Neutral Citation: **[2025] UKUT 00057 (TCC)**

Case Number: UT/2023/000082

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

CUSTOMS DUTIES – importation of pet food bags using incorrect tariff classification code – submission by importer of requisite documentation outside applicable time limit – whether FTT erred in deciding that exception from time limit for a failure "due to exceptional circumstances" did not apply – whether arguments on appeal should be admitted – appeal dismissed

Heard on: 29 October 2024
With further written submissions on:
12, 19 and 26 November 2024
Judgment date: 14 February 2025

Before

JUDGE THOMAS SCOTT
JUDGE VIMAL TILAKAPALA

Between

UFLEX EUROPE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Dilpreet Dhanoa, instructed by HW Fisher

For the Respondents: Jessica van der Meer, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant ("Uflex") was assessed by the Respondents ("HMRC") to customs duty and VAT in respect of the importation of certain pet food bags between April 2014 and December 2018. The parties disagreed on the correct custom classification of the bags. Uflex also sought to claim retrospectively a lower rate of duty on the imports by late presentation of certain documentation, relying on an exemption for "exceptional circumstances" for the lateness. HMRC rejected that claim.

2. Uflex appealed against the assessments to the First-tier Tribunal (Tax Chamber) (the "FTT"). In a decision released on 3 May 2023 (the "Decision"), the FTT decided in favour of Uflex's customs classification of the goods, but held that the required documentation had been submitted outside the statutory period and there were no "exceptional circumstances" to justify the lateness within the meaning of the relevant legislation. The consequence was that the assessments were upheld.

3. Uflex now appeals against the FTT's decision that there were no exceptional circumstances.

BACKGROUND AND ISSUE IN THIS APPEAL

4. References below in the form FTT[x] are to paragraphs of the Decision.

5. During the relevant period, Uflex imported bags (the "bags") used to contain dog or cat food. The bags were made from woven polypropylene strips and coated on the outside with plastic.

6. The primary issue in the appeal before the FTT was the correct classification of the bags for the purposes of customs duty (the "classification issue"). There is a statutory scheme which is intended to offer certain developing countries lower tariffs on their exports into the UK, called the Generalised Scheme of Preferences ("GSP"). Under the GSP, goods are entitled to reduced or nil rates of customs duty, known as "preference rates". Once a trader establishes the correct tariff code for the products, then the place of origin for the products must be checked to see if the product in fact qualifies for preference. When importing under the GSP, a GSP "Proof of Origin" has to be completed in the country of origin. HMRC considered that the bags should be classified under commodity code 6305 33 90 00 ("heading 6305"), which attracts duty at a rate of 7.2%, with a potential preference rate of 5.7%. Uflex considered that the bags should be classified under commodity code 3923 29 90 00 ("heading 3923"), which attracts duty at a rate of 6.5%, with a potential preference rate of 0%.

7. The FTT decided that the bags were properly classified under heading 3923, as Uflex contended: FTT[78]. HMRC has not sought to challenge that decision.

8. However, the position was complicated by the fact that, until 2016, Uflex had incorrectly classified the bags under a third classification code, 4911 10 90 00 ("heading 4911"). A Proof of Origin must be presented within a specified period, but the relevant GSP certificates for the bags were not presented within the relevant time frame. This was because the code incorrectly applied by Uflex attracted a 0% rate of duty (which was not a preferential rate), so Uflex had mistakenly considered that a GSP Certificate of Origin ("GSP Certificate") was unnecessary.

9. There is an exception for the time limit within which a GSP Certificate must be presented which provides that the authorities "may" accept late submission "where failure to submit those documents by the final date is due to exceptional circumstances". The parties disagreed on whether this exception applied. The FTT decided that it had full appellate jurisdiction in relation to this issue: FTT[105]. The FTT also decided that HMRC would be obliged to accept

a late GSP Certificate if Uflex could demonstrate that the delay was due to exceptional circumstances: FTT[106]. Neither of those conclusions is challenged in this appeal.

10. The FTT decided that the delay was not due to exceptional circumstances for the purposes of the time limit exception. It is that decision which is the sole issue in this appeal.

RELEVANT LEGISLATION

11. The legislation is contained in Article 97 of EEC Commission Regulation 2454/93. The provisions below are those which are relevant and were in force during the relevant period.

12. Article 97k states:

> 1. Every beneficiary country shall comply or ensure compliance with:
>
> (a) the rules on the origin of the products being exported, laid down in Section 1;
>
> (b) the rules for completion and issue of certificates of origin Form A, a specimen of which is set out in Annex 17…
>
> …
>
> 3. Where, in a beneficiary country, a competent authority for issuing certificates of origin Form A is designated, documentary proofs of origin are verified, and certificates of origin Form A for exports to the European Union are issued, that beneficiary country shall be considered to have accepted the conditions laid down in paragraph 1.
>
> …
>
> 5. A proof of origin shall be valid for 10 months from the date of issue in the exporting country and shall be submitted within the said period to the customs authorities of the importing country.

13. Article 97n provides for the exception to the 10 month time limit which is central to this appeal, as follows (emphasis added to original);

> **Procedures at release for free circulation in the European Union**
>
> *Article 97n*
>
> 1. Certificates of origin Form A or invoice declarations shall be submitted to the customs authorities of the Member States of importation in accordance with the procedures concerning the customs declaration.
>
> 2. Proofs of origin which are submitted to the customs authorities of the importing country after the period of validity mentioned in Article 97k (5) may be accepted for the purpose of applying the tariff preferences, **where failure to submit these documents by the final date set is due to exceptional circumstances**. In other cases of belated presentation, the customs authorities of the importing country may accept the proofs of origin where the products have been presented to customs before the said final date.

THE DECISION

14. We discuss below the FTT's understanding of the submissions of each party and the key findings of fact relating to its decision on the exceptional circumstances issue. We set out in full the FTT's decision on this issue. Before the FTT, but not in this appeal, Uflex were represented by Mr Firth. The relevant passage is at FTT[107]-[112]:

> 107. In relation to the substantive issue concerning "exceptional circumstances", Mr Firth's essential argument is that where [an] importer incorrectly claims a 0% rate, with the result that it does not (or does not see the need to) present a GSP Form A within the 10 month period provided for

> in Article 97K, that should constitute "exceptional circumstances" for the purposes of Article 97n(2). This was, he submitted, not an event which would normally confront any trader, carrying on the same activity, in the exercise of his/her occupation.
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> 108. We reject that submission. It seems to us that the purpose of the "exceptional circumstances" exception in Article 97n (2) does not extend to absolving behaviour which would undermine the fundamental duty of an importer to declare imported goods under the correct heading.
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> 109. Both parties referred to a decision of the First-tier Tribunal in *Euro Packaging Ltd v HMRC* [2017] UKFTT 160 (TC). However, in that decision (which involved the question of remission of duty) the facts were materially different from the present appeal. Consequently, we derived little assistance from that decision.
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> 110. In *Sohl & Sohlke* at [68] and [76] the Court held that problems peculiar to an undertaking, such as the fact that employees have suddenly fallen ill or have been absent on leave, the induction of new employees, problems with the application of a data processing system developed for the purposes of carrying out customs formalities or, in cases involving outward processing, the excessive work involved in the preparation of attributions which ought normally to be prepared by the customs authorities, did not constitute exceptional circumstances. The Court held that circumstances which, although not unknown to the trader, are not events which would normally confront any trader in the exercise of his occupation may constitute exceptional circumstances.
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> 111. In this case, the mistaken application of tariff heading 4911 resulted in the Appellant's failure to submit GSP Form A within the 10 month period. The need correctly to classify goods on importation is a task that confronts every trader carrying on the same kind of business. It seems to us that such an error does not constitute exceptional circumstances.
>
> 112. Accordingly, we consider that there were no "exceptional circumstances" for the purposes of Article 97n(2).

GROUNDS OF APPEAL: ISSUES

15. The grounds of appeal gave rise to two general issues. First, each ground contained multiple arguments, and certain of the grounds overlapped. Additionally, the grounds of appeal were prepared by another counsel, and the skeleton argument did not precisely track those grounds, and was further modified in oral submissions. Second, HMRC objected to a number of the arguments on the basis that they were new and had not been raised before the FTT. In order properly to address the second issue, we directed following the hearing that the parties should provide further written submissions on the issues of whether any of the arguments was new, and if so why they should fairly be addressed, and also whether any of the arguments contained in the grounds sought to resile from a position taken before the FTT. The parties duly provided those submissions, which we found helpful and have taken into account in reaching our decision.

16. Because of these issues, it has been necessary in this decision to set out the grounds of appeal in considerably greater detail than would usually be necessary. We will first consider HMRC's objections to various of the arguments within those grounds.

ADMISSIBILITY OF NEW ARGUMENTS

17. Uflex was granted permission to appeal on all of the grounds set out below. In granting permission, the FTT made no comment on whether any of the grounds raised issues which had not been raised before the FTT. However, in their Response to the grounds of appeal, HMRC

submitted that three of the four grounds raised new points not argued before the FTT, so that the issue arose of whether the Upper Tribunal should allow those points to be taken in this appeal. In her oral submissions, Ms van der Meer also objected to aspects of the remaining ground on this basis. Ms Dhanoa's response was that this was not the case, because all of the grounds, and the arguments within those grounds, related to aspects of the case made by Uflex before the FTT or to the basis on which the FTT made its decision. Ms Dhanoa pointed out that, in addition, HMRC's position was inconsistent with its assertion that the grounds of appeal simply repeated or re-presented arguments considered and rejected by the FTT.

18. In *C F Booth Limited v HMRC* [2022] UKUT 00217 (TCC) ("*Booth*"), the Upper Tribunal helpfully summarised the principles regarding new points on appeal as follows:

> 67. …It is well-established that an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court, particularly where that would necessitate new evidence or would have resulted in the trial below being conducted differently: see e.g. *Singh v Dass* [2019] EWCA Civ 360, §§15–18. We also note the comments of Warby LJ in *Sivier v Riley* [2021] EWCA Civ 713, §18, that "[w]e do not usually allow entirely new points to be taken on appeal. It is often procedurally unfair to do so, and normally wrong because appeals are by way of review and not re-hearing. Ordinarily the place for arguments to be given their first run-out is the court of first instance."
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> 68. In similar vein in *Jones v MBNA* [2000] EWCA Civ 51, May LJ commented at §52 that:
>
> > "Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. … The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view, this is not such a case."
> >
> > …
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> 73. Moreover, the mere fact that permission to appeal on this issue has been granted does not mean that it is necessarily appropriate for us to hear argument on the point. In *Mullarkey v Broad* [2009] EWCA Civ 2 permission to appeal had been granted ahead of the substantive hearing, but the question nevertheless arose at the subsequent hearing of whether the appellant should be allowed to present its case on appeal on new points that had not been raised in the case below under appeal. Lloyd LJ explained:
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> > "29. Points of this kind more often arise at the stage of an application for permission to appeal or, if permission has been granted, on seeking to amend the grounds of appeal. Here, by contrast, permission to appeal has been given on grounds which include the new points. However, the grant of permission, on which the Respondent was not heard, only shows that there were

> thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing ...
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> 30. The authority cited by Counsel in relation to the question whether a concession should be allowed to be withdrawn is *Pittalis v Grant* [1989] 1 QB 605, in particular a passage in the judgment of Nourse LJ at page 611, as follows:
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> > 'The stance which an appellate court should take towards a point not raised at the trial is in general well settled … It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 ChD 419, 429, per Sir George Jessel M.R.: 'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.' Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.' "

19. Ms van der Meer dealt with Ms Dhanoa's criticism that HMRC's objections were inconsistent by stating in her Response that "HMRC's case is that [the Appellant's] grounds- which are dense, contain various sub-grounds and are at times in tension with each other- try to advance both new submissions whilst simultaneously also seeking to reargue points made before the FTT". That description is not unwarranted, and we reject Ms Dhanoa's criticism. The only issue we have to determine is whether HMRC's objection to various arguments as new is made out, and, if so, whether it would be fair to admit those arguments in this appeal.

20. In the context of this appeal, that issue can be broken down into three primary questions:

(1) Was the relevant point raised before the FTT?

(2) Is it a pure point of law?

(3) Should we exercise our discretion to consider the issue in this appeal?

21. As to the first question, Ms van der Meer said in her Response that this "is a deceptively simple, analytical question: either the appeal submissions were made in the FTT, as evidenced by Mr Firth's Skeleton and the FTT Decision, or they were not". While that formulation has the merit of simplicity, the question is more complicated. If a point was raised in written or oral submissions, or discussed in the FTT's decision, then we agree that it is not an entirely new point in the context of an appeal. However, if an argument raised on appeal (with permission) asserts an error of law in the FTT's decision on a particular issue, it may not have been possible in the initial hearing to have anticipated the asserted error. As May LJ put it in *Jones v MBNA* (set out above), the principle is that "normally a party cannot raise in subsequent proceedings claims or issues which **could and should** have been raised in the first proceedings"

(emphasis added to original). Additionally, an appellant must sensibly be permitted some leeway in an appeal in making good a ground of appeal, so the identification of a "new" issue should not take place at such a microscopic level that every argument or authority not specifically mentioned in the proceedings below is automatically "new" in an appeal. That may be particularly pertinent where, as here, the issue which is the subject of the appeal was not the primary focus of the appealed decision, and so was dealt with relatively briefly.

22. Very recently in *HMRC v Bluecrest Capital Management (UK) LLP* [2025] EWCA Civ 23 ("*Bluecrest Capital*"), the Court of Appeal also distinguished between the taking of a new point on appeal and "a forensic change of position by the adoption of an alternative fallback argument of construction on a pure question of law": [111]. The Court also suggested that in a tax appeal other principles were relevant to the issue of whether to admit new arguments.

23. While we have considered each of the points contained in the grounds of appeal below to which HMRC have objected on the basis that it raises a point which was not raised before the FTT, if one steps back from the multiplicity of arguments contained within the grounds, the gist of Ms Dhanoa's primary submissions can, we think, be summarised as follows:

(1) The FTT erred in not taking into account its own decision that Uflex's customs code classification was correct, and that, as a result, there had been no loss of duty as a result of the original erroneous classification used by Uflex.

(2) The FTT erred by misunderstanding the primary purpose of a GSP Certificate.

(3) The decision that there were no exceptional circumstances was contrary to the purposes of the Customs Code.

(4) The FTT misdirected itself in law by not taking into account and applying a number of CJEU authorities on tests analogous to exceptional circumstances.

(5) The FTT erred in applying the restrictive test in *Firma Sohl*, and, in any event, applied the test in *Firma Sohl* wrongly on the facts.

24. We consider that several of these arguments do, to different degrees, consist of points that were not raised before the FTT and which could have been raised before the FTT, although some of them could not reasonably have been anticipated in advance of the Decision. Certainly, an argument that the approach adopted in *Firma Sohl* is too restrictive as matter of law seeks in effect to resile from the position taken by Mr Firth on behalf of Uflex before the FTT, as recorded at FTT[93].

25. However, we have concluded that all of the arguments to which HMRC have objected as being "new" raise pure points of law, and would not have required further or different evidence to have been raised before the FTT, or before this tribunal. In terms of procedural fairness, HMRC have been on notice since permission to appeal was granted that Uflex sought to run these arguments, and have had ample opportunity to respond. Indeed, entirely sensibly, HMRC have responded in detail to each argument to cater for the possibility that we might decide, as we have, to admit them in this appeal. In those circumstances, and since we see no reason why HMRC cannot be adequately protected in costs, we consider that it is in the interests of justice that those points be considered by the Tribunal in determining this appeal.

26. In *Commercial Bank of Dubai PSC v Al Sari* [2024] EWCA Civ 643 at [59] and [60], Males LJ endorsed the following summary given by Popplewell LJ in *ADM International Sarl v Grain House International SA* [2024] EWCA Civ 33 at [95][1]:

[1] Cited with approval in *Bluecrest Capital* at [106].

> The court has a general discretion as to whether to allow new points of law to be taken on appeal, the ultimate test being whether it is in the interests of justice … That will depend upon an analysis of all the relevant factors, which include the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken, especially where it would have required additional evidence.

27. That is the analysis and process we have followed in this case. We will, therefore, consider all of the arguments presented by Uflex in reaching our decision.

AN EVALUATIVE JUDGMENT?

28. Before we consider the grounds of appeal, we deal first with an overarching submission made by HMRC in relation to the grounds of appeal generally. HMRC say that the issue in dispute involved an evaluative judgment by the FTT, and as such the principles established in relation to challenges to such judgments apply to this appeal.

29. It is well established that in an appeal against an evaluative judgment, the question is not whether the appellate court or tribunal would have reached the same decision. In *Carey Street Investments Limited (in liquidation) v Brown* [2024] EWCA Civ 571, Newey LJ described the limited jurisdiction of an appellate court in relation to a challenge to a finding of fact, and then said this, at [25]:

> The position is comparable with evaluative assessments. An appellate Court will not interfere merely because it might have arrived at a different conclusion. It will do so only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see e.g. *R (R) v Chief Constable of Greater Manchester* [2018] 1 WLR 4079, at paragraph 64, and also *In re Sprintroom Ltd* [2019] 2 BCLC 617, at paragraphs 76 and 77).

30. In relation to an appeal against a decision of the FTT, the Upper Tribunal in *Red White and Green Limited v HMRC* [2023] UKUT 00083 (TCC), stated as follows, at [36]-[37]:

> 36. In approaching the grounds of appeal we acknowledge that we must not over-analyse the FTT's reasoning process; be hypercritical of the way in which the Decision is written; or focus too much on particular passages or turns of phrase to the neglect of the Decision read in the round (see Mummery LJ in *Brent LBC v Fuller* [2011] EWCA Civ 267).
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> 37. We also take into account that there is limited scope to interfere with an evaluative judgment of the FTT. In *Quashie v Stringfellow Restaurants Limited* [2012] EWCA Civ 1735 at [9], the Court of Appeal endorsed the following statement of principle:
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> > …The responsibility of determining and evaluating all the relevant admissible evidence (both documentary and otherwise) is that of the tribunal in the first instance; an appellate tribunal is entitled to interfere with the decision of that tribunal, that a contract of employment does or does not exist, only if it is satisfied that in its opinion no reasonable tribunal, properly directing itself on the relevant question of law, could have reached the conclusion under appeal, within the principles of *Edwards v Bairstow* [1956] AC 14.

31. While the principles applicable to an appeal against an evaluative assessment or judgment are relatively settled, the extent to which a decision on a particular issue is an evaluative

assessment in the first place is not always straightforward. A lay person could be forgiven for thinking that most decisions taken by a judge involve evaluating the facts and then reaching a judgment or assessment. The phrase "multi-factorial assessment" is perhaps slightly clearer in that respect.

32. Determining whether a set of facts falls within a particular statutory provision or definition for tax purposes may involve an evaluative assessment or multi-factorial assessment, but it remains necessary that the court or tribunal tasked with that assessment properly directs itself as to the law and takes into account relevant authority. In this appeal, we consider that the FTT's decision as to whether on the facts Uflex's failure was "due to exceptional circumstances" within Article 97n was an evaluative judgment, but that the meaning of those words, and the guidance to be drawn from the relevant authorities, were questions of law. Some of the arguments set out below are challenges to the FTT's evaluative judgment, and to that extent the principles summarised above apply. Several others, however, allege errors of law by the FTT in its construction of the exemption and/or the guidance to be drawn from certain authorities. Therefore, we must be careful to distinguish those challenges which, on due consideration, are indeed challenges to an evaluative assessment.

GROUND 1

33. Ground 1 is that the FTT misunderstood or mischaracterised the relevant question in considering whether there were exceptional circumstances.

34. Ms Dhanoa said that the starting point is the rule that a GSP Certificate must be presented to the customs authorities of the importing country within ten months of the date of issue. The primary purpose of a GSP Certificate is to provide proof of the place of origin of the goods, to demonstrate that the goods qualify for a preferential rate of duty. The primary purpose of a GSP Certificate is not (as the FTT appears wrongly to have concluded) concerned with ensuring compliance with the separate duty of an importer to declare imported goods under the correct customs heading.

35. As a matter of principle, therefore, the effect of allowing an exception to the ten-month limit would not be "absolving behaviour which would undermine the fundamental duty of an importer to declare imported goods under the correct heading." Ms Dhanoa said that the FTT therefore erred in law when concluding otherwise, at FTT[108].

Discussion

36. We agree with Ms Dhanoa as to the primary purpose of a GSP Certificate. However, the FTT did not conclude otherwise. At FTT[108], the FTT is clearly and explicitly setting out what it considers to be the purpose of the "exceptional circumstances" exception and not the purpose of a GSP Certificate. Considering the Decision as a whole, it is also clear that the FTT did not misdirect itself as to the purpose of a GSP Certificate: see, in particular, FTT[79]-[85].

37. The FTT made no error of law in taking into account the purpose of the exception. However, it made no finding as to the positive purpose of the exception, save that it did not extend to absolving the behaviour described at FTT[108].

38. The assertion contained within Ground 1 that the FTT erred in deciding that granting the exception would have undermined "the fundamental duty of an importer to declare imported goods under the correct heading" does not serve to identify any independent error of law, but simply represents disagreement with its conclusion. However, we consider below the separate error alleged in this context under Ground 3.

39. For these reasons, the appeal under Ground 1 fails.

GROUND 2

40. Ground 2 is that the FTT failed to consider whether the facts of the case were out of the ordinary such as to amount to "exceptional circumstances" within the scope of Articles 97k(5) and 97n(2). Ms Dhanoa submitted that this is supported by the following arguments:

(1) In *Reiner Woltmann v Hauptzollamt Potsdam Case* C-86/97 ("*Reiner Woltmann*") and *Spedition Wilhelm Rotermun GmbH v Commissioners of the European Community* Case T330-99 ("*Spedition*"), the CJEU held that Article 905 of the Community Customs Code, as implemented by the Implementing Regulation, contained an equitable provision intended to deal with "exceptional situations" faced by an operator and was intended to apply, inter alia, where the circumstances of the trader and the administrator were such that it would be inequitable to require the trader to bear the loss which, in normal circumstances, would not have been incurred. In determining whether a "special circumstance" existed, the Commission considered that it was necessary to balance the Community interest against the interests of the trader who had acted in good faith.

(2) *Firma Sohl & Sohlke v Hauptzollampt Bremen* C-48/98 ("*Firma Sohl*") held that exceptional circumstances meant circumstances which put the trader in an exceptional situation in relation to other traders carrying on the same activity. In *Euro Packaging UK Limited v HMRC* [2017] UKFTT 160 (TC) ("*Euro Packaging*") it was accepted that there would be exceptional circumstances if there was a misclassification that HMRC had not picked up despite inspecting the goods.

(3) In *Eyckeler & Malt AG v Commission of the European Communities* (Case T42/96), ("*Eyckeler*") the CJEU considered what would amount to "special circumstances" (albeit in a different context), and held that it would be "where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred." The Court said that the exercise is one whereby "the Community interest in ensuring that the customs provisions are respected [is to be balanced against] the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk."

(4) In *Bacardi GmbH v Hauptzollamt Bremerhaven* (Case C-253/99) ("*Bacardi*"), the CJEU noted that: "Factors which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned for the purposes of Article 905(1) of the implementing regulation exist where, having regard to the objective of fairness underlying Article 239 of the Customs Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist."

(5) Uflex originally applied one classification, in good faith, resulting in 0% duty being due. Even if Uflex had known the correct classification at the time, the duty would still have been zero, applying the preference rate. Accordingly, Uflex was not seeking remission of duty that should have been paid; the duty was not payable even on the correct classification.

(6) In terms of exceptional circumstances, Uflex was in different circumstances to other traders carrying on the same activity because the classification it applied in good faith (and not determined to be wrong until 2016) gave rise to zero duty which meant that the Appellant had no reason to submit a proof of origin to take advantage of a preference. A trader who reasonably believes that their goods are classified under one heading with zero duty cannot make a provisional claim for preference in order to come within the second sentence of Article 97n(2), because in that scenario, there is no basis for

preference to be claimed. This contrasts with traders who do use the classification that is eventually found to be correct, because such traders have a full opportunity and the requisite knowledge to present the GSP Certificate in time, or to make a provisional claim.

(7) The relevant question for the FTT should have been whether the facts of the case were out of the ordinary, and taking into account whether accepting a GSP Certificate outside the ordinary 10 month period of validity would (on those facts) undermine the purpose of the time limit.

Discussion

41. Ground 2 contains within it a number of arguments. While there is some overlap, they can be unpacked and summarised as follows:

(1) Various CJEU decisions indicate that the FTT should have adopted a different and less strict approach to the relevant exception.

(2) The relevant legal question for the FTT should have been whether the facts of the case were "out of the ordinary", and for a number of reasons they clearly were.

(3) Uflex's situation was analogous to that in *Euro Packaging*, in which the exception was found to apply.

(4) Uflex is not seeking remission of duty that should have been paid; even on what was found subsequently to be the correct classification, the duty was zero.

(5) Even if the correct approach was that in *Firma Sohl*, on the facts Uflex satisfied the requirements for that approach to apply.

42. Ground 2 asserts that the FTT erred in law by misdirecting itself as to the meaning of Article 97n(2), because it did not take into account the less strict approach adopted to analogous exceptions in other CJEU decisions and in the FTT's decision in *Euro Packaging*.

43. The FTT began (at FTT[80]) by summarising the operation of the Generalised Scheme of Preferences, the need to present a GSP Certificate to the customs authorities in the importing country within 10 months of the date of issue of the certificate and the exception in Article 97n(2). It then discussed the FTT's jurisdiction in relation to that issue, concluding, in agreement with Mr Firth, that it had full appellate jurisdiction. In relation to the separate issue of whether HMRC had discretion to refuse a late proof of origin if "exceptional circumstances" were demonstrated to be present, Mr Firth referred to *Euro Packaging* and *Eyckeler*. Turning to whether exceptional circumstances existed, Mr Firth cited *Firma Sohl*, and described the relevant test in the terms in which it is set out in that decision: FTT[93]. The FTT considered whether exceptional circumstances arose on the facts by reference to that test: FTT[110]. The FTT took into account the purpose of the exceptional circumstances exception: FTT[108]. It stated that it derived little assistance from *Euro Packaging*. Applying the test as described in *Firma Sohl*, the FTT concluded that there were no exceptional circumstances for the purposes of Article 97n(2).

44. Pausing there, it is apparent that in directing itself as to the law, the FTT accepted Mr Firth's submissions, and was not presented with many of the arguments now raised under Ground 2. However, since we have decided to admit those arguments, the question is whether the FTT erred in law in taking this approach.

45. The FTT correctly identified the issue before it, namely whether Uflex's delay was "due to exceptional circumstances" for the purposes of Article 97n(2). Reliefs or exemptions based on concepts such as exceptional or special circumstances or situations are found in many EU and domestic provisions. Their interpretation is dependent both on the precise language used

and the context in which it occurs. "Exceptional circumstances" is a relatively protean phrase. An attempt to rely on analogies with different terminology used in different contexts and for different purposes is unlikely to be particularly useful.

46. We consider that the FTT did not err in law in proceeding on the basis that, in the absence of directly applicable authority on Article 97n(2), relevant guidance to the issue before it was to be found in *Firma Sohl*. That case concerned an extension of a time limit for the customs clearance of goods in temporary storage, contained in Article 49(1) of the Customs Code. Article 49(2) allowed for an extension of the time limit "where circumstances so warrant". The CJEU noted that since it was not possible to determine the circumstances which could justify a time extension from the wording of the Article, it was necessary to consider whether those circumstances could be determined from the purpose of Article 49[2]. It determined that the objective of Article 49(1) would not be achieved if traders were able to rely on circumstances which were not "exceptional" in order to obtain a time extension. The relevant passages of the decision are as follows:

> 68 By this question, the national court asks essentially, first of all, what circumstances can justify an extension of the time-limit referred to in Article 49(1) of the Customs Code and whether problems peculiar to an undertaking, such as the fact that employees have suddenly fallen ill or have been absent on leave, the induction of new employees, problems with the application of a data processing system developed for the purposes of carrying out customs formalities or, in cases involving outward processing, the excessive work involved in the preparation of attributions which ought normally to be prepared by the customs authorities, might constitute such a circumstance.
>
> …
>
> 69 As regards the circumstances which may justify an extension of the time-limit, it should be noted that Article 49(2) of the Customs Code allows customs authorities to extend the time-limit for carrying out the formalities required to assign to goods covered by a summary declaration a customs-approved treatment or use '[w]here circumstances so warrant', but such extension may not exceed 'the genuine requirements which are justified by the circumstances'.
>
> 70 Since it is not possible to determine the circumstances which can justify an extension from the wording of that Article, it is necessary to examine whether those circumstances may be determined from the purpose of that provision.
>
> …
>
> 72 The objective of Article 49(1) of the Customs Code would not be achieved if traders were able to rely on circumstances which were in no way exceptional in order to obtain an extension. Such an interpretation of the term 'circumstances' contained in that provision would lead to the result that temporary storage could be regularly extended and the temporary storage procedure might, in time, be transformed into a customs warehousing procedure.
>
> 73 Therefore, the term 'circumstances' within the meaning of Article 49(2) of the Customs Code must be interpreted as referring to circumstances which are liable to put the applicant in an exceptional situation in relation to other traders carrying on the same activity.

[2] The predecessor to Article 49(2) was Article 7 of Council Directive 68/312/EEC, which conferred power to extend the equivalent time limit "where exceptional circumstances so warrant".

> 74 Exceptional circumstances which, although not unknown to the trader, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances.
>
> 75 It is for the customs authorities and the national courts and tribunals to determine in each case whether such circumstances exist.
>
> 76 It should, however, be added that in any event circumstances such as those given by way of example by the national court [see 68 above] do not constitute circumstances which may justify an extension of the time-limit referred to in Article 49(1) of the Customs Code.

47. In this passage the CJEU set out its view of when circumstances should or should not be regarded as "exceptional" for the purposes of extending a customs time limit. As such, although the time limit was shorter than that in relation to Article 97, it was closely analogous to the issue before the FTT. In their skeleton arguments before the FTT, both Mr Firth and Ms van der Meer relied on this passage as describing exceptional circumstances for the purposes of Article 97n(2).

48. Ms Dhanoa relied on a number of other CJEU decisions, which, she argued, indicate that the FTT should have adopted a different or less stringent approach to the issue. As set out above, they are *Reiner Woltmann*, *Spedition*, *Eyckeler* and *Bacardi*. However, the provisions of the Customs Code with which those decisions are concerned are different in material respects to Article 97n(2).

49. *Reiner Woltmann* and *Spedition* both concerned a general provision of the Customs Code (Article 239) under which duties may be repaid or remitted in certain situations, including (under Article 905) a situation "which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned". The Court in *Reiner Woltmann* described Article 905 as "a general fairness clause intended to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in [other Articles] of the Regulation". In *Spedition*, the Court said this, at paragraphs 52 and 53:

> 52 According to settled case-law, Article 905 includes a general equitable provision designed to cover the exceptional situation in which the economic operator concerned might find himself in comparison with other operators engaged in the same business…It is intended to apply, inter alia, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred (Case T-42/96 *Eyckeler &C Malt v Commission* [1998] ECR II-401, paragraph 132).
>
> 53 In the context of the broad margin of assessment it enjoys in that respect… the Commission must also assess all the facts in order to determine whether they constitute a special situation and must balance, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the trader acting in good faith not to suffer harm beyond normal commercial risk (*Eyckeler & Malt*, cited above, paragraph 133)…

50. In *Eyckeler*, the CJEU had made similar observations in relation both to Article 239 and to another provision which stated that "import duties may be repaid or remitted in special situations...which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned". As set out above, similar statements were made in *Bacardi*.

51. We agree with Ms van der Meer that the additional authorities now raised by Uflex do not serve to identify any error of law by the FTT. They relate to general equitable reliefs which are expressed in different language to Article 97n(2) and which are tied to the concepts of negligence and deception in the context of remission of duty. In that very different context, it is readily apparent that concepts such as fairness or equity and the need for a balancing exercise may arise. The FTT made no error in not reading across and applying principles arising in that context to Article 97n(2), particularly given the more relevant guidance offered in *Firma Sohl*.

52. Ground 2 asserts that "the relevant question for the FTT should have been whether the facts of the case were out of the ordinary". Insofar as that approach seeks to reformulate the applicable test, it is an unwarranted gloss on the wording on Article 97n(2). Insofar as it seeks to extrapolate a more relaxed test, on the basis of the CJEU authorities we have discussed, we do not accept that case is made out, or that those authorities indicate that exceptional circumstances simply means any circumstances which are out of the ordinary.

53. Ground 2 includes an argument that the FTT erred in not finding that Uflex's position was analogous to that in *Euro Packaging*. In that case, which was decided by the same FTT judge as the Decision, one of the issues considered by the FTT was whether a customs debt was eligible for remission under Article 239 of the Code (the "general equity" clause discussed above). In determining a separate claim for remission under Article 220, the FTT decided that HMRC had made an error in the course of an inspection: [124]-[125] of the decision. In relation to the Article 239 claim, the FTT concluded that the taxpayer was in an exceptional situation compared with other traders, giving its reasons as follows (at [147]):

> The appellant had repeatedly imported goods under heading 4202 929890 and the goods were cleared under Route 1 and Route 2 – the latter involving an inspection of the goods. No queries were raised about the alleged mis-classification of the bags. Secondly, Officer McKenna had carried out an audit of the bags in 2011. The evidence establishes that the bags were made available for Officer McKenna's inspection. There was no reason for the appellant to believe, after that inspection, that HMRC were anything other than satisfied with the classification of the goods under CN heading 4202 929890. We consider that those two factors place the appellant in an exceptional situation compared with other traders.

54. In the Decision, the FTT stated (at FTT[109]) that "in [*Euro Packaging*] (which involved the question of remission of duty) the facts were materially different from the present appeal. Consequently, we derived little assistance from that decision". We do not consider that the FTT made any error of law in this conclusion. *Euro Packaging* concerned remission of duty, it related to the "general equity" provision of the Code, and it turned on facts which were materially different to those in this appeal. For those reasons, the FTT was justified in deriving "little assistance" from it.

55. The remainder of Ground 2 consists of a number of factors which, it is said, the FTT was wrong to ignore, or to which the FTT gave insufficient weight, in concluding that the delay was not due to exceptional circumstances. In substance, those are challenges to the FTT's evaluative conclusion. They appear, on examination, to be presented on two alternative bases. The first is that the FTT should have applied a different legal test, and the second accepts that the FTT applied the correct test (but reached the wrong result on the facts). We have rejected the argument that the FTT misdirected itself in law, so these arguments fall to be considered on the latter basis.

56. Ground 4 largely comprises arguments to this effect, so we consider below in determining Ground 4 the various factors identified by Uflex as demonstrating that the FTT was wrong to conclude that exceptional circumstances did not arise.

57. The appeal under Ground 2 fails.

GROUND 3

58. Ground 3 is that "failing to grant an exception under the ten month limit is contrary to the fundamental purpose of ensuring that imported goods are subject to duty at the correct rate under the Customs Code".

59. It is asserted that given that a specific finding of fact was made in Uflex's favour concerning the correct classification code, the FTT's failure to subsequently grant an exception pursuant to the ten month limit was fundamentally contradictory to the spirit of the Customs Code, which is to ensure that imported goods are subject to duty at the correct rate. Furthermore, it was contrary to the statutory purpose of allowing developing countries preferential tariff rates on importing goods into the UK.

60. Reference is made to the EU's guidance on what might amount to "exceptional circumstances", which makes clear that an extension to time can be permitted and "duly justified" in exceptional circumstances.

61. Ms Dhanoa submitted that denying Uflex the substantive benefit of the correct classification rate, simply on the procedural basis of an explicable, good faith and unforeseeable delay in submitting the relevant GSP Certificates (in circumstances where the origin has not been challenged), would be "entirely contrary to the statutory purpose and intent of the Customs Code" and would be unnecessarily restrictive.

Discussion

62. The EU guidance to which Ms Dhanoa directed us comprises the EU's published guidance on preferential origin arrangements, and on the "[A]pplication in the European Union of the provisions concerning the validity of proofs of origin concerning goods placed under some special procedures". While there are no "special procedures" in this case, Ms Dhanoa relied on the following statement in that guidance:

> The customs authorities should not accept the belated presentation of a proof of origin if it would not allow the authenticity of the proof and the originating status of the goods concerned to be verified and a possible subsequent entry of the amount of duty at stake into the accounts to be ensured.

63. Ms Dhanoa sought to contrast the facts in this case with those referred to in this sentence. However, we note that the passage referred to continues as follows:

> They shall in particular take account of the time limit for the preservation of supporting documents in the exporting country and of the time constraints regarding the procedure for subsequent verification of origin. Against this background, a belated presentation should not be accepted beyond a maximum period of two years following the date of issuance or making out of the proof. In case of replacement certificates the two year time limit should start to run from the date of issue or making out of the original proof of origin. This two year extended time limit should not be further extended routinely but only in duly justified exceptional circumstances, e.g. in cases of force majeure.

64. In fact, when considered in its entirety, this passage is consistent with the FTT's approach to the exemption from the normal time limit. It does not take any further the argument raised in Ground 3. Nor do we find that the remainder of the guidance to which we were referred sheds any useful light on the issue in this appeal.

65. It is argued under this ground that the FTT's finding was contrary to the fundamental purpose of the Customs Code to charge duty on imports under the correct code, and to the purpose of allowing preferential tariff rates. Ms Dhanoa says that is because the FTT found

that Uflex's classification code was correct, and the denial of the preferential rate was on "the procedural basis of an explicable, good faith and unforeseeable delay" in submitting GSP Certificates.

66. We do not accept this argument, for the following reasons.

67. First, while it is self-evident that a fundamental purpose of the Code is the correct classification of imports, that purpose is achieved subject to the imposition of numerous substantive and procedural conditions and safeguards. An importer in principle entitled to a particular code does not have *carte blanche* to say that while it has failed to comply with one or more of the conditions prescribed by the Code, that does not matter because the fundamental purpose of the Code is to apply the right classification.

68. Ms Dhanoa relied on the following passage from the decision of the CJEU in *Hauptzollamt Wurzburg v H Weidenmann GmbH & Co* (Case C-231/81) ("*Weidenmann*"), at [7]:

> 7 …The system of tariff preferences, whilst it may involve the requirement of a certificate of origin in order to justify the application of preferential rates, must not be understood as authorizing excessively restrictive administrative measures in the actual machinery for checking the origin of the goods.

69. However, conditions such as the ten-month time limit in this case are not an "excessively restrictive administrative measure" and do not offend against the purpose of ensuring correct customs treatment. In *Weidenmann* itself, the CJEU considered that a provision providing that certificates of origin had to be presented within 10 months (the time limit in this appeal), save in cases of force majeure or in exceptional circumstances, was a permissible condition: see [13] of that decision.

70. Similarly, the purpose of the preferential origin system is not undermined by a decision that, on the facts, the exception for late submission does not apply.

71. Second, the argument relies on mere assertion. It describes the delay as "explicable, good faith and unforeseeable". As we will discuss below in relation to Ground 4, the FTT did not make findings of fact to this effect.

72. Third, it is the purpose of the exception in Article 97n(2) which is of primary relevance in applying that exception, and that is what the FTT referred to at FTT[108].

73. Finally, we explain below why the FTT did not err in its decision by not taking into account of its own decision on the classification issue.

74. The appeal under Ground 3 fails.

GROUND 4

75. Ground 4 is that "the FTT erred in its application of the exceptionality test as set out in *Firma Sohl*". Notwithstanding this description, some of the arguments made in support of this ground in Ms Dhanoa's skeleton argument go further. Those arguments are (in summary) as follows:

(1) Although the FTT in this appeal asserted that it had applied the test of exceptionality, it did so in a way that was erroneous and/or overly prescriptive, and contrary to the spirit of the purpose of Article 97 in the context of the present appeal.

(2) The relevant provision at issue in *Firma Sohl* was Article 49(1) of the Customs Code, the text and purpose of which were different from the language of Articles 97k and 97n of the Implementing Regulation, including as to the relevant time limit. The CJEU in *Firma Sohl* took a relatively restrictive approach to the question of when it would be

appropriate for the national court to allow an exception to the time limit. However, it was erroneous for the FTT to apply an identically restrictive approach in the present case, given the different statutory context.

(3) In any event, the FTT also failed correctly to apply the test set out in *Firma Sohl*. Uflex found itself in the highly unusual position of having applied the incorrect classification originally, only to then self-correct and to have this position endorsed by the FTT, but to still not have the preference rate that flows from having applied the correct customs code to the import. Uflex was indeed in an exceptional situation compared to other traders carrying on the same activity. It could not have reasonably foreseen that the incorrect Customs Code had been applied in circumstances where it had been importing without any issue, until it corrected its own error. In any event, upon correcting that error the FTT agreed that Uflex had subsequently been applying the correct code and the FTT erred in concluding that Uflex was not in an exceptional circumstance as a result of that factual matrix.

Discussion

76. Arguments (1) and (2) have been dealt with above. We have rejected the argument that the FTT erred in law in applying the approach referred to in *Firma Sohl* and the argument that its decision involved an error of law because it was contrary to the purpose of Article 97.

77. Under this ground of appeal, we consider the arguments raised to support the assertion that, accepting *Firma Sohl* as the appropriate approach, the FTT nevertheless reached a decision on the facts which amounted to an error of law. As explained above, this is in substance a challenge to the FTT's evaluative judgment, and is therefore to be considered in this appeal by reference to the principles summarised at paragraphs 29 to 32 above.

78. Drawing together the arguments raised under the four grounds of appeal, Uflex's submission that exceptional circumstances did arise on the facts relies on the following factors:

(1) The delay was due to explicable and unforeseeable circumstances, and Uflex acted in good faith.

(2) The FTT failed to take into account its decision that Uflex's classification code was correct.

(3) The FTT's decision did not give appropriate weight to the fact that there was no loss of customs revenue, because under both the code applied in error by Uflex and the code found by the FTT to be correct, the customs duty would have been 0%.

(4) It followed from (3) that Uflex was not claiming any remission of duty. Nor would it have been possible for Uflex to have made a provisional claim for preference, because Uflex reasonably believed that the goods were classified under another zero duty heading.

(5) The combination of circumstances clearly meant that Uflex was in a different situation to other traders carrying on the same activity.

79. In relation to the assertions that the delay was due to unforeseeable circumstances and that Uflex had acted in good faith, the first point is that, as we have explained above, those are not criteria identified as relevant in *Firma Sohl* in determining whether exceptional circumstances caused a failure to comply with a customs time limit.

80. In any event, these assertions are not supported by the FTT's findings of fact. The material findings made by the FTT, which are not challenged in this appeal, include the following:

> Mr Dore [witness for HMRC] also observed that the Appellant had incorrectly classified imported goods under Chapter 49 of the tariff (classification code 4911109000) attracting a 0% duty. Again, we did not consider the statement to be controversial and the Appellant accepted that it had incorrectly classified the bags under Chapter 49. (FTT[29]).
>
> As we have already mentioned, the Appellant had incorrectly classified imported goods under Chapter 49 of the tariff (classification code 4911109000) attracting a 0% duty. It was common ground that this was an incorrect classification. The error was identified in 2016 when HMRC carried out an assurance audit of the Appellant's imports. The Appellant did not present goods for inspection but rather HMRC selected the Appellant's goods for inspection. (FTT[79]).
>
> The GSP certificates were not presented within the relevant time frame as at the time of importation the incorrect classification (under commodity code 4911109000) allowed the Appellant a 0% rate of duty (which we understood not to be a preferential rate), thus rendering the GSP Proof of Origin certificates unnecessary. (FTT[82]).
>
> In this case, the mistaken application of tariff heading 4911 resulted in the Appellant's failure to submit GSP Form A within the 10 month period. The need correctly to classify goods on importation is a task that confronts every trader carrying on the same kind of business. It seems to us that such an error does not constitute exceptional circumstances. (FTT[111]).

81. At FTT[94]-[95], the FTT records a submission by Mr Firth that Uflex had applied the mistaken classification in good faith, but it makes no finding in relation to that submission.

82. These passages set out the FTT's findings, which did not include findings that Uflex acted in good faith or that the circumstances causing the delay were unforeseeable.

83. We do not accept the argument that the FTT erred by not taking into account its own decision as to the classification code issue. The legal issue before the FTT related to the importation of goods between April 2014 and December 2018, and the failure of Uflex to provide the necessary GSP Certificates within the statutory time limit in relation to imports during that period. Article 97n(2) requires a determination of whether the "failure to submit these documents by the final date set is due to exceptional circumstances". That is a determination which falls to be made by reference to the facts at the time of expiry of the statutory time limit, not a decision of the FTT several years later. Further, and most importantly, it is a determination of the **reason for or cause of the delay**; Article 97n(2) is not a general fairness clause, and it does not look at whether there are exceptional circumstances surrounding or relating to the delay, but only at the cause of that delay.

84. The argument that there was no loss of revenue, because duty was zero under both Uflex's mistaken classification and the classification subsequently found to be correct by the FTT, is again not a relevant fact in identifying the cause of the delay. Similarly, the fact that Uflex was not seeking remission of duty does not go to the reason for the delay. We agree with Ms van der Meer's statement in her skeleton argument that this "confuses the cause of the failure to submit the GSP Certificate in time with the effect of that failure". The FTT found as a fact that the delay was due to an incorrect classification by Uflex and that the error was identified only when HMRC selected the goods for an inspection audit. The issue which fell to be determined by the FTT was the reason for the delay, not the effect, or net effect, of the error.

85. The FTT found that the reason for the delay was a mistaken classification by Uflex. Ms Dhanoa argues that, in deciding that this was not an event which normally confronted any trader

in the exercise of their occupation[3], the FTT reached a decision which was not reasonably available to it or was perverse. As such, even though it was an evaluative conclusion, it amounted to an error of law.

86. The FTT's conclusion at FTT[111] was as follows:

> In this case, the mistaken application of tariff heading 4911 resulted in the Appellant's failure to submit GSP Form A within the 10 month period. The need correctly to classify goods on importation is a task that confronts every trader carrying on the same kind of business. It seems to us that such an error does not constitute exceptional circumstances.

87. At [75] of *Firma Sohl*, the CJEU stated that:

> It is for the customs authorities and the national courts and tribunals to determine in each case whether such circumstances exist.

88. We consider that it was within the range of decisions reasonably and rationally available to it for the FTT to reach the conclusion which it did. There was therefore no error of law in this conclusion.

89. The appeal under Ground 4 fails.

DISPOSITION

90. For the reasons set out above, the FTT did not misdirect itself and reached a decision which was reasonably available to it.

91. The appeal is dismissed.

JUDGE THOMAS SCOTT
JUDGE VIMAL TILAKAPALA

Release date: 14 February 2025

[3] *Firma Sohl* at [74].