October 1996 and the Answer given on behalf of the Commission on 25 November 1996 OJ No. C 83/51 of 14 March 1997 where the Commission had applied the same reasoning. As far as the Appellant was concerned the three year time limit was in Article 221.3 CCC and so the eleven month time limit in Article 379.1 was procedural only.

109. In considering the arguments of the parties we first deal with the argument that the first notification for movement TI 000524 was not given "as soon as possible" although it was given within the eleven month time limit in Article 379.1

IPC. The facts that we have found are that the first time that Customs and Excise became aware of any irregularities in this transit movement was on 26 October 1995. The notification about TI movement 000524 was sent on 15 December 1995. During December 1995 Customs and Excise were still making enquiries of the customs office at Algeciras and by 15 December had not received a reply. However, Customs and Excise notified the Appellant even before they received the reply (which came on 26 January 1996). In our view the notification of 15 December 1995 was given within a reasonable time.

110. Before turning to consider the authorities cited to us we first consider the framework of the legislation. Chapter 3 of the Community Customs Code contains provisions dealing with the recovery of the amount of the customs debt. The scheme of the legislation provides that duties resulting from a customs debt are calculated by the customs authorities as soon as possible and entered in the accounts (Article 217 CCC). If a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure the amount of the customs debt is to be entered in the accounts at the latest on the second day following that on which the goods were released (Article 218 CCC). If the amount is not entered in the accounts within the time limit in Article 218 then it shall be entered within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount (Article 220 CCC). As soon as it has been entered in the accounts the amount of duty is to be communicated to the debtor (Article 221.1 CCC) and paid usually within ten days (Article 222 CCC). However, communication to the debtor shall not take place after the expiry of three years after the customs debt was incurred (Article 221.3 CCC). Thus there is an overall time limit of three years after which recovery cannot usually be made.

111. Within that context we consider Articles 378, 379 and 380 IPC which apply to uncompleted transit operations. By the nature of such operations it is difficult to determine the event which gives rise to the customs debt and the place at which that event occurs. Accordingly, Articles 378, 379 and 380 deal with these uncertainties. Article 378.1 provides that, if a consignment has not been presented at the office of destination and the place of the offence or irregularity cannot be established, the offence or irregularity is deemed to have been committed in the member state of departure unless proof of the regularity or the place of the offence or irregularity is furnished to the customs authorities. Of course, if proof of regularity of a transit operation is available no duty will be payable and if proof of the place of the offence or irregularity is provided (and that place is in another member state) then that will be the place where the customs debt is incurred and not the office of departure. Article 378.3 provides that, if the member state where the offence or irregularity actually occurred is determined before the expiry of the period of three years from the date of registration then it is that member state who shall recover the duties and any duties paid in the member state of departure are repaid. This three year time limit is consistent with the three year time limit in Article 221.3 CCC.

112. Article 379 IPC contains the provisions for notifying the principal and these fulfil the same purpose as Article 221 CCC which provides for the amount of duty to be communicated to the debtor. Article 379.2 IPC also provides for the principal to be notified of his opportunity of providing proof of the regularity of the transit operation or proof of the place where the offence or irregularity actually occurred. The time limit is three months and the relevance of the time limit appears from the second part of Article 379.2 and from Article 378.2 IPC, namely that it is after the period of three months that the member state of departure has to recover the duties. It is clear from Article 378.3 that, if proof is

provided at any time within the three year period, then the duties paid will be repaid, the assumption being that if proof is not provided earlier then the duty will have been recovered in the member state of departure.

113. With that framework in mind we turn to consider the authorities cited to us. Covita (1998) concerned breach of the time limits in what is now Article 220 CCC. Cherries had been imported during the period from 24 June to 21 July 1992 and post-clearance recovery was commenced on 21 December 1992. At paragraph 36 of its judgement the Court of Justice said:

"The sole purpose of the time-limits laid down in Articles 3 and 5 of Regulation No. 1854/89 [now Article 220 CCC] is to ensure rapid and uniform application by the competent administrative authorities of the technical procedures for the entry in the accounts of amounts of import or export duties. Failure by the customs authorities to observe those time-limits may give rise to the payment of interest in respect of delay by the Member State concerned to the Commission ... It follows that those time limits do not nullify the right of the customs authorities to take action for post-clearance recovery pursuant to the provisions of Regulation No. 1697/79 since Article 2(1) of that Regulation [now Article 221.3 CCC] provides for a period of three years for the recovery of uncollected duties, calculated from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred."

114. That decision was based on the provisions of what is now Articles 220 and 221 CCC and the present appeal concerns an uncompleted transit movement to which the provisions of Articles 378. 379 and 380 IPC apply. However, it will be clear from what we have said above that we are of the view that the provisions of Article 378, 379 and 380 IPC reflect the provisions of Articles 220 to 222 CCC, adapted as necessary to deal with the situation of an uncompleted transit operation where the time and place of the incurrence of the customs debt are not known.

115. A point similar to that raised in Covita was also raised in De Haan Beheer where the Court of Justice applied the same principles as in Covita.

116. The eleven month time limit was not considered in Lensing (see paragraphs 47 to 50 of the Opinion of the Advocate General).

117. It follows from our consideration of the legislation that we are of the view that the purpose of the eleven month time limit in Article 379 IPC is to ensure that timely steps are taken to recover the customs duties bearing in mind the need to establish which member state is responsible for such recovery. After the eleven month period has passed, together with the further three months in which the principal has time to provide proof of regularity, the member state of departure has to recover the duty. We conclude that, although failure by the customs authorities to observe the eleven month time-limit might give rise to the payment of interest to the Commission in respect of delay, such failure does not nullify the right of the customs authorities to recover the duty.

118. Our conclusion on the first question is that the failure to comply with the eleven month time limit in Article 379.1 for consignment 000367 does not mean that the duty cannot be recovered.

Question (b) Does the failure to indicate the three month time limit in Article 379.2 mean that the duty cannot be recovered?

119. The second question arising out of the second issue in the appeal is whether the failure to indicate the three month time limit in Article 379.2 means that the duty cannot be recovered.

120. We have found as facts that the letters of 14 November 1997 did refer to the three month time limit for producing proof of regularity and the letters of 9 January 1998 gave an opportunity to produce proof of the place of irregularity. However, none of those letters were sent within eleven months of the date of registration as required by Article 379.1. Also, the letters of 9 January 1998 did not refer to the period of three months within which proof of the place of irregularity could be produced.

121. For the Appellant it was argued that the failure to indicate the three month time limit at an early stage had denied the Appellant the opportunity to discover what had happened to the consignments and to prove the regularity of the transit operation under Regulation 380(b) IPC. At the hearing in September 2000 it was argued that in Lensing the Court of Justice had made it clear that, if there had been failings, then it was necessary to look at the facts and apply the regulations. Reference was made to paragraphs 31 to 37 of the judgement and it was argued that Lensing assumed that the time limits were mandatory and should be observed and, to that extent, the decision assisted the Appellant.

122. For Customs and Excise it was argued that Article 379.2 IPC merely said that no steps should be taken to recover the duty within the three month time limit but did not say that there should be no recovery if the time limit was not notified. The purpose of Article 379.2 IPC was to give the principal time within which to furnish proof of the regularity and so any failure to notify the time limit benefited the principal because he had a longer time to produce such proof. In any event, breach of Article 379 did not prejudice the Appellant because at no time had the Appellant been able to provide proof of the regularity of the transit operations or proof of the place where the offence or irregularities were actually committed. Lensing was distinguished on its facts. There the notice of recovery was issued before any request for proof of regularity had been made; in this appeal the principal was notified in 1995 of the non-discharge; in 1997 of the need to provide proof of regularity in three months; and in 1998 of the opportunity to provide proof of the place of irregularity. In Lensing the Court was not concerned with a late request for proof (as there was no request at all) or whether proof of regularity included the place of irregularity. Also in Lensing there was in fact proof of regularity and so it was unfair to shut the principal out from establishing proof late. Reference was made to the Opinion of the Advocate General at paragraphs 35-43 where it was accepted that it was possible for customs authorities to accept proof up to three years after the date of registration and for the trader to produce proof in that period. The Court of Justice, at paragraphs 27 to 31 of its judgement, had decided all that was needed for that case. Although the judgement in Lensing was silent on the effect of a notification which did not refer to the place of the irregularity, the Advocate General had dealt with that in paragraphs 36 and 37 of his Opinion.

123. Lensing (1999) concerned the external Community transit procedure. The TI declaration was registered on 8 July 1992 at Neubrandenburg and the office of destination was given as Charleroi, Belgium. The consignment was to be produced on 16 July 1992 at the latest. On 22 January 1993 the customs authorities at Neubrandenburg told the principal that the transit procedure had

not been completed and asked for help in clarifying the situation. Two enquiries were sent from Neubrandenburg to Charleroi on 3 May 1993 and 12 October 1994 and were not answered. At no time did the office of departure notify the principal of the three months within which proof of the regularity or of the place where the irregularity actually occurred could be furnished. On 19 January 1995 the customs authorities in Neubrandenburg issued an assessment for customs duty and value added tax. The principal objected as it had a receipt dated 9 July 1992 from the consignee in Belgium as proof that the consignee had received and paid for the goods before the time limit for the production of the consignment.

124. Before the Court of Justice the principal argued that the customs authorities at Neubrandenburg had not complied with the provisions of what is now Article 379.2 IPC as they had not mentioned the three month time limit in which proof of the regularity or the place of irregularity could be furnished. The first question before the Court, therefore, was whether the member state of departure could only recover the import duties if the principal had been notified beforehand of the time limit of three months laid down in what is now Article 379.2 IPC and had not furnished the proof required by that Article.

125. In his Opinion the Advocate General, at paragraphs 30 to 51, concluded that the requirement to give the notice under Article 379.2 was obligatory before the member state of departure could recover the duties. The provisions of Article 379 IPC were aimed at ensuring a rapid conclusion of the investigation procedure and of establishing the member state which was competent to collect the duties; it gave the principal an opportunity to prove either that the procedure had been concluded or to prove that the offence occurred in another member state, thus escaping the customs debt. Also, if proof was forthcoming then the duties would be recovered by the member state which was actually responsible. In fact the principal in that case had provided proof of the place where the offence had occurred (namely Belgium) and so the duty should be recovered in Belgium and not in Neubrandenburg.

126. The Court of Justice at paragraphs 29 to 31 of its judgement said:

"29. It thus follows from the wording of Article 36(3) of Regulation No. 222/77 [now Article 378.3 IPC] and Article 11a(2) of Regulation No. 1062/87 [now Article 379.2 IPC] that the indication by the office of departure of the time-limit within which proof of the place of the offence may be furnished by the principal is obligatory.

30. Second, that requirement makes it possible to invite the principal to produce any evidence he may have within a mandatory time limit, with a view to determining without delay the state with jurisdiction to recover duty under the conditions laid down in Article 36(1) and (3) of regulation No. 222/77 [now Article 378 IPC].

31. Accordingly, the answer to Question 1 must be that Article 36(3) of Regulation No 222/77 [now Article 378.3 IPC] in conjunction with Article 11a(2) of regulation No. 1062/87 [now Article 379.2 IPC] is to be interpreted as meaning that the member state to which the office of departure belongs may recover duty on import only if it has indicated to the principal that he has three months to prove where the offence or irregularity was actually committed and such proof has not been provided in that period."

127 Thus the decision in Lensing is limited to the right of the member state of departure to recover duties and it is clear that recovery cannot take place unless

the principal has been given the opportunity to provide the proof mentioned in Article 379.2 and such proof has not been provided within the three months. In this appeal the second notifications of 14 November 1997 did ask for proof of regularity within three months but they did not ask for proof of the place of irregularity. The letters of 9 January 1998 did ask for proof of the place of irregularity but they did not mention the period of three months within which such proof should be furnished. However, the fact is that the Appellant has had much longer than three months since 8 January 1998 to provide proof either of regularity or the place of irregularity and has not done so.

128. It is in the light of those facts that the decision in Lensing should be considered. There, if the principal had been asked to produce proof of the place of regularity within three months he would have done so. Also, that proof would have altered the place where the duties were recoverable as they should have been recovered in Belgium. It is against that background that the Court of Justice decided that the member state of departure could not recover the duties. The facts in the present appeal are different. Here the Appellant has not been able to provide proof at any time either of the regularity or of the place of irregularity and so there is no possibility of any other member state recovering the duty.

129. In order to apply the principles in Lensing to the different facts of this appeal we have considered the purpose of the relevant provisions. In his Opinion the Advocate General said that the provisions of Article 379 IPC were aimed at ensuring a rapid conclusion of the investigation procedure and of establishing the member state which was competent to collect the duties; it gave the principal an opportunity to prove either that the procedure had been concluded or to prove that the offence occurred in another member state, thus escaping the customs debt. Also, if proof was forthcoming then the duties would be recovered by the member state which was actually responsible. The Court of Justice said that the three month notification made it possible to determine without delay the state with jurisdiction to recover duty. Although in Lensing the failure to give the three month notification meant that the wrong member state recovered the duty, in the present appeal the Appellant has had every opportunity to give proof and has not been able to do so and so there is no possibility that the duty will be recovered by the wrong member state.

130. We have not found a decision on this question to be without difficulty but, on balance, we have concluded that such failure as there was to indicate the three month time limit in Article 379.2 does not mean that the duty cannot be recovered.

131. Our conclusion on the second issue in the appeal is that the fact that the notifications to the Appellant did not comply with the provisions of Article 379 IPC does not mean that the duty is not recoverable.

Issue (3) - Is there obvious negligence or evidence of a special situation?

132. The third issue in the appeal is whether there was no deception or obvious negligence attributable to the Appellant within the meaning of Article 239 CCC and whether there was evidence which might constitute a special situation within the meaning of Article 905 IPC.

133. The relevant part of Article 239 CCC provides:

"Article 239

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

- to be determined in accordance with the procedure of the committee;

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

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office ... ."

134. The situations to which the provisions of Article 239.1 CCC may be applied are contained in Articles 899 to 905 IPC. Article 899 IPC provides that, if an application for repayment or remission is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903 IPC, then the duties shall be repaid or remitted and if they correspond to one of the circumstances referred to in Article 904 IPC the duties shall not be repaid or remitted. The relevant parts of Article 905 IPC provide:

"Article 905

1. Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909. ...

In all other cases, the decision-making customs authority shall refuse the application."

135. The arguments of the parties on this issue raised four questions, namely:

(a) Was there obvious negligence on the part of the Appellant within the meaning of Article 239.1 CCC and Article 905.1 IPC?

(b) Does the fact that Customs and Excise did not warn the Appellant of known fraud in relation to transit movements of high risk goods constitute a special situation within the meaning of Article 905.1 IPC?

(c) Does the fact that the Appellant was not invited within eleven months of the date of registration to provide proof of regularity or of the place of the irregularity constitute a special situation within the meaning of Article 905.1 IPC?

(d) If there is evidence of a special situation can the tribunal order the remission of the duty?

136. We consider each question separately.

Question (a -Was there obvious negligence on the part of the Appellant within the meaning of Article 239.1 CCC and Article 905.1 IPC?

137. For the Appellant it was accepted that the Appellant knew of the risk of fraud and also knew that fraud was a long standing problem. However it was argued that there had been no obvious negligence by Mr Catt who had received the TI declaration receipts in February 1995 which put his mind at rest. He just assumed there was a delay at the office of destination. When he was told of the fraud he was put under a requirement of secrecy and so could not conduct his own investigations.

138. For Customs and Excise it was argued that the Appellant had been negligent because it had not properly controlled the use of its comprehensive Community transit guarantee and had not examined the copy TI declarations received from Orbit which showed that they had been used for cigarettes. The Appellant was an experienced trader and, although Customs and Excise may have made some procedural flaws, the evidence showed that the difficulties had been caused by the Appellant. In Sohlke there was obvious negligence.

139. The meaning of the phrase "obvious negligence" in Articles 239 CCC and 905.1 IPC was considered by the Court of Justice in Sohlke in paragraphs 51 to 60 of its judgement. In paragraph 52 the Court said that the term must be interpreted in such a way that the number of cases of repayment or remission remains limited. In paragraph 53 the Court said that the case law applicable to a similar term in Article 220(2)(b) CCC also applied to Article 239 CCC. In paragraph 56 the Court said that it was necessary, in determining whether or not there had been "obvious negligence", to consider the complexity of the provisions, the professional experience of the trader and the care taken by the trader. As regards the care taken by the trader, if doubts existed as to the exact application of the provisions non-compliance with which might result in a customs debt being incurred, the onus was on the trader to make enquiries and seek all possible clarification to ensure that he did not infringe those provisions.

140. Applying those principles to the facts of the present appeal we first find that the relevant provisions relating to the liability of a principal for the completion of an external transit operation are not complex. As far as the professional experience of the trader is concerned, the Appellant is a trader whose business activities consist mainly in import and export transactions and it has considerable experience in the conduct of such transactions. In evidence Mr Catt confirmed that he was experienced in shipping requirements and was aware of all the legal procedures. Turning to the care taken by the trader, Mr Catt admitted that, at the time that the two movements commenced, his system was at fault in permitting Orbit to use the Appellant's guarantee. He did not think that Orbit would use the guarantee to ship cigarettes and alcohol but was aware of the risk if a trans-shipment of high risk goods was made within the Community. He accepted that the TI declarations (of which he received copies from Orbit) mentioned cigarettes in Box 31 on both occasions. He also accepted that the Appellant's clerk would check the value of any consignment but would not check the forms in great depth; he said that his staff did not want to discourage work. He personally did not see the copy TI declarations but as soon as he looked at them after the event he realised what had happened. Because the system was deficient he had changed it. We have also found as a fact that at the end of 1994 (and before the two movements the subject of this appeal) the Appellant became aware that Orbit was using the Appellant's guarantee for high risk transit movements. Although cigarettes were not mentioned at that time we think that a careful trader would thereafter have monitored the use of the guarantee.

141. We have already said that we found Mr Catt to be an open, honest and frank witness and that the difficulties in which the Appellant finds itself were caused by Orbit. However, Mr Catt knew of the implications of the comprehensive Community transit guarantee and of the risks involved in the transit of high risk goods, and yet he allowed Orbit to use the guarantee for their own movements without adequate supervision. Accordingly, we have reluctantly had to conclude, on the evidence before us, that there was obvious negligence (but no deception) on the part of the Appellant.

142. The answer to the first question is that there was obvious negligence on the part of the Appellant within the meaning of Article 239.1 CCC and Article 905.1 IPC.

143 That means that we do not have to reach a decision on the other three questions relating to this issue but as arguments were put to us we express our views.

Question (b) - Does the fact that Customs and Excise did not warn the Appellant of known fraud in relation to transit movements of high risk goods constitute a special situation within the meaning of Article 905.1 IPC?

144. The second question arising out of the third issue in the appeal is whether the fact, that Customs and Excise did not warn the Appellant of known fraud in relation to transit movements of high risk goods, constitutes a special situation within the meaning of Article 905.1 IPC.

145. For the Appellant reference was made to Articles 1 and 2 and 11 to 19 of Council Regulation 1468/81 and to Articles 13 to 16 and Article 45 of Council Regulation (EEC) No. 516/97 and it was argued that the European legislation imposed a duty on the customs authorities of the United Kingdom and Spain to collaborate on community transit fraud promptly and spontaneously. They had not done so and the Appellant had been prejudiced. Further, Customs and Excise had known that there was fraud relating to the transit of cigarettes. This was a case where the relationship of the trader and the administrative authorities was such that it would be inequitable to require the trader to bear the loss. Reiner Woltmann v Hauptzollamt Potsdam Case C-86/97 Judgment 25 February 1999 was cited and it was argued that the Appellant was in an exceptional situation as compared with other operators employed in the same business. Sohlke was also cited and it was argued that crucial information had been withheld from the Appellant until it was too late to do anything about it. Article 905 IPC only required evidence which "might" constitute a special situation.

146. For Customs and Excise it was argued that a simple failure to discharge a movement with an innocent principal could not be a special situation. The whole purpose of the external Community transit system was that, if the goods were not discharged, then the principal and its guarantor were liable to pay the charges. Although Customs and Excise knew that there was fraud in the transit system, that was common knowledge. However, there was no evidence that Customs and Excise knew in advance that the two movements the subject of the appeal were fraudulent and would not be discharged. Accordingly, Customs and Excise had not acted unfairly by not warning the Appellant. De Haan Beheer was distinguished as in that case the customs authority had known in advance of the fraud in connection with the particular movement. Eyckeler & Malt AG v Commission of the European Communities Case T-42/96 Judgement of the Court of First Instance 19 February 1998 was also distinguished as there the error of the Commission had led to the customs debt being incurred.

147. In considering the arguments of the parties we first refer to legislation and then to the authorities cited to us.

148. Council Regulation (EEC) No 1468/81 provides for mutual assistance between the administration authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs matters. Title II is headed "Spontaneous assistance". Article 11 provides that the competent authorities of each Member State shall provide assistance to the competent authorities of the other Member States without prior request of the latter. Article 13 provides that the competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all information of use in connection with operations which are contrary to the law on customs matters. Council Regulation (EEC) 516/97 contains similar provisions.

149. In the present appeal the customs office at Algeciras responded to all the requests for information made by Customs and Excise. Also there was nothing in the facts of this appeal which would lead us to conclude that the Appellant had been prejudiced by any failure on the part of Customs and Excise. Customs and Excise only heard about the forgeries in October 1995 by which time Mr Catt accepted that any evidence which might have assisted the Appellant would have disappeared. We have also found that Customs and Excise did not know about any fraud relating to the two consignments the subject of the appeal before the transit movements took place.

150. In Eyckeler & Malt (1998) certain quantities of Hilton beef (the Hilton quota) could be imported into the Community from Argentina free of levies. Certificates of authenticity were required and, under the relevant regulations, the Commission had a responsibility to monitor the implementation of the quota. The Commission were aware in 1989 of the possibility that certificates of authenticity were being falsified. The appellant imported Hilton beef in 1992 and the certificates of authenticity were subsequently found to be false. In paragraphs 132 and 133 of its judgement the Court of Justice said that Article 239 was intended to apply where the circumstance characterising the relationship between a trader and the administration were such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred. It was therefore necessary to assess all the facts in order to determine whether they constituted a special situation. It was also necessary to balance the Community interest in ensuring that the customs provisions were respected with the interests of the importer acting in good faith not to suffer harm beyond normal commercial risk. In paragraph 189 of its judgement the Court said that the falsifications made it possible for the Hilton quota to be exceeded only because the Commission had failed to discharge its duty of monitoring the application of the quota. Also, the falsifications were carried out in a very professional way which exceeded the normal commercial risk which must be borne by the trader. What is now Article 905 IPC was intended to be applied when circumstances characterising the relationship between a trader and the administration were such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred. The circumstances of that case amounted to a special situation.

151. The facts in Eyckeler & Malt may be distinguished from the facts of the present appeal as in this appeal there was no obligation on Customs and Excise to monitor the use of the TI declarations. The difficulties faced by the Appellant in this appeal arise from the fact that it allowed its comprehensive Community transit guarantee to be used by Orbit and it was used in a way which was not intended by the Appellant. That was a commercial risk which must be borne by

the trader. It was not the relationship between the Appellant and Customs and Excise which caused the difficulties; rather it was the relationship between the Appellant, Orbit and the exporter.

152. In Woltmann (February 1999) about 3.2 million cigarettes belonging to third parties were stolen from a warehouse belong to the appellant who was asked to pay import duties on the cigarettes. The theft was not an insurable risk and so hardship was caused to the appellant who would become insolvent. In paragraph 21 of its judgement the Court of Justice said that, in deciding whether there is a sepcial situation, it is necessary to verify whether the circumstances relied on are liable to place the appellant in an exceptional situation as compared with other operators in the same business.

153. De Haan Beheer (September 1999) also concerned fraud relating to cigarettes in the external Community transit procedure. Between July and September 1993 the principal drew up TI declarations relating to several consignments of non-Community cigarettes to be despatched from customs warehouses in the Netherlands to Antwerp for export to non-member countries. The goods never reached the office of destination and were consumed in the Netherlands without the payment of customs duty. The particular fraud had been known to the Netherlands customs authorities who, by the end of July 1993, were aware that, or had serious grounds for suspecting that, a transit fraud involving cigarettes was being organised. The principal was not in any way implicated in the fraud. In paragraph 45 of its judgement the Court of Justice said that one of the points to be considered was the fact that, had the Netherlands customs authorities informed the principal of their suspicion of fraud, the principal could have taken measures, after the first consignment, to avoid incurring a customs debt in relation to the further consignments. In paragraph 52 the judgement states that a special situation could exist where a principal found himself in an exceptional situation in comparison with other operators engaged in the same business. The judgement continues at paragraph 53:

"Although it may be legitimate for the national authorities, in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence, deliberately to allow offences or irregularities to be committed, to place on the person liable the burden of the customs debt arising from the choices made in connection with the prosecution of offences is inimical to the objective of fairness which underlies Article 905(1) of Regulation No. 2454/93 in that it puts that person in an exceptional situation in comparison with other operators engaged in the same business."

154. The facts in De Haan Beheer are very different from the facts in the present appeal. Here the evidence is that there has been fraud in the external Community transit system since about 1990 and Customs and Excise undertook two operations involving cigarettes in 1993 and two in 1994. They also undertook four such operations in 1995 but those were most probably after the two movements the subject of this appeal which took place in January 1995. We have accepted the evidence of Mr Hook that Customs and Excise had no knowledge of any risk involved in the two movements the subject of this appeal. Some time before May 1996 Customs and Excise had commenced the criminal investigation which led to the search of the warehouse in Sittingbourne. However, that operation was concerned with consignments which were not declared and which were exported through Dover whereas the movements the subject of this appeal were declared and were exported through Ramsgate. Although documents relating to consignment TI 000367 were discovered during those investigations they did not form part of that investigation and, in any event, there was no evidence that

Customs and Excise knew of any fraud relating to movement TI 000367 before it took place.

155. Having considered all the evidence we are of the view that the circumstances of this appeal did not place the Appellant in an exceptional situation as compared with other operators engaged in the same business. Neither were the circumstances characterising the relationship between the trader and the administration such that it would be inequitable to require the trader to bear the loss. The loss suffered by the Appellant comes within the category of normal commercial risk.

156 We conclude that the fact that Customs and Excise did not warn the Appellant of known fraud in relation to transit movements of high risk goods did not constitute evidence of a special situation within the meaning of Article 905.1 IPC.

(c) Does the fact that the Appellant was not invited within eleven months of the date of registration to provide proof of regularity or of the place of the irregularity constitute a special situation within the meaning of Article 905 IPC?

157. The third question arising out of the third issue in the appeal is whether the fact that the Appellant was not invited within eleven months of the date of registration to provide proof of the regularity or the place of the irregularity of the transit movements constitutes evidence of a special situation.

158. For the Appellant it was argued that Customs and Excise had not complied with the provisions of Article 379 IPC and, in particular, the late notifications sent to the Appellant constituted evidence of a special situation because the delay had made it impossible for the Appellant to provide proof of regularity or of the place of irregularity. Although Mr Catt knew how to provide proof of regularity, as described in Article 380 IPC, he had not known that proof of the place of irregularity would do. If the Appellant had been properly notified it could have investigated the matter in Spain when the evidence was available.

159. For Customs and Excise it was argued that in Eyckeler & Malt and in De Hann Beheer the errors of the customs authorities or of the Commission had led to the customs debt being incurred whereas in the present appeal the procedural flaws all occurred after the customs debt had been incurred. The duty point arose when the goods were not presented at Algeciras and that was well before Customs and Excise became involved.

160. We first consider the argument that, if the Appellant had been notified earlier it could have produced proof of regularity or of the place of irregularity. In evidence Mr Catt accepted that he could have written to the customs office in Algeciras for confirmation that the goods had been discharged under Article 380(a) IPC and he could also have written to the customs office in Morocco for a certificate under Article 380(b) IPC when Customs and Excise were asking for proof of regularity. However, he had never before had to ask foreign customs offices for help. He expected Customs and Excise to get in touch with foreign customs offices and get them to verify the completion of the transit movements. However, he also accepted that proof of regularity could in fact not have been obtained as the goods were missing before they got to Algeciras. If he had known of the problems in 1995 he could have tried to make enquiries but he also accepted that the goods were probably disposed of quickly and that evidence might not have been there in summer of 1995. We found Mr Catt to be a credible witness.

161. We accept that in this appeal Customs and Excise did not adhere to the time limits laid down in Articles 378 and 379 IPC; they did not adopt the procedures described in Annex II of the Interim Report on Transit published by the European Commission on 10 February 2000 as they did not contact the Appellant within ten weeks of the date of registration; enquiries of the office of departure were not made four months after the date of registration; and although Customs and Excise knew by January 1996 that the documents produced by the Appellant were forged they did not inform the Appellant of that fact until July 1997. There was no explanation for that delay. However, we find, on the evidence before us, that even if the Appellant had been invited, within eleven months of the date of registration, as required by Article379 IPC, to provide proof of regularity or of the place of irregularity, it would not have been able to do so as the evidence by then would not have been there. Also, even if the Appellant had been told in January 1996 that the documents which it had produced had been forged, it would not then have been able to provide valid documentation as no such valid documentation existed.

162. In our view it was not the fact that Customs and Excise did not comply with the provisions of Article 379 IPC which made it impossible for the Appellant to produce proof of regularity or of the place of the irregularity. Rather it was the fact that those taking part in the fraud made it almost impossible for such proof to be provided. We are satisfied that, even if the eleven month time limit had been complied with, the Appellant could not have provided such proof.

163. We conclude that the fact that the Appellant was not invited within eleven months of the date of registration to provide proof of regularity or of the place of the irregularity does not constitute a special situation within the meaning of Article 905 IPC.

Question (d) - If there is evidence of a special situation can the tribunal order the remission of the duty?

164. The fourth question is whether, if there were evidence which might constitute a special situation, the tribunal could order the remission of the duty.

165. For the Appellant it was accepted that, if there were evidence which might constitute a special situation, then the tribunal could not order remission of the duty but that the matter should be remitted to the Commission for a decision relying upon paragraphs 161 to 165 of the tribunal decision in South Lodge (Imports) Limited v The Commissioners of Customs and Excise [1999] V&DR 411.

166. At the hearing in February 2000 Customs and Excise agreed with the Appellant. However, at the hearing on 28 September 2000 attention was drawn to the very recent decision of the High Court in Reece v The Commissioners of Customs and Excise (then unreported) where the High Court had expressed the view that the tribunal was able to order the remission of duty. Nevertheless, Customs and Excise preferred the decision in South Lodge.

167. Since the decision in South Lodge was released the judgements of the Court of Justice in De Hann Beheer and Sohlke have been published At paragraphs 46 to 48 of the judgement in De Haan Beheer (September 1999) reference is made to the role of the Commission. In Sohlke (November 1999) at paragraph 91 of the judgement reference is also made to the forwarding of the file to the Commission. At the date of the hearing on 29 September 2000 a transcript of the decision in Reece was not available.

168. We do not have to decide this question but, as the parties agreed with the decision in South Lodge, and in the light of the recent decisions of the Court of Justice, we do not demur from it.

169. Our conclusion on the third issue in the appeal is that there was obvious negligence on the part of the Appellant within the meaning of Article 239 CCC and that there is no evidence which might constitute a special situation within the meaning of Article 905 IPC.

Issue (4) - Should value added tax be payable on the importations?

170. The fourth issue in the appeal is whether value added tax should be payable on the importation of the cigarettes.

171. Section 1(1)(c) of the 1994 Act provides:

"1(1) Value added tax shall be charged, in accordance with the provisions of this Act - ...

(c) on the importation of goods from places outside the member States."

172 Section 15 of the 1994 Act provides:

"15(1) For the purposes of this Act goods are imported from a place outside the member States where-

(a) having been removed from a place outside the member states, they enter the territory of the Community;

(b) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory; and

(c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred.

(2) Accordingly -

(a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the Community would be incurred, and

a. the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt."

173. Thus section 15(1) sets out three cumulative conditions which must be satisfied if goods are to be treated as imported from a place outside the member states. It was not disputed that the conditions in section 15(1)(a) and (b) were satisfied and the argument centred upon whether the conditions in section 15(1)(c) were satisfied.

174. Section 15(1)(c) sets out two alternative conditions, one of which must be satisfied. The first condition is that the customs debt on entry into the territory of the Community is incurred on the removal of the goods to the United Kingdom. The alternative condition is that the customs debt is incurred while the goods are in the United Kingdom.

175. As far as the first condition is concerned, the parties agreed that consignment TI 000524 was imported from the United States of America into the European Union in the Netherlands; that the goods were in duty suspension while they were in the United Kingdom; and that the customs debt in respect of the duty on their entry into the territory of the Community was not incurred on their removal to the United Kingdom within the meaning of section 15(1)(c). There was no evidence before us as to how consignment TI 000367 entered the territory of the Community nor how it entered the United Kingdom. Accordingly, on the evidence before us we cannot say that the circumstances were such that it was on the removal of the consignment to the United Kingdom that any Community customs debt in respect of its entry into the territory of the Community was incurred within the meaning of section 15(1)(c).

176 As far as the alternative condition is concerned, the parties agreed that it was only if the goods had been diverted in the United Kingdom that section 15(1)(c) applied as then the circumstances would be such that the Community customs debt in respect of duty on the entry into the territory of the Community would be incurred while the goods were in the United Kingdom.

177. We find that the goods were not diverted in the United Kingdom for the following reasons. First, because during the criminal investigation in 1996 the conclusion was reached by Customs and Excise that diversion of Winston cigarettes had not taken place in the United Kingdom because there was no market for Winston cigarettes in the United Kingdom. We have found as facts that consignment TI 000524 consisted entirely of Winston cigarettes and that consignment TI 00367 consisted mainly of Winston cigarettes. Secondly, because the TI declarations for both consignments were stamped at Ramsgate by Customs and Excise. That points to the conclusion that the cigarettes were exported from the United Kingdom. And, finally, because we have found as facts that both consignments left Ramsgate for Dunkirk in the "Sally Star". We also find that it is most improbable that the goods were diverted in United Kingdom waters.

178. Accordingly we conclude that neither consignment was diverted in the United Kingdom and so the circumstances were not such that the Community customs debt in respect of duty on the entry into the territory of the Community was incurred while the goods were in the United Kingdom. Accordingly, the conditions in section 15(1)(c) are not satisfied and so the goods were not imported from a place outside the member states within the meaning of section 15 and of section 1(1)(c).

179. We conclude that value added tax is not payable on the importations.

180. That means that we do not have to consider the fitth issue in the appeal but as arguments were put to us we express our views.

Issue (5) - Were the supplies zero-rated?

181. The fifth issue in the appeal is whether the supplies of the cigarettes were zero-rated.

182. Section 30 of the 1994 Act contains the provisions relating to zero-rating. Section 30(6)(a) provides:

"(6) A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods-

(a) has exported them to a place outside the member States ; ...

and in either case if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled."

183. Section 30(8) of the 1994 Act provides:

"(8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where-

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both-

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

184. The regulations referred to in section 30(6) and (8) are contained in Part XVI (Importations, Exportations and Removals) of the Value Added Tax Regulations 1995 SI 1995 No. 2518. Regulation 129 deals with supplies to overseas persons and regulation 134 deals with supplies to persons taxable in another member state. These regulations provide:

"129 Where the Commissioners are satisfied that-

(a) goods intended for export to a place outside the member States have been supplied, otherwise than to a taxable person, to-

(i) a person not resident in the United Kingdom,

(ii) a trader who has no business establishment in the United Kingdom from which taxable sup-plies are made, or

(iii) an overseas authority, and

(b) the goods were exported to a place outside the member States ,

the supply, subject to such conditions as they may impose, shall be zero-rated."

185. Regulation 134 provides:

"134 Where the Commissioners are satisfied that-

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person taxable in another member State.

(c) the goods have been removed to another member State and

(d) ...

the supply, subject to such conditions as they may impose, shall be zero-rated.

186. For the Appellant it was argued that if the goods left the European Union then they were zero-rated under section 30(6)(a) and if they did not and were released in another member state they were zero-rated under Regulation 134.

187. Section 30(6) applies to certain exports outside the member states but Regulation 129 provides that Customs and Excise must be satisfied that the goods were exported. In this appeal there was no evidence that the cigarettes were exported to a place outside the member states.

188. Section 30(8) applies to certain exports to other member states but section 30(8)(a)(ii) only applies if the goods are acquired by a person who is liable for value added tax on the acquisition in accordance with the law of the member state of the acquisition. In this appeal there was no evidence that the goods had been acquired by a person taxable in another member state.

189. We conclude therefore that the supply of the goods was not zero-rated.

Decision

190. Our decisions on the issues for determination in the appeal are:

(1) that the customs debt was incurred in the United Kingdom and, specifically, that it was not incurred at the place where the events from which it arose occurred as provided by Article 215.1 CCC but in the member state to which the office of departure belonged as provided by Article 378.1 IPC;

(2) that the fact that the notifications to the Appellant did not comply with all the provisions of Article 379 IPC does not mean that the duty was not recoverable;

(3) that there was obvious negligence on the part of the Appellant within the meaning of Article 239 CCC and that there was no evidence which might constitute a special situation within the meaning of Article 905 IPC and, in particular, that the facts that Customs and Excise had not warned the Appellant of known fraud in relation to transit movements of high risk goods and that the notifications to the Appellant did not comply with all the provisions of Article 379 IPC were not evidence which might constitute a special situation;

(4) that value added tax was not chargeable on the importation of the goods into the United Kingdom because a customs debt in respect of duty on the entry of the goods into the Community had not been incurred either on the removal of the goods to the United Kingdom or while the goods were in the United Kingdom within the meaning of section 15(1)(c) of the 1994 Act; that decision means that

we do not have to consider the fifth issue but as we heard some argument we express our views which are:

(5) that the supplies of the goods were not zero-rated for value added tax purposes because there was no evidence that they had been exported to a place outside the member states within the meaning of section 30(6) of the 1994 Act or that they had been removed from the United Kingdom and acquired in another member state by a person liable for value added tax within the meaning of section 30(8).

191. The appeals against the imposition of customs duty are therefore dismissed but the appeals against the imposition of value added tax are allowed.

Costs

192. We are minded to direct that Customs and Excise should pay 27.6% of the costs of the Appellant of and incidental to and consequent upon this appeal as that is the proportion which the amount of value added tax assessed bears to the total amount assessed. However, either party has liberty to apply if it wishes to make representations on the subject of costs.

DR A N BRICE

CHAIRMAN

RELEASE DATE: 15th December 2000

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