**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**
**ON APPEAL FROM THE FIRST TIER TRIBUNAL (TAX CHAMBER)**
**SITTING IN LONDON**

**Case No: FTC/17/2014**

***Customs Duty – import of Chinese garlic falsely declared as Cambodian origin – Customs Code Art 221 – customs debt resulting from a criminal act – post clearance demand issued after expiry of the three year period – no express provisions in UK law extending the three year time limit – whether notification valid in the absence of such legislation – FTT held the notification invalid – appeal allowed — no need for express provisions in UK law to extend the three year time limit – notification valid***

**Before**:

**MR JUSTICE BIRSS**

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**Between :**

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| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Appellants** |
| **- and -** | |
| **F.M.X. FOOD MERCHANTS IMPORT EXPORT Co. Ltd** | **Respondent** |

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**Kieron Beal QC** and **Simon Pritchard** (instructed by **HMRC**) for the **Appellant**
**Eamon McNicholas** instructed by the **Respondent**

Sitting in public in London: 2nd, 3rd November 2015

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# DECISION

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MR JUSTICE BIRSS

**Mr Justice Birss:**

## DECISION

1. This appeal concerns the duty due on a consignment of garlic imported from Cambodia as of Cambodian origin pursuant to forged documents. The customs duty was paid on the basis that the garlic was Cambodian. The garlic was in fact of Chinese origin and therefore subject to a quota payment and to anti-dumping duty. This was discovered later. HMRC seeks to recover the extra unpaid customs duty.

2. The appeal is brought against a decision of the First Tier Tribunal (FTT) of 29th November 2013. The appellants are the Commissioners for Her Majesty's Revenue and Customs (HMRC) and the respondent is FMX Food Merchants Import Export Co. Limited, a company concerned with the importation of fruit and vegetables. In its decision of 29th November 2013, the FTT had allowed FMX's appeal against a post-clearance demand issued on 1st April 2011. The post-clearance demand had charged FMX with customs duty amounting to £503,577.63 in relation to ten consignments of garlic imported into the UK between 12th August 2003 and 20th January 2004. The post-clearance demand was issued following an appeal by FMX against an earlier post-clearance demand issued on 22nd February 2015 for duty of £370,872.50 in respect of similar imports by FMX which occurred after January 2004. That appeal was dismissed (see ***FMX Food Merchants Import Co Ltd v HMRC*** [2011] UKFTT 20 (TC)).

3. The relevant rules are in Art 221(3) and (4) of Council Regulation (EEC) No. 2913/92 (the Customs Code). This provides that:

> "(3) Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Art 243 is lodged, for the duration of the appeal proceedings.
>
> (4) Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3."

4. The post-clearance demand issued on 1 April 2011 was issued outside of the three year time limit found in Art 221(3). The FTT held that this meant that the notification was not valid, for the following reasons.

5. The FTT noted that there is no UK legislation which purports to extend the time limit for the purposes of Art 221(4) and also noted that s37(2)(a) of the Limitation Act 1980, which excludes "any proceedings by the Crown from the recovery of tax or duty or interest on any tax or duty" includes the duty under appeal. Therefore the

FFT held that there was no express time limit laid down in the UK legislation for the recovery of customs debts resulting from criminal acts. On that basis, the question addressed by the FTT was whether the absence of such legislation meant that there was nothing to override the three year time limit in Art 221(3) (FMX's argument) or whether the applicability of general principles of law should constitute "provisions in force" which would be sufficient to override the three year time limit (HMRC's argument).

6. The FTT held that Art 221(4) is an enabling provision which gives the UK a wide margin of appreciation to implement whatever limitation provision it chooses. However, the FTT also held that it was clear from the wording of Art 221(4) that it contemplated the enactment of a provision of domestic law which would contain conditions relating to a limitation period. In the absence of this, the FTT decided that a failure to address the matter of limitation could not effectively be regarded as the adoption of an unconditional provision by which there would be no applicable limitation period at all. Therefore there were no "provisions in force" which could render effective a notice issued later than the three year limit in Art 221(3). Since the notice in this case was outside the three year limit, it was not valid

7. Therefore the FTT decided FMX is not obliged to pay the £503,577.63 in customs duty. It was and is not disputed that, but for this point, the post-clearance demand would have been validly issued to FMX. If HMRC's appeal is allowed, FMX will be obliged to pay the duty.

8. In the course of their decision, the FTT made a number of findings in relation to circumstances around the imported consignment, which amounted to findings of fraud. Those findings have not been appealed. They can be briefly mentioned. The FTT found that a fraud had been perpetrated which was liable to give rise to criminal court proceedings under s 167(1) Customs and Excise Management Act 1979. The nature of the fraud was this – certain individuals made false declarations to the Cambodian authorities with a view to procuring false Form A certificates which stated that the consignments of garlic originated from Cambodia when they were Chinese. The fraudsters were aware that the false Forms A would be presented to HMRC for the purposes of the UK import declaration.

9. FMX had caused the false Forms A to be delivered to HMRC to support its claims for exemption from customs duty. This finding was made regardless of whether FMX had any knowledge that the certificates were false. No assertion was made by HMRC during the proceedings before the FTT that FMX was a knowing participant in the fraud.

10. The last stage of the fraud involved the presentation of the false documents to HMRC in the UK. In presenting the false Forms A to HMRC, it was found that FMX also committed an act that was liable to give rise to criminal court proceedings under s 167(3) CEMA 1979, being an offence of, inter alia, delivering to HMRC a document which was untrue in a material particular. This finding was made irrespective of whether FMX knew or was reckless as to the falseness of the Forms A.

11. A final relevant provision is s 167(4) CEMA 1979, which permits customs duty which is not paid by reason of any act which falls within s 167(1) or 167(3) of CEMA 1979 to be recovered as a civil debt.

12. HMRC submit that they should have been able to recover the customs duty. They obtained permission to appeal from the FTT (Judge Kevin Poole on 6th February 2014).

13. HMRC submit that the FTT erred in law by concluding that Art 221(3) and (4) of the Customs Code operated to mean that the post-clearance demand was issued to FMX out of time. HMRC have three arguments against the statutory construction adopted by the FTT which are as follows:

    i) The FTT was wrong to find that Art 221(4) required Member States to enact a limitation by domestic legislation in order to positively disapply the three year time limit found in Art 221(3). Moreover, by virtue of s37(2) of the Limitation Act 1980, there is no time limit in relation to the recovery of customs duties. Nor is there any time limit for the civil recovery envisaged by s167(4) CEMA 1979. Therefore the notice was not out of time and was valid.

    ii) Alternatively, if it is necessary to find some domestic law in force which places a limit on serving notices, then the common law, the equitable doctrine of laches, Art 47 of the Charter of Fundamental Rights and/or Art 6 ECHR could amount to a general set of domestic legal principles capable of constituting "provisions in force" as referred to in Art 221(4). These respective legal sources operate to ensure stale claims cannot be brought and therefore provide a time limit which is sufficient to disapply the three year time limit set out in Art 221(3).

    iii) In the alternative to (i) and (ii), the court should take a similar approach to that of the Court of Appeal in ***HMRC v IDT*** [2006] EWCA Civ 29 and adopt a ***Marleasing*** interpretation of the relevant provisions of UK law. The result would be to interpret s37(2)(a) of the Limitation Act 1980 in such a way as to disapply the disapplication of the Act to proceedings by the Crown for the recovery of customs duty deemed to be civil debts by virtue of 167(4) CEMA 1979. On that basis the usual civil limitation provisions would apply which would produce a normal six year limitation period subject to s32(1)(a), which provides that the limitation period only starts to run in cases of fraud when the relevant claimant discovers the fraud. On that basis the notification would be in time.

14. FMX argues that the FTT was correct to decide that the post-clearance demand had been issued out of time. It contends the wording of Art 221 is *acte clair*, and requires positive national provisions to displace the three year limitation period. In support, FMX refers to Regulation (EC) No. 450/2008 (the Modernised Customs Code) and its successor, Regulation (EU) No. 952/2013 (the Union Customs Code). The Modernised Customs Code provided that the three year limitation period specified in Art 221(3) should be extended to a period of ten years. The Union Customs Code specifies that that limitation period shall be extended to a period of minimum five years and maximum 10 years in accordance with national law. FMX argues that these regulations provided a clear indication that it was necessary for Member States to positively enact national laws in order to provide for an exception to the three year time limit for circumstances involving criminal acts.

15. FMX further contends that the existence of an open-ended period not defined by a limitation period would be contrary to legal certainty. FMX referred in argument to Case C-294/11 ***Ministero dell'Economia e delle Finanze v Elascom NV*** [2012] STC 2053, in particular at paragraph 29, where it was stated that the ability "to make an application for the refund of excess VAT without any temporal limit…would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regards to his rights and obligations vis-á-vis the tax authorities, not to be open to challenge indefinitely."

16. In response to HMRC's third argument, FMX says that HMRC's construction of the Limitation Act 1980 is strained, that it "goes against the grain" of the legislation (referring also to ***O'Brien v MoJ*** [2015] EWCA 1000) and cannot be supported by reference to its terms. It says that the Act is clearly limited in scope and is not an encapsulation of every aspect of UK law concerning limitation periods. FMX submits that there are many limitation periods set by other provisions in UK law.

*Assessment*

17. I have already referred to Art 221. There are a number of other provisions of the Customs Code to refer to in order to place the article in its context. Art 201 provides that a customs debt on importation shall be incurred through the release for free circulation of goods liable to import duties and that the customs debt is incurred at the time of acceptance of the customs declaration in question. Art 4(10) defines "Import duties" as including customs duties. Broadly speaking, Arts 217 to 219 impose obligations on Member States to ensure that customs debts are entered into the accounting records as between the Member States and the EU and paid within certain time periods. Art 221(1) provides that, as soon as it has been entered into the accounts, the amount of duty shall be communicated to the debtor. Art 222(1) provides for payment by the debtor of the amount of duty communicated to the debtor. Subject to other provisions, the payment has to be made within 10 days of communication (Art 222(1)(a)). As explained above, Art 221(3) provides for communication of the customs debt within three years of the debt being incurred and Art 221(4) concerns customs debts resulting from a criminal act. "Provisions in force" is defined by Art 4(23) as "Community or national provisions".

18. In Case C-201/04 ***Belgische Staat v Molenbergnatie NV*** [2006] ECR I 2049 the ECJ considered the provisions of Art 221 of the Customs Code in a form before they were amended to produce Art 221(3) and (4) in force today. The language has changed but for present purposes the difference does not matter. The court distinguished between procedural and substantive rules, holding that Art 221(1) and (2) were entirely procedural in nature whereas the three year period in Art 221(3) (in its form then but it makes no difference now) was a substantive rule (ECJ paragraphs 35-41). In paragraphs 50-54 the ECJ considered the fourth question, whether Member States were required, in their national legislation, to regulate the manner in which notification of a customs debt is made. The agent for the importer argued that only a document which referred unambiguously to Art 221 of the Customs Code could be deemed to constitute a communication under the article. The ECJ did not agree with the agent. The relevant passage is as follows:

> "50 By the fourth question, the national court is essentially asking whether Member States are required to determine the

procedures in accordance with which notification of the amount of duties, under Art 221 of the Customs Code, must be made to the person liable for the customs debt.

51 The Belgian Government and the Commission submit that Member States are not required to regulate in their national legislation the manner in which notification of the customs debt is made. The agent submits that Member States must set out those procedures and, if they have not done so, only a document referring unambiguously to Art 221 of the Customs Code can be deemed to constitute communication within the meaning of that article.

52 In order to reply to the question raised, it should be noted that, according to the general principles on which the Community is based and which govern the relations between it and the Member States, it is for the Member States, under Art 10 EC, to ensure that Community rules are implemented within their territories. In so far as Community law, including its general principles, does not include common rules to that effect then, when the national authorities implement Community rules, they are to act in accordance with the procedural and substantive rules of their own national law (see, in particular, Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau* [1995] ECR I-4069, paragraph 26, and Case C-495/00 *Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others* [2004] ECR I-2993, paragraph 39).

53 Given the absence in the Community customs legislation of provisions on the meaning of 'appropriate procedures' or of any provision conferring power on entities other than the Member States and their authorities to determine those procedures, it must be held that the procedures are within the scope of the national legal systems of the Member States. Should the latter not have enacted specific procedural rules, it is the responsibility of the competent State authorities to guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights.

54 In the light of the foregoing, the answer to the fourth question is that Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights."

19. So Member States are not required to adopt specific procedural rules relating to the manner of communication of the amount of the customs debt.

20. The ECJ held in Case C-62/06 ***Fazenda Pública v ZF Zefeser*** [2007] ECR I-11995 that that there was no need for criminal proceedings to have been actually initiated at the point where the exception in what is now Art 221(4) was invoked (paragraph 25).

21. In Case C-124/08 and 125/08 ***Gilbert Snauwaert and others v Belgium*** [2009] ECR I-6793, paragraphs 25–26 and 30–31, the ECJ held that the "act" referred to in what is now Art 221(4) did not ultimately have to be committed by the customs debtor.

22. In Case C-264/08 ***Belgium v Direct Parcel Distribution Belgium NV*** [2010] ECR I-731 the ECJ followed ***Molenbergnatie***, holding, at paragraph 29, that "Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication."

23. Finally I will refer to Case C-75/09 ***Agra Srl v Agenzia Dogane*** [2010] ECR I-5595, especially paragraphs 33–35. Here the ECJ stated that Art 221(4) defers to national laws as regards rules governing the limitation period for the extinction of the customs debt and that "it is for each Member State to determine the rules governing the extinction, through the passage of time, of customs debts which it has not been possible to assess because of an act which could give rise to criminal court proceedings" (paragraph 35).

24. Neither the Modernised Customs Code nor the Union Customs Code assist in answering the question posed by this appeal. The former code never came into force. The latter code will come into force in future but the fact that this sets a maximum and minimum period under the provision which is going to replace Art 221(4) has no bearing on the correct interpretation of Art 221(4) itself.

25. Turning to the questions to be decided on this appeal, the first is whether the absence of legislation positively dealing with a limitation period for the recovery of customs duty in relation to criminal acts, means that the Commissioners could not recover the amount of the post-clearance demand from FMX unless it was issued within the three year period set by Art 221(3). That depends on the correct interpretation of Art 221(4).

26. The purpose of Art 221(4) is clear. It is concerned with cases in which the customs debt is the result of a criminal act and the purpose of the article is to disapply the three year period set by Art 221(3) in those circumstances. One reason for disapplying the three year period is obvious; the criminality may not come to light until after the period has expired. The correct duty should still be paid in such a case. There may be other reasons for disapplying the three year period in that context, but it is sufficient to identify this one for present purposes. Recital 11 of the amending Regulation which added Arts 221(3) and (4) into the Customs Code relates to this to some extent, in that it distinguishes between errors made by the authorities of a third country for which the paying person should not be held responsible on the one hand, and on the other hand incorrect certificates issued by the third country based on incorrect information provided by the exporter, e.g. the sort of fraudulent information provided

to the Cambodian authorities in this case. Although the recital does not go on to spell it out, it is plain that the point being made is that in the latter case the paying person may have to pay more duty when the error comes to light.

27. The wording of Art 221(4) does not state in terms that Member States must enact a finite period limiting the time within which an effective communication of the amount has to be made. The conclusion that it has that effect arises from the fact that the provision requires the communication to be subject to "the conditions set out in the provisions in force". The FTT decided that the article contemplates some particular provision which contains conditions but that since none have been enacted in the UK, there are no provisions in the UK which disapply the default three year period set out in Art 221(3).

28. In my judgment Art 221(4) does not mean that some actual provisions have to be enacted in national law in order to disapply the three year period set by Art 221(3). On the contrary the instrument which disapplies the three year period in Art 221(3) is Art 221(4) itself. All that Art 221(4) provides for is that the communication has to be under the conditions set out in the provisions in force. "Provisions in force" could set criteria governing the manner of the communication itself (e.g. that it must be made by registered post) but the ECJ held in the ***Molenbergnatie*** and ***Direct Parcel*** cases (above) that Member States are not required to enact specific provisions to deal with such matters. They can rely on national rules of general application to ensure the debtor receives adequate information.

29. Equally "provisions in force" could include a finite limitation period (cf ***Agra***) and, as FMX pointed out, many Member States do that. Art 221 is at least permissive in that sense, allowing the Member States to make provision for a limit of some kind. However, while Art 221 is permissive, there is nothing in the language and nothing to be derived from its purpose, which leads to the conclusion that the article requires Member States to lay down any particular kind of temporal limitation.

30. FMX relied on information available from the Commission to point out that at least one state has a 30 year period. HMRC pointed out that in ***Agra***, the provisions in Italian law under consideration imposed a five year limit to run from the date when a criminal judgment was made final. As HMRC pointed out, since the Article does not impose a requirement to actually take criminal proceedings (***Zefeser***), the provision considered in ***Agra*** is capable of being unlimited in time.

31. In my judgment the FTT erred in its construction of Art 221(4). The provision is enabling in that it permits Member States to make provisions if they wish and those provisions could involve a finite limitation period. But it does not require the Member State to make any provisions at all. It is not a Directive requiring Member States to legislate in a particular way. The ECJ has held that the article does not require Member States to enact specific provisions relating to the manner in which the communication is made. By parity of reasoning the very same words in the article cannot require Member States to enact a limitation period. Nothing in Art 221 says anything about what would happen if a Member State does not enact a finite limitation period. In my judgment it cannot be interpreted as meaning that if a Member State has no finite limitation period (or no express rule about limitation tied to the particular circumstances, or no formal legislation tied to this part of the Customs Code at all) it follows that a notice outside the three year period is inevitably

invalid. On the contrary, Art 221(4) has disapplied the three year period in the factual circumstances in this case. HMRC's notification complies with all applicable law and there is no law which makes it invalid. I will allow the appeal on the first ground.

32. HMRC's second ground includes the submission that while the result of the construction I have accepted means that there is no expressly identified finite period within which HMRC must send a customs debt communication in a case in which the debt arises from a criminal act, that does not mean that HMRC has an unlimited license to pursue stale claims. HMRC submitted that the general common law relating to abuse of process (see ***Grovit v Doctor*** [1997] 1 WLR 640) together with the equitable doctrine of laches (***Lindsay Petroleum v Hurd*** (1873-74) L.R. 5 P.C. 221) and/or Art 47 of the Charter or Art 6 ECHR would cure any substantive or procedural unfairness in a given case.

33. In other words if the reason why there must be a finite period enacted under Art 221(4) is fairness to the debtor by the prevention of stale claims, the general law already achieves that result.

34. I accept HMRC's submission. The common law (and rules of equity) already equip the courts to prevent procedural unfairness in proper cases and, for example, go as far as striking out a claim as abusive as a result of inordinate delay which would make a fair trial impossible. To take an extreme example, if HMRC knew all the relevant facts but still waited a further 20 years before issuing a communication and seeking to enforce the debt claim, that sort of conduct would very likely make a fair trial impossible and would be abusive. Such a case would very probably be struck out.

35. I asked counsel for FMX whether the construction of Art 221(4) he contended for would be satisfied if the UK had enacted a statutory instrument which states in terms that there was no express limitation period in the UK applicable under Art 221(4). His answer was that that would be contrary to legal certainty, citing ***Elsacom***. However that has to be compared with the positive point advanced by FMX that some states comply with Art 221(4) by having a 30 year limitation period under Art 221(4). If the presence of a 30 year limitation period is sufficient to satisfy a requirement for fairness in preventing stale claims and legal certainty under Art 221(4), then it seems to me that the general law of abuse of process and laches does so as well (and better).

36. I will allow the appeal on the second ground too.

37. There is no need to consider the third ground.

*Conclusion*

38. The appeal is allowed.

**Mr Justice Birss**

**(Signed on original)**

**Released 10 December 2015**