Neutral Citation: **[2024] UKUT 00079 (TCC)**

Case Number: UT/2023/000029

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London, EC4A 1NL

CUSTOMS DUTY – inward processing relief – requirements of a bill of discharge ('BoD') – whether a single error on BoD or data mismatch between BoD and HMRC's Management Support System gives rise to a customs debt under Article 204 Community Customs Code in relation to all products on the BoD – appeal allowed

Heard on: 22 February 2024
Judgment date: 28 March 2024

Before

MRS JUSTICE BACON
JUDGE GREG SINFIELD

Between

THYSSENKRUPP MATERIALS (UK) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Valentina Sloane KC and Jeremy White, counsel, instructed by Ernst & Young LLP

For the Respondents: Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

Introduction

1. At all material times, the Appellant (**TK**) was authorised by the Respondents (**HMRC**) to operate the Inward Processing (**IP**) procedure and claimed Inward Processing Relief (**IPR**) under the suspension system in relation to components used by TK in manufacturing civil and military aircraft. As part of its obligations under the IP regime, TK submitted a Bill of Discharge (**BoD**) to HMRC each quarter in the form of a spreadsheet. Each of the relevant BoD spreadsheets contained around 100,000–200,000 data points.

2. In 2017, HMRC issued a C18 Post Clearance Demand Note requiring TK to pay £8,889,275.43, comprised of (i) £2,409,009.91 in respect of customs duty; and (ii) £6,480,265.52 in respect of import VAT for the period March 2014 to December 2014. The basis of the demand was that HMRC considered that TK's quarterly BoDs for 2014 contained errors which breached the relevant IP requirements, such that TK was not entitled to the IPR claimed for that period. TK agreed that its BoDs contained some errors and also some data that was inconsistent with information in HMRC's Management Support System (**MSS**) database but maintained that the overwhelming majority of entries were accurate, and that the identified errors were immaterial or *de minimis*. HMRC did not accept that: its position was (and remains) that a single defect on a BoD means that customs duty and import VAT liabilities arise in respect of *all* the imports covered by the quarterly BoD in question.

3. TK appealed to the First-tier Tribunal (Tax Chamber) (the **FTT**). By the time of the hearing before the FTT in November 2021, HMRC had accepted that the quantum of the Demand should be reduced to £7,739,730.55, comprising (i) customs duty of £2,016,400.94; and (ii) import VAT of £5,723,329.61.

4. In its decision [2022] UKFTT 00443 (TC) (the **FTT Decision**), the FTT dismissed TK's appeal. In summary, the FTT held that any error, including a minor and immaterial error, or any mismatch between the BoD and the MSS, can give rise to a customs debt. The FTT also held that a single error in an import or disposal line of one import entry on a BoD means that customs duty and import VAT are due on all the goods covered by that BoD. The FTT based its conclusions on its interpretation of the decision of the Court of Justice of the European Union (**CJEU**) in Case C-262/10 *Döhler Neuenkirchen* EU:C:2012:559, which we discuss further below.

5. TK now appeals to the Upper Tribunal (Tax and Chancery Chamber) (**UT**) against the Decision on the grounds that the FTT erred in respect of both of those findings, and that in any event it did not give sufficient reasons for its conclusions.

Overview of the inward processing regime

6. In the absence of any special procedure or exemption, customs duty and VAT are payable on goods imported into the UK from outside the EU. Where businesses regularly import goods into the UK from outside the EU, "process" them, and then re-export them outside the EU, these liabilities could generate significant competitive disadvantages relative to businesses operating outside the EU. The overall purpose of IPR is to mitigate these disadvantages by enabling an authorised business to import goods, process them, and then re-export them without incurring liability to customs duty and import VAT.

7. At the relevant time, the requirements for the operation of IPR were set out in Council Regulation (EEC) 2913/92 establishing the Community Customs Code (the **CCC**), as implemented by Regulation (EEC) 2454/93 (the **Implementing Regulation**). That legislation provided for two different IPR systems, namely the "suspension system" and the "drawback system". Under the suspension system, which was the relevant IPR procedure in this case, the customs liabilities which would normally arise on importation are suspended so that no immediate obligation to pay them arises. If the goods or products created from the imported products (known as "compensating products") are then exported outside the EU, those liabilities are discharged altogether. If the goods are dealt with in some other way, such as being released for free circulation within the EU, then the liabilities may become payable.

8. The suspension system carries the risk of loss of duty and VAT, if goods which are physically present in the EU are then improperly diverted to free circulation without payment of the suspended import charges. Consequently, the use of the IPR procedure (and, in particular, the suspension system) is subject to strict controls, and users must be authorised.

9. The authorisation specifies a processing period (or "throughput period") which is, broadly, the period during which the relevant customs duty and import VAT are suspended. If at the end of the processing period the goods or compensating products have not been exported, and do not qualify for relief on some other basis, the suspended customs duty and import VAT become payable. Further conditions may also be included in the authorisation. The overall object of the controls and conditions is to ensure that the authorities are able to track the goods which are subject to IPR until they have been exported from the EU, or are released to free circulation within the EU after payment of any relevant suspended duties and VAT.

10. Goods imported into the UK are recorded on HMRC's Customs Handling of Import and Export Freight (**CHIEF**) system. The CHIEF data are retained in HMRC's MSS database. As part of its IPR controls, HMRC checks the information provided by authorised users on their BoDs against the corresponding MSS data. This enables HMRC to ascertain whether the suspended liabilities have been discharged, or whether they have become payable.

Legislative framework

11. During the relevant period, the CCC and Implementing Regulation set out the requirements for the operation of the IPR procedure, including provisions relating to authorisation and the ways in which the procedure could be discharged.

12. For the purposes of this appeal, the main relevant provision of the CCC is Article 204, which specifies when a customs debt can be incurred in the following terms:

> "1. A customs debt on importation shall be incurred through:
>
> (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, … from the use of the customs procedure under which they are placed, or
>
> (b) non-compliance with a condition governing the placing of the goods under that procedure …,
>
> in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the … customs procedure in question.

> 2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure … was not in fact fulfilled.
>
> 3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, … from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

13. The requirements for the holder of an authorisation to keep records and provide a BoD are set out in the Implementing Regulation. Article 515 of that Regulation provides that the customs authorities must require the holder of an authorisation to keep records, save for temporary importation. The required list of records is set out in Article 516 and includes:

> "(c) the date and reference particulars of other customs documents and any other documents relating to entry and discharge;
>
> (d) the nature of the processing operations, types of handling or temporary use;
>
> …
>
> (f) information enabling the goods to be monitored, including their location and particulars of any transfer;
>
> (g) commercial or technical descriptions necessary to identify the goods;
>
> (h) particulars enabling monitoring of the movements under the inward processing arrangements operating with equivalent goods".

14. Article 496(j) of the Implementing Regulation defines "records" as meaning:

> "the data containing all the necessary information and technical details on whatever medium, enabling the customs authorities to supervise and control the arrangements, in particular as regards the flow and changing status of the goods; in the customs warehousing arrangements records are called stock records".

15. Article 521(1) of the Implementing Regulation requires a BoD to be supplied within 30 days of expiry of the period for discharge, where the suspension system is applied. Under Article 521(2), the BoD must contain the following particulars, unless otherwise determined by the supervising office:

> "(a) reference particulars of the authorisation;
>
> (b) the quantity of each type of import goods in respect of which discharge, repayment or remission is claimed or the import goods entered for the arrangements under the triangular traffic system;
>
> (c) the CN code of the import goods;
>
> (d) the rate of import duties to which the import goods are liable and, where applicable, their customs value;

> (e) the particulars of the declarations entering the import goods under the arrangements;
>
> (f) the type and quantity of the compensating or processed products or the goods in unaltered state and the customs-approved treatment or use to which they have been assigned, including particulars of the corresponding declarations, other customs documents or any other document relating to discharge and periods for discharge;
>
> (g) the value of the compensating or processed products if the value scale method is used for the purpose of discharge;
>
> (h) the rate of yield;
>
> (i) the amount of import duties to be paid or to be repaid or remitted and where applicable any compensatory interest to be paid. Where this amount refers to the application of Article 546, it shall be specified;
>
> (j) in the case of processing under customs control, the CN code of the processed products and elements necessary to determine the customs value."

16. Article 859 of the Implementing Regulation provides specific rules on when certain failures are considered to have "no significant effect" for the purposes of Article 204(1) CCC:

> "The following failures shall be considered to have no significant effect on the correct operation of the … customs procedure in question within the meaning of Article 204(1) of the [CCC], provided:
>
> - they do not constitute an attempt to remove the goods unlawfully from customs supervision,
>
> - they do not imply obvious negligence on the part of the person concerned, and
>
> - all the formalities necessary to regularise the situation of the goods are subsequently carried out:
>
> …
>
> 9. In the framework of inward processing … exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time."

TK's IP authorisation

17. The background to the appeal before the FTT is set out at §§17–22 of the FTT Decision and may be shortly summarised as follows.

18. TK imports materials such as aluminium into the UK, required for the process and supply of aircraft components to its customers. It was approved for IPR using the suspension system during the relevant period. Its authorisation required it to submit quarterly BoDs in Excel spreadsheet format, showing that goods imported under the authorisation had been discharged from the relief. It was required to maintain records of all IP transactions and retain associated documents in support of the BoDs, to be produced to HMRC on request.

19. TK's imports during the relevant period were covered by authorisations issued in December 2013 (covering the period 1 January 2014 to 31 March 2014) and May 2014 (covering the period 1 April 2014 to 31 March 2016). The December 2013 authorisation stated that the relevant conditions were unchanged from TK's earlier authorisation issued in November 2010 (covering the period 1 January 2011 to 24 June 2013).

20. The November 2010 authorisation specified a throughput period of 18 months, together with various other conditions summarised at §24 of the FTT Decision. The only condition in the November 2010 authorisation relating to TK's BoDs was that:

> "Suspension returns on form C&E 812 must be received by the supervising office within 30 days of the end of the throughput period stated at (15) above. The authorisation holder is responsible for ensuring that form C&E 812 is received by the supervising officer by the due dates. Failure to do so may result in relief being refused".

21. The November 2010 authorisation also contained specific conditions about record-keeping, so as to enable HMRC to carry out audits and verifications. It is not alleged that there was any breach of these above conditions.

22. The terms of the May 2014 authorisation were substantially identical to those of the November 2010 authorisation, save that the throughput period was reduced from 18 months to six months.

23. TK was accordingly required to submit its BoDs together with HMRC's form C&E 812. That form specified that the accompanying BoD should provide all the information required by Article 521 of the Implementing Regulation, and should be in a format that was readable and understandable by HMRC. The form stated that further information on the data required for a BoD could be found in Notice 221 of 22 May 2014. Notice 221 included the following statement:

> "12.2 What is a BoD?
>
> The BoD discharges your liability for Customs duties and Import VAT suspended at import and provides HMRC with the information we require for any assurance or audit checks that need to be carried out to make sure the conditions of IP procedure (which are laid down in EU law) have been met throughout the end to end process.
>
> Periodic assurance checks or audits are undertaken on all Customs Procedures with Economic Impact. This is to make sure that IP traders are not obtaining an advantage over others without fully complying with the conditions of the procedure. The BoD should provide all the information required to trace the IP goods from the moment of entry to the moment of discharge from the procedure.
>
> It should include references to all the relevant documentation used to enter and dispose of the goods such as CHIEF import and export declaration reference numbers etc. If an assurance check is then undertaken we are able to trace the movement of the IP goods using the declaration reference numbers."

24. The Declaration at the end of form C&E 812 required the relevant trader to confirm that the information on the form was accurate and complete, and that all goods entered or received under IP had been accounted for in accordance with Article 521. The form warned that anyone

who gave false information about goods declared under these arrangements might be liable to penalties under the Finance Act 2003.

The disputed BoDs

25. In 2014, HMRC raised concerns that the information on TK's BoDs did not match the information contained in HMRC's MSS. TK accepted that its BoDs could be improved, and agreed a new BoD report format with HMRC. The relevant BoDs were then resubmitted to HMRC in the new format.

26. HMRC decided that the BoDs for the period March 2014 to December 2014 were still non-compliant. It issued a decision letter on 21 April 2017 and a C18 Demand on 26 April 2017. TK appealed to the FTT on 4 August 2017.

27. The hearing before the FTT proceeded on the basis of a consideration of 72 illustrative alleged defects identified by HMRC, set out in a Scott Schedule. That was reduced, before us, to 12 categories of defects which were said by HMRC to reflect the key types of defect identified by it. We address these in more detail below under Ground 3.

The FTT's decision

28. The FTT started by considering the *Döhler* case, rejecting TK's submission that the principle set out in that case was only applicable where there was an absolute failure to supply a BoD (§30). Instead, the FTT considered, the ruling in *Döhler* was to the effect that "the non-fulfilment of an obligation gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt" (§33).

29. Next, the FTT rejected TK's submission that only errors or omissions in a BoD that are material incur a customs debt, and considered that "even a minor error, such as the use of an incorrect code number, that might sound like a rather trivial offence, can still incur a customs debt" (§41).

30. Turning to the specific errors identified by HMRC, the FTT found that TK's BoDs were required to contain particulars sufficient to reconcile MSS and BoD data without further investigation, such that a mismatch between the MSS and BoD data and any error in the import or disposal lines of one import entry meant that the BoD was inaccurate and incomplete (§§26, 49 and 63).

31. On that basis, the FTT found that the Scott Schedule examples of discrepancies between the MSS and BoD date were all cases where the BoD was inaccurate and/or incomplete, regardless of the materiality of those discrepancies (§§51–57). It reached the same conclusion in relation to the remaining examples of errors, or alleged errors, in the BoDs (§§58–61).

32. The FTT's conclusion was that TK's BoDs were indeed non-compliant in respect of the errors alleged by HMRC, and that those errors gave rise to a customs debt in respect of the entire quantity of goods covered by those BoDs (§63).

Grounds of appeal

33. TK advances four grounds of appeal.

34. Ground 1 is that the FTT was wrong to find that TK's BoDs were required to contain accurate particulars that reconciled the MSS and BoD data without further investigation, and that breach of that "requirement" gave rise to a customs debt.

35. Ground 2 is that the FTT erred in interpreting *Döhler* to mean that a single error in one row in a BoD gives rise to liability to a customs debt on all the goods covered by the BoD.

36. Ground 3 is that the FTT erred in holding that any error or discrepancy in a BoD gives rise to a customs debt, even if the error is *de minimis* or immaterial.

37. Ground 4 is that the FTT gave insufficient reasons for its decision and did not address TK's detailed submissions.

38. In their skeleton arguments and submissions for the hearing both parties addressed Ground 2 first; we will therefore do the same in our discussion below. First, however, it is necessary to make some preliminary comments about the relevant case-law.

Case law

39. The consequences of failures to comply with customs procedure obligations have been considered in a number of judgments of the CJEU.

40. In Case C-430/08 *Terex* EU:C:2010:15, the CJEU considered the situation of a trader mistakenly putting on an export declaration a customs procedure code indicating the export of Community goods (i.e. goods which had been in free circulation in the EU), instead of the code used for goods whose duties had been suspended under the IP procedure. HMRC considered that this led to a customs debt and refused to allow Terex to revise its export declarations retrospectively under Article 78 CCC.

41. The CJEU held that since the IP procedure carries risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with their obligations under that procedure, and the consequences of non-compliance must be construed strictly. Accordingly, goods declared for an ineligible procedure were in principle subject to a customs liability (§§42–51). However, the CJEU went on to find (contrary to the approach adopted by HMRC) that Terex could regularise the situation by correcting the export declarations under Article 78 CCC, which provided for amendment of customs declarations (§§53–62). That regularisation might require the remission of import duties not legally owed (§63).

42. In Case C-402/10 *Groupe Limagrain Holding* EU:C:2011:704, the issue was not the accuracy of the relevant customs declaration but the obligation to keep stock records under Article 105 of the CCC and Article 520 of the Implementing Regulation. The CJEU held that the record-keeping obligation under the Implementing Regulation was an essential obligation under the customs procedures, which was not fulfilled where "minimal indispensable information" was lacking (§§33–37). However, it was necessary to take account of the purpose of stock records, which was to enable the verification of the nature and exact quantities of goods for which a refund was due. Doubts as to the accuracy of entries in the stock records or relating to discrepancies or minor omissions in those records could therefore be resolved by reference to additional documents (§38).

43. In reaching those conclusions, the CJEU cited and applied its earlier judgment in Case 121/87 *Bayernwald Früchteverwertung* EU:C:1988:481, [1988] ECR 6273, which had

addressed a failure to comply with record-keeping requirements for the grant of production aid. Advocate General Slynn in his opinion had considered that Member States were entitled to refuse aid where accounts containing the specified information were not kept at all, "or if they are so incomplete or inaccurate that they cannot fairly be described as stock accounts containing the prescribed information". Since, however, the objective of the exercise was to enable the authorities to check the quantities of products in respect of which aid was due, he took the view that if doubts were raised as to the accuracy of the figures in the stock accounts, the discrepancies or inaccuracies could be corrected by reference to other documents. It would, in his view, "be going too far to deny aid *in toto* because of some minor error or omission which could readily be corrected by the primary documents" (pp. 6283–4).

44. The CJEU followed the Advocate General and held at §19 that:

> "If the indispensable minimum information is not present, the requirement to keep a stock account cannot be regarded as having been met. However, if any doubt exists as to the accuracy of certain entries in the stock account, Article 4(2) [of Regulation 1530/78] does not preclude the use of other additional documents in order to remove those doubts."

45. HMRC sought to dismiss the *Bayernwald* judgment as addressing a different regulatory regime. That misses the point, however, that §19 of the CJEU's judgment in that case was approved and applied by the CJEU in its judgment in *Limagrain*, in a case which concerned the obligation under the Implementing Regulation to keep stock records for the purposes of a similar customs procedure, namely the export refund regime.

46. The cases referred to above all concerned inaccuracies in the records submitted or retained by the traders. In *Döhler*, the CJEU addressed a more extreme example, where the relevant trader had failed to submit any BoD *at all* within the time limit, even after that deadline was extended by the customs authorities by almost two months. The authorities had therefore imposed duty on all the imported goods in respect of which the period for discharge had expired. When Döhler finally submitted its BoD, it indicated that some (but not all) of the imported goods had been re-exported from the EU and so would not have incurred any customs duty had the BoD been submitted on time. Döhler challenged the difference between the amount of duty imposed by the customs authorities and the lesser amount which Döhler considered was due.

47. The CJEU noted the "obvious risks" of the suspension system to the correct application of the EU customs legislation and collection of duties, and the consequence that beneficiaries of that procedure must comply strictly with their obligations; and that (citing *Terex*) the consequences of non-compliance must be strictly interpreted (§41). In that regard, the CJEU noted the central importance of the obligation to submit a BoD within the required period (§42).

48. On that basis, the CJEU held (at §45) that the failure to submit a BoD gave rise to a customs debt in respect of all of the goods covered by the BoD. We highlight part of this paragraph in bold since we will need to return to this in our discussion below.

> "Therefore, it must be held that the non-fulfilment of an obligation, linked to the benefit of an inward processing procedure in the form of a system of suspension, which must be carried out after the discharge of that customs procedure – **in the present case the obligation to submit the bill of discharge within the period of 30 days prescribed in the first indent of the first subparagraph of Article 521(1) of the Implementing Regulation** – gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt pursuant

> to Article 204(1) of the Customs Code, where the conditions set out in Article 859(9) of the Implementing Regulation are not met."

49. The CJEU's answer to the question referred was then set out at §48:

> "In light of the above, the answer to the question referred is that Article 204(1)(a) of the Customs Code must be interpreted as meaning that the non-fulfilment of the obligation to submit the bill of discharge to the supervising office within 30 days of the expiry of the period for discharging the relevant procedure laid down in the first indent of the first subparagraph of Article 521(1) of the Implementing Regulation gives rise to a customs debt in respect of the entire quantity of the imported goods covered by the bill of discharge, including those re-exported outside the territory of the European Union, where the conditions set out in Article 859(9) of the Implementing Regulation are not considered to be fulfilled."

50. The wording of §48 was repeated in the operative part of the judgment, or *dispositif*.

51. Three preliminary points should be noted about this decision. First, contrary to the submissions of Mr Waldegrave for HMRC, the CJEU did not find that *any* failure to comply with an obligation under the IPR regime in relation to an entry on a BoD would result in a customs debt being incurred on the entire quantity of goods covered by that BoD, even if the BoD was submitted on time and was otherwise compliant with the relevant obligations under the CCC and Implementing Regulation. Rather, as its answer to the referring court (at §48) made clear, the CJEU was specifically concerned with the consequences of a failure to submit the BoD *at all* within the relevant deadline. The obligation to submit a BoD was therefore not met in respect of *any* of the relevant imported goods (including those which had been re-exported), which is why all of the goods covered by the BoD incurred a customs debt. We return to this point below.

52. Secondly, the premise of that conclusion was that Article 859(9) of the Implementing Regulation was inapplicable. As set out above, Article 859(9) provides that a failure to comply with the time-limit for submission of a BoD is to be considered as having no significant effect on the correct operation of the customs procedure in question if the time limit would have been extended had an extension been applied for in time, and provided that certain other conditions are satisfied including that the relevant failure did not imply "obvious negligence" on the part of the person concerned. The Finanzgericht Hamburg had found that the conditions for the application of this provision were not met, since there were no circumstances which would have warranted a further extension of the deadline, and Döhler had been obviously negligent in failing to submit its BoD on time despite a specific warning from the customs authorities. Both the question referred by the referring court, and the answer given by the CJEU, were therefore formulated on the assumption that Article 859(9) did not apply, a point expressly noted by the CJEU at §44 and then repeated in §48.

53. Thirdly, the effect of the *Döhler* decision has now been superseded for the purposes of the Regulation (EU) 952/2013 on the Union Customs Code, which replaces the CCC. Under Article 124 of that Regulation, a customs debt which has arisen through non-compliance with one of the conditions for a customs procedure will be extinguished where evidence is provided to the satisfaction of the customs authorities that the goods have not been used or consumed and have been taken out of the customs territory of the EU, and there has not been any attempted deception: see further Case C-476/19 *Combinova* EU:C:2020:802.

54. Finally, TK relied upon the judgment of the CJEU in Case C-154/16 *Latvijas Dzelzceļš (**Latvian Tankers**)* EU:C:2017:392. *Latvian Tankers* concerned the Community (now Union) transit procedure which allows goods to be transferred through EU territory (without import liabilities arising) to a customs office. One of the conditions associated with this procedure is that the goods are produced "intact" at the customs office of destination. In *Latvian Tankers* the relevant goods were a quantity of liquid solvent, some of which had leaked and was lost in the course of transit so that it could not be produced "intact" on arrival at the customs office of destination. The CJEU held that this gave rise "in principle" (subject to possible relief depending on the circumstances of the loss) to a customs debt by virtue of Article 204(1)(a) of the CCC. However, it also held that where goods were not produced intact at the customs office due to the total destruction or irretrievable loss of some of the goods in transit, a customs debt on importation only arose on that part of the goods which was not produced (§65).

Ground 2

55. Ground 2 concerns the question of whether the *Döhler* judgment of the CJEU is to be interpreted to mean that a single error on a single cell within a BoD will lead to a customs debt being incurred on all of the goods covered by that BoD.

56. There is no dispute that the IPR regime requires strict compliance with the obligations for a relevant trader's authorisation, and that non-compliance with those obligations may lead to a customs debt being incurred in relation to the relevant imported goods. The proposition that a single error in a single cell within a BoD will lead to a customs debt being incurred in relation to *all* goods covered by that BoD is, however, so disproportionate as to be entirely absurd, and we do not consider that it is supported by the *Döhler* judgment.

57. As we have already noted, the *Döhler* judgment did not consider the question of whether an error in a single cell (or even several cells) within a timely BoD would infect the entirety of that BoD. Rather, it was concerned with the failure to submit a timely BoD *at all*, and its answer to the referring court was specifically put on that basis. The court in *Döhler* therefore simply did not have before it the issue raised by Ground 2.

58. Nor does the reasoning within the *Döhler* judgment come close to suggesting the principle contended for by HMRC. The high point of HMRC's case was §45 of the judgment, which HMRC describes as the "critical paragraph" and the "conclusion" of the CJEU. The reason that HMRC seized upon that paragraph is that the punctuation of §45 is slightly different to that of §48: in §45, the obligation to submit the BoD within the required period is referenced in the clause highlighted in bold above, which is separated from the rest of the paragraph by dashes. Interpreting those dashes as indicating a parenthetical clause, HMRC submitted that the CJEU's conclusion in *Döhler* can be stated by omitting that clause as follows:

> "non-fulfilment of an obligation, linked to the benefit of an inward processing procedure in the form of a system of suspension, which must be carried out after the discharge of that customs procedure … gives rise, in respect of the entire quantity of the goods covered by the bill of discharge, to a customs debt".

59. That is, we regret to say, pure syntactical sleight of hand and does not reflect the conclusion of the CJEU in *Döhler*. The CJEU's conclusion is in fact set out in §48. That is the paragraph which gives the answer to the referring court, and it is that paragraph which is repeated in the *dispositif*. Both §48 and the *dispositif* make clear that the consequence of non-compliance found in that case (namely the customs debt on the entire quantity of goods covered by the BoD) arose because the BoD had not been submitted at all within the relevant period of

time. The CJEU does not, in either §48 or the *dispositif*, reach any conclusion as to the consequences of errors in individual cells within a BoD.

60. The highlighted clause in §45 cannot therefore simply be omitted from the reasoning as HMRC seeks to do, because its removal then produces a conclusion which is completely different to the conclusion set out in §48 and the *dispositif*.

61. Nor does the removal of the highlighted clause from §45 make sense in any event when read in the context of the preceding reasoning. §45 follows a series of paragraphs which refer specifically to a breach of the obligation to submit the BoD within the required period, which was the problem raised by the referring court. None of those preceding paragraphs suggest that the court is considering the consequences of any other type of non-compliance. It is highly improbable (to say the least) that the CJEU intended in §45 to set out a proposition with sweeping and dramatic effects regarding a problem not raised by the referring court and not addressed in any of the preceding paragraphs of the judgment.

62. In addition, the final clause of §45 ("where the conditions set out in Article 859(9) of the Implementing Regulation are not met") confirms that the premise of the reasoning in that paragraph is not only that the relevant breach is a total failure to submit a timely BoD, but also that, on the facts of the case, the failure to submit a timely BoD cannot be disregarded as having no significant effect. Article 859(9) notably refers *only* to a failure to submit a timely BoD, and not to any other breach. HMRC attempts to side-step that inconvenience by also omitting the final clause of §45 from its statement of the relevant principle. But that clause cannot be omitted, because it sets out the essential premise of the paragraph.

63. We therefore unhesitatingly reject HMRC's interpretation of *Döhler*.

64. HMRC's fallback argument was a contention that the facts of the present case are "on all fours" with those of *Döhler*, since a document which purports to be a BoD but which does not satisfy the relevant requirements is at least arguably not a BoD at all. On that basis, it was suggested that the 2014 BoDs were, as in *Döhler*, not submitted on time.

65. That is a hopeless proposition. There is a fundamental difference between the failure to submit a BoD *at all* within the required time period, and the submission of a BoD which contains a small number of errors (such as typographical errors) across a total of over a hundred thousand data points. The latter does not come close to representing a document that is (to adopt by analogy the words of Advocate General Slynn in *Bayernwald Früchteverwertung*) "so incomplete and inaccurate" that it cannot fairly be described as a BoD at all.

66. HMRC asked, rhetorically, why there should be a difference between the consequence of providing a BoD a day late, and the consequence of submitting a BoD on time but with errors. The answer lies in Article 204(1) CCC, under which a customs debt is not incurred if the relevant failure has "no significant effect on the correct operation of the … customs procedure in question" and Article 859(9) of the Implementing Regulation, which specifically applies that provision to a late submission of the BoD: if the delay in submitting a BoD is trivial and not the result of obvious negligence, then it is not likely to lead to a customs debt across the entirety of the BoD. Article 204(1) applies in like manner to other errors with no significant effect. There is therefore no inconsistency. *Döhler* was, however, not a case where the BoD was late by a trivial period. It was a case where the BoD was over two months late, despite a warning specifically given by the customs authorities. That is why the referring court had found that Article 859(9) did not apply on the facts of the case.

67. We do not, therefore, consider that *Döhler* can be applied by analogy to the present case. There is, therefore, no authority supporting HMRC's proposition that a customs debt will arise across the totality of the goods covered by a BoD which contains one or more errors, and we have no hesitation in rejecting that proposition as a matter of principle. We agree with TK that it would produce absurd and disproportionate results. The four BoDs in dispute in this appeal contained, between them, an estimated 487,000 to 667,000 data points. It would be entirely irrational for minor errors within such a large number of data points in those BoDs to invalidate the entire BoDs, giving rise to a customs debt across the totality of the goods covered by the BoDs.

68. We do not rule out the possibility that a situation might arise where a BoD is submitted that is "so incomplete and inaccurate" that it cannot properly be described as a BoD at all. That is, however, not the premise of Ground 2 of this appeal. Nor is it the position on the facts of this case, particularly given the conclusions that we reach below on Grounds 1 and 3 of this appeal.

69. Finally and for completeness, although TK relied on *Latvian Tankers* in support of its submissions on Ground 2, we reach our conclusions on this ground without reliance on that judgment. Although that case does offer some support for the proposition that a breach of a customs obligation in relation to only part of a consignment of goods will not necessarily give rise to a customs debt in relation to the entire consignment, we note that unlike the facts of the present case (and the previous cases of *Terex*, *Limagrain*, *Bayernwald Früchteverwertung* and *Döhler*), the breach in *Latvian Tankers* did not lie in defective record-keeping or other documentation, but in the irretrievable loss of part of the dutiable goods. We are therefore cautious about drawing too much from a decision reached on a very different factual basis.

70. For the reasons given above, we consider Ground 2 of the appeal to be well-founded.

Ground 1

71. The consequence of our conclusion on Ground 2 is that an error in relation to a single entry does not invalidate the entirety of the BoD. Such an error might, however, give rise to a customs debt in relation to the specific goods covered by that entry. That raises the question of whether the types of errors and discrepancies in the BoDs identified by HMRC are indeed such as to give rise to customs debts for the relevant entries (as HMRC maintains), or whether they are immaterial errors or discrepancies which do not give rise to customs debts (as TK maintains is the case for almost all of the alleged defects identified by HMRC). That is the subject of Grounds 1 and 3 of this appeal.

72. Ground 1 raises the question of whether the FTT was correct to find in §§26, 49 and 63 that TK's BoDs were required to contain particulars that reconciled the BoD data with the data held in HMRC's MSS data set, without the need for further investigation, and that breach of this requirement incurred a customs debt under the CCC.

73. One example of such a discrepancy is where the customs declaration contained an error such as a commodity code error, which was then reflected in the CHIEF data in the MSS database, but the correct code was subsequently entered on the BoD. Another example is where the data entered on the CHIEF system were correct, but an error was then made on the BoD entry.

74. Under Article 204(1) CCC, a customs debt is incurred through either non-fulfilment of an "obligation" arising from the use of the relevant customs procedure, or through non-

compliance with a "condition" of that procedure. The obligations in relation to the supply of a BoD are set out in Article 521 of the Implementing Regulation. These include the requirements for that BoD to contain the particulars specified in Article 521(2), "unless otherwise determined by the supervising office". None of those particulars include a requirement for the particulars in the BoD to enable reconciliation with HMRC's MSS without further investigation. Nor was that a condition of TK's authorisations relevant to the disputed BoDs.

75. At the hearing, Mr Waldegrave submitted that the requirement in Article 521(2)(e) for a BoD to specify "the particulars of the declarations entering the import goods under the arrangements" meant that the BoD was required to contain the same particulars as the relevant customs declarations, even if the customs declarations had contained an error (such as, in the example above, an incorrect commodity code). He said that the correct details could (potentially) have then been given in explanatory comments in the BoD spreadsheet.

76. We do not accept that submission. Article 521(2) requires the BoD to contain various particulars of the import goods in respect of which discharge is claimed, including the quantity of each type of goods, the CN code of those goods and the rate of import duties to which those goods are liable. It is implicit in those requirements that those particulars should be an accurate description of the goods at the moment of discharge from the IPR procedure. HMRC's form C&E 812, which accompanied the BoDs, likewise required the relevant trader to confirm that the information submitted was accurate, with a warning regarding penalties for false information. The suggestion, in those circumstances, that TK should have knowingly entered *inaccurate* descriptions of the relevant goods, purely in order to enable reconciliation with a customs declaration which contained the same error, is bordering on the Kafkaesque (a point we made during the course of the hearing).

77. We certainly do not consider that such a requirement can be read into Article 521(2)(e). That provision requires the BoD to provide the details of the relevant import declaration, a requirement reinforced by §12.2 of Notice 221 (cited above). The BoDs complied with that requirement by specifying the relevant import entry numbers. That requirement cannot, however, sensibly be interpreted as a requirement to replicate *errors* within the relevant import declaration. We also note that the BoD spreadsheet format (which had been agreed with HMRC) did not contain a column for further comments. It clearly was not, therefore, envisaged by HMRC at the time that the spreadsheet was agreed that a comments column should be used to explain why knowingly inaccurate particulars were being entered on the BoD.

78. The answer to problems of discrepancies between the BoD and the corresponding import declarations lies rather in the requirement for holder of an IP authorisation to keep records. That requirement is set out in Articles 515 and 516 of the Implementing Regulation, and it is apparent from Article 496(j) of the Implementing Regulation that the purpose of record-keeping is to enable the customs authorities to supervise and control the relevant customs arrangements. Consistent with those provisions, TK's authorisations required it to retain detailed records for a minimum of four years after disposal of the goods held under the authorisation.

79. The record-keeping requirement should not, however, be conflated with the requirements of a BoD. A breach of the obligations and conditions referred to in Article 204(1) does not, therefore, arise merely because it may have been necessary to have reference to TK's records in order to verify the accuracy of some entries on the BoD, where discrepancies arose between those entries and HMRC's MSS data.

80. We therefore consider Ground 1 of the appeal to be well-founded.

Ground 3

81. The question under Ground 3 is whether any error or discrepancy on a BoD gives rise to a customs debt, even if the error is *de minimis* or immaterial. We will address that question by reference to the specific errors, or categories of errors, identified in the examples before us. We start, however, with some general principles.

82. First, as already discussed, a customs debt will be incurred under Article 204(1) CCC where there has been either non-fulfilment of an "obligation" arising from the use of the relevant customs procedure, or non-compliance with a "condition" of that procedure, unless it is established that the relevant failure has "no significant effect on the correct operation of the … customs procedure in question". An error which has either *no* effect, or *no significant* effect on the correct operation of the IP procedure will not therefore incur a customs debt under Article 204(1).

83. Secondly, the obligations and conditions in relation to the supply of a BoD are set out in Article 521 of the Implementing Regulation and TK's authorisation. Article 521(2) specifies the particulars which the BoD must contain, unless otherwise determined by the supervising office. TK's authorisations did not contain any further requirements as to the particulars to be provided in its BoDs, and HMRC has not identified any determination requiring additional particulars to be provided on TK's BoDs beyond those specified in Article 521(2). An error or discrepancy in the particulars provided in the disputed BoDs will therefore not incur a customs debt under Article 204(1) CCC unless it amounts to non-compliance with the requirements set out in Article 521(2).

84. Thirdly, while there is no dispute that the requirements of the IP procedure must be strictly construed, it follows from both *Terex* and *Limagrain* that this does not preclude the correction of minor errors where necessary. In particular, while emphasising that when compliance with the obligation to keep stock records is an "essential obligation" under the CCC (*Limagrain* §33), the CJEU in *Limagrain* confirmed that discrepancies or minor omissions in stock records could be resolved by reference to additional documents. There is no principled reason why the same should not apply to a BoD. Moreover, given that Article 496(j) of the Implementing Regulation explicitly envisages that the customs authorities may have recourse to the records retained pursuant to Articles 515 and 516 for the general purposes of supervising and controlling the customs arrangements, it would in our judgment be very odd to suggest that reference to those documents could not be made for the purposes of verifying the accuracy of a BoD.

85. HMRC contended that the relevant paragraphs of the judgment in *Limagrain* were concerned with the question of whether there was a breach of the relevant requirement rather than the subsequent question of the implications of any breach. That ignores, however, the remainder of the judgment. While the court in *Limagrain* did address (under the first question) the issue of whether an inaccuracy or discrepancy in the stock records could be resolved, it then went on to consider (under the second question) the consequences of non-compliance with the obligation to maintain stock records. In the present case, it is likewise necessary to consider first whether the alleged error or discrepancy can be resolved, before considering whether it is to be regarded as a relevant and material error for the purposes of Article 204(1).

86. We turn to HMRC's illustrative examples of errors with these preliminary points in mind.

87. HMRC examples 1–3 are examples of discrepancies between the commodity codes shown on HMRC's MSS system (derived from the original import declaration) and the commodity codes on the relevant BoDs. Some of these are cases where the original import declaration was corrected by a post-clearance amendment (**PCA**); in other cases no PCA was made. It is common ground that the commodity code is a required element of a BoD under Article 521(2)(c) of the Implementing Regulation. In all of these examples, however, TK maintains that the commodity code is correctly stated on the BoD.

88. The FTT considered these at §§51, 52 and 55 and found that where the MSS and BoD data cannot be reconciled, the BoD falls to be regarded as inaccurate and/or incomplete. We disagree. For the reasons given in relation to Ground 1, TK's primary obligation in relation to its BoDs is to set out accurate details of the goods which have been discharged from the IP procedure. TK is not required to ensure that the details provided in the BoD match the data held on HMRC's MSS database. Where there is a discrepancy between the BoD and the MSS data, the question is whether the accuracy of the BoD data can be verified by reference to TK's records. Where TK's records establish that the commodity code is correctly entered on the BoD, there is no breach of the requirements of Article 521(2) and no customs debt is incurred.

89. HMRC example 4 is a discrepancy between the Entry Processing Unit (**EPU**) code given in respect of an import entry on the MSS and the BoD. The EPU forms the first part of the import entry number, which is the number used to record the details of the relevant import declaration. As already noted, the details of the import declaration are required by Article 521(2)(e). In the example given, the import entry code on the MSS is 516-001152X, with 516 being the EPU code. In the corresponding entry in the BoD, the EPU code is given as 515, which is accepted by TK as being an error. TK's position, however, is that the error is immaterial.

90. The FTT considered this at §57 and concluded that the BoD was inaccurate and/or incomplete. We agree that this is an example of a minor inaccuracy; but the next question is whether that inaccuracy can be resolved. It is apparent that it can be (and has been) resolved, and it is not suggested that the error has any impact on the customs duty due. This is therefore an example of an error which has been established to have no effect at all on the correct operation of the customs procedure. Accordingly, no customs debt is incurred under Article 204(1).

91. HMRC example 5 is a discrepancy between the quantities shown on the MSS and the BoD. It is common ground that the quantity of goods is a required element of the BoD under Article 521(2)(b), and TK accepts that the quantity shown on the BoD is wrong. TK's position, however, is that the error is immaterial.

92. The FTT considered this at §58 and concluded that the BoD was inaccurate and/or incomplete. We agree that this is an example of an inaccurate entry; but again the question is whether that inaccuracy can be resolved. It is apparent that it can be (and has been) resolved, and it is not suggested that the error has any impact on the customs duty due. Again, therefore, this is an example of an error which has been established to have no effect at all on the correct operation of the customs procedure, such that no customs debt is incurred under Article 204(1).

93. HMRC example 6 is a discrepancy between the quantities shown on the MSS and the BoD, due to the carry forward of stock from a previous quarter. TK maintains that the BoD is accurate. HMRC's position is that the BoD should have indicated that the quantities included stock carried forward.

94. The FTT considered this at §59 and concluded that the BoD was inaccurate and/or incomplete, agreeing with HMRC that the BoD did not clearly indicate that earlier imports contributed to the relevant quantities. We disagree. It is accepted that carry forward of imports from one quarter to the next is permitted, and HMRC has not identified any requirement for a BoD to explain where the quantity stated is made up, in part, of imports carried forward in that way. This is an example of an entry where there is in fact no error at all, but simply a query which can be (and has been) resolved by reference to TK's records. That is not a breach of the requirements of Article 521(2), and no customs debt is incurred.

95. HMRC example 7 is a discrepancy between the quantities shown on the MSS and the BoD, which TK accepts is material and gives rise to a customs duty of £578.63. We therefore agree with the FTT Decision at §61 that a customs duty of that amount is due in relation to this entry. For the reasons given in relation to Ground 2, however, we do not agree with the FTT's further conclusion that this means that a customs debt is also due on the entirety of the goods covered by the BoD in question.

96. HMRC example 8 is a discrepancy between the customs values shown on the MSS and the BoD. It is common ground that the customs value is a required element of the BoD under Article 521(2)(d). TK's position is, however, that the BoD is correct as has been shown on TK's audit trail. HMRC's position is that the mismatch between the MSS and the BoD renders the BoD inaccurate.

97. The FTT considered this at §53 and concluded that the BoD was inaccurate and/or incomplete, on the basis of the mismatch between that and the MSS. We disagree. As with examples 1–3, we do not consider that a BoD must be regarded as inaccurate simply because its details do not match the corresponding details on the MSS. Where TK's records establish that the customs value entered on the BoD is in fact correct, there is no breach of the requirements of Article 521(2) and no customs debt is incurred. We also note for completeness that the total customs duty difference for this example is £3.27, and there is a similar example on the Scott Schedule where the difference is £0.01. HMRC cannot plausibly suggest that these are material discrepancies.

98. HMRC example 9 is a reference in one entry to the EU legislation in force at the time of the BoD, rather than to the predecessor legislation in force at time of disposal of the relevant goods. TK accepts that this is an error in the BoD but contends that it is immaterial. HMRC's position is that "technically" this is an inaccuracy.

99. The FTT considered this at §60 and concluded that the BoD was inaccurate and/or incomplete. We agree that this is an example of an inaccurate entry; again, however, the question is whether that inaccuracy can be resolved. It is apparent that it can be (and has been) resolved, and it is not suggested that the error has any impact on the customs duty due. Again, therefore, this is an example of an error which has been established to have no effect at all on the correct operation of the customs procedure, such that no customs debt is incurred under Article 204(1).

100. HMRC example 10 is a reference in one entry to the IP having been discharged by "transfer to end use customer", namely to BAE Systems. HMRC's complaint (as set out on the Scott Schedule) appears to be that the transfer should have been made via a customs declaration to CHIEF. TK's position is that even if that is the case, the BoD accurately describes the way in which TK has discharged the goods.

101. The FTT considered this at §60 and concluded that the BoD was inaccurate and/or incomplete. No reasons are given for this conclusion so we do not know whether the FTT reached any view as to the merits of HMRC's submissions as to the procedure by which this transfer should have been made. On the material before us, however, the problem does not appear to be that the BoD was inaccurate. Rather, what is said is that the transfer was either not permitted under the IPR regime, or was not carried out according to the correct procedure. We have, however, had no specific argument on this point and we are therefore not able to express a view on the merits of HMRC's objection.

102. HMRC example 11 is an entry for which the export date was erroneously given as 2013 rather than 2014. TK accepts that this is an error in the BoD but contends that it is immaterial, since there was never any doubt that the relevant date was 2014. HMRC's position is that this is a significant inaccuracy.

103. The FTT considered this at §60 and concluded that the BoD was inaccurate and/or incomplete. We agree that this is an example of an inaccurate entry; again, however, the question is whether that inaccuracy can be resolved. It is apparent that it can be (and has been) resolved, and it is not suggested that the error has any impact on the customs duty due. Again, therefore, this is an example of an error which has been established to have no effect at all on the correct operation of the customs procedure, such that no customs debt is incurred under Article 204(1).

104. HMRC example 12 is an entry where TK claimed an extension of the throughput period. TK maintains that the BoD is accurate and that it is entitled to the extension sought. HMRC disputes the way in which the extension is claimed on the BoD.

105. The FTT considered this at §60 and concluded that the BoD was inaccurate and/or incomplete. We disagree. TK's authorisation makes clear that the throughput period for goods remaining in stock at the end of the agreed throughput period may be extended automatically provided that certain conditions are satisfied. HMRC does not say that those conditions are not satisfied in the case in question, nor is it suggested that TK's audit trail in respect of the extension claimed is incomplete or defective. Rather, HMRC's complaint is that the BoD should have correlated the extension to individual import entries, rather than to the total unused quantity of material.

106. There is, however, no requirement in either Article 521(2) or TK's authorisation for particulars of the individual import entries to be provided in the BoD where throughput extensions are claimed by the authorised trader. This is, therefore, another example of HMRC requiring particulars that go beyond the obligations and conditions imposed on TK. On the material before us, there is no evidence that the particulars given in the BoD are in breach of either Article 521(2) or TK's authorisation. Accordingly, no customs debt is incurred under Article 204(1).

107. We therefore consider Ground 3 of the appeal to be well-founded, both as a matter of general principle, and in relation to the majority of the specific examples identified by HMRC. The exceptions are HMRC example 7, in relation to which a customs duty is admitted by TK, and HMRC example 10, for which the material before us is not sufficient for us to reach a conclusion on whether a customs debt is due.

Ground 4

108. Given our conclusions on Grounds 1–3, it is not necessary to address Ground 4.

Disposition

109. For the reasons given above, TK's appeal is allowed.

110. We are grateful to all counsel and those instructing them for the obvious care with which this case was prepared and presented.

Costs

111. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MRS JUSTICE BACON
JUDGE GREG SINFIELD

Release date: 28 March 2024