Appeal number: UT/2024/000033
UT/2024/000042

Neutral Citation: [2025] UKUT 00142 (TCC)

UPPER TRIBUNAL

(TAX AND CHANCERY CHAMBER)

The Royal Courts of Justice,
Rolls Building, London EC4A 1NL

ANTI-DUMPING DUTY, COUNTERVAILING DUTY AND VAT – importation of solar panels made from cells originating in Taiwan – correct classification for tariff purposes – whether any error in classification corrected – remission of duties on basis of "special circumstances" – appeal and cross-appeal dismissed

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

CANADIAN SOLAR EMEA GmbH

Respondent

Heard on: 11 and 12 March 2025
Judgment date: 2 May 2025

TRIBUNAL: The Honourable Mr Justice Marcus Smith
Judge Thomas Scott

Representation:

Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Timothy Lyons, KC, instructed by Reed Smith LLP, for the Respondent

DECISION

A. INTRODUCTION

1. By its decision dated 22 January 2024 (the "Decision"), the First-tier Tribunal (Tax Chamber) (the "FTT") was obliged to consider whether solar "cells" used by the Respondent ("Canadian Solar") in the construction of solar panels were "consigned from" Taiwan or whether they were consigned as "modules" (more prosaically, solar panels) from Vietnam. On this issue and other related issues turned Canadian Solar's liability to:

(1) Anti-dumping duty of £3,210,145 ("ADD").

(2) Countervailing duty of £691,323.36 ("CVD").

(3) Import VAT of £780,293.67.

We refer to these collectively as the "charges".

2. The Appellants ("HMRC") decided that these charges were due, and Canadian Solar appealed that decision to the FTT. By its Decision, the FTT decided that:

(1) The solar cells were consigned from Taiwan and that therefore the charges were in principle payable. This involved deciding:

(a) Whether Canadian Solar had used the correct commodity codes for the products they were importing into the EU. The FTT concluded that the wrong code had been used.

(b) Furthermore, the FTT concluded that Canadian Solar's error – which, as we will come to describe, and as the FTT itself fully recognised, was entirely understandable – could not be corrected after the event.

(2) This was, however, a case where "special circumstances" existed within Article 120 of Regulation (EU) No 952/2013 (the "Union Customs Code" or "UCC"), such that, in the circumstances of this case, the charges should be remitted. Article 120 is referred to as the "general equity provision".

3. The combined effect of the FTT's decision was to leave Canadian Solar the winner in terms of outcome. However, considering matters issue-by-issue, HMRC had "won" on the issues described at [2(1)(a)] and [2(1)(b)] (which we shall describe, respectively, as the "interpretation issue" and the "correction issue"), whereas Canadian Solar had "won" on the "general equity issue" described at [2(2)].

4. With the permission of the FTT, HMRC appeal the conclusion reached by the FTT in regard to the general equity issue and Canadian Solar cross-appeals on the basis that the FTT should have decided both the interpretation issue and the correction issue in its favour.

5. Before outlining the relevant facts, some general points can be made in regard to the three issues that are before us:

(1) This was HMRC's appeal, so we would normally have heard from HMRC first on the general equity issue. However, the logical order for considering the three issues was in the order we have set them out above, as follows:

(a) Interpretation issue.

(b) Correction issue.

(c) General equity issue.

We are very grateful to the advocates for accommodating our request to deal with these issues in this order, and for the careful and helpful way in which they addressed us.

(2) This decision unsurprisingly addresses these three issues in this order. Not only does this track the order of consideration of the issues by the FTT, but (as we anticipated) the consideration of the earlier issues affects the consideration of the later issues.

(3) In order for Canadian Solar to succeed in recovering the charges, it only needs to succeed in relation to one of these three issues. By contrast, in order to defeat Canadian Solar's claim for remission of the charges, HMRC must succeed on all three: "two out of three ain't bad", but it is not enough for HMRC's purposes.

6. We turn to consider the relevant background facts.

B. THE RELEVANT FACTS

(1) No agreed statement of facts

7. References to paragraphs in this section B are to paragraphs of the Decision. The FTT noted that although the facts were not in dispute (at [6]), the parties had failed to produce an agreed statement of facts (at [6]). The FTT was therefore obliged to find facts in circumstances where the parties could easily have spared the FTT that burden. Although the hearing bundles before us contain this factual material, we consider that the relevant facts are stated in the Decision, and we draw our statement of the facts from the Decision.

(2) The facts as found by the FTT

8. The FTT, whose findings of fact we accept and which were not challenged on appeal, the appeal being on points of law only, found as follows:

(1) Canadian Solar is a company based in Germany: [7] It imports solar energy equipment: [7].

(2) Between 9 November 2017 and 19 December 2017 inclusive, there were 13 importations of solar panels and their parts: [8]. The solar panels contained solar cells: [9]. From 2015, Canadian Solar sourced its solar cells from manufacturers in Taiwan: [9]. The solar cells were manufactured in Taiwan and (after manufacture) were shipped from Taiwan to Vietnam: [9]. In Vietnam, the solar cells were incorporated into solar panels (or modules), in that they were connected to form a frame with a glass protective covering: [9]. These (now) solar panels, containing the solar cells, were then shipped to the United Kingdom: [9].

(3) All 13 importations (each an "Entry" and together the "Entries") were declared under the following commodity codes:

(a) "8541 40 90 49", covering solar modules imported from anywhere other than China, Malaysia and Taiwan.

(b) "8541 50 00 00", covering semi-conductor devices: [10].

(4) Canadian Solar's use of these codes (which we shall refer to as the "**Solar Module Code**" and the "**Semi-Conductor Code**") resulted in no charge to ADD or CVD being raised since the Customs Handling of Import and Export Freight system ("CHIEF") does not take account of the Country of Origin declared, because ADD and CVD is not due on goods properly declared to those codes: [11].

(5) There was a dispute before the FTT as to whether the Solar Module Code used by Canadian Solar was in fact the correct code. This is a point of law at issue before us, and we confine ourselves to stating the facts as found by the FTT:

(a) HMRC contended that the correct commodity code for the solar cells imported was not the Solar Module Code but code "8541 40 90 53", the relevant Entries having been consigned from Taiwan. We shall refer to this code as the "**Alternative Solar Module Code**" (which we hope is a term appropriately neutral between the contentions of HMRC and Canadian Solar): [12]

(b) Had the Alternative Solar Module Code been used (it was not), Canadian Solar would have been presented with a further option (an "**Additional Code**") by CHIEF to select either:

(i) the generic "all other companies" rates for ADD/CVD by inputting additional code "B999", which would have attracted both ADD at 53.4% and CVD at 11.5%: [13(1)]; or

(ii) the specific code for one of the relevant (potentially exempt) producers in Taiwan. Thus, the code of one of the approved Taiwanese manufacturers of solar cells (e.g. "C081" for Gintech Energy Corporation) could have been entered: [13(2)].

(c) The UK Integrated Online Tariff provides the user with the ability to scroll down to the appropriate manufacturer within the applicable country (here, *arguendo*, Taiwan) and, against its name will be listed the relevant

Additional Code together with the applicable conditions set out within a further link: [14]. This further link sets out the requirements that had to be met in order to avoid the incidence of ADD/CVD. Thus, the requirement might be to provide an invoice with a signed declaration, resulting in duty of 0%, whereas without such an invoice ADD of 53.40% and CVD of 11.50% would be chargeable: [14].

(6) It was common ground as between HMRC and Canadian Solar (and the FTT so found) that the solar cells had their origin, for customs purposes, in Taiwan, by virtue of Commission Delegated Regulation 2015/2446, Annex 22-01, HS 2012 Code ex 8541 (a): [15]. The Cell Certificates of Origin contained within the import paperwork for the Entries confirmed this: [15]. This was because the solar cells were manufactured in Taiwan and there was insufficiently substantial processing carried out on the solar cells to change their origin for customs purposes from Taiwan to Vietnam: [15].

(7) In this case, the manufacturers of the solar cells in Taiwan were potentially exempt companies listed as exempt Taiwanese producers for the purpose of Article 1 of both the Commission Implementing Regulation (EU) 2016/185 (ADD) and the Commission Implementing Regulation (EU) 2016/184 (CVD) (collectively, the "2016 Implementing Regulations" and individually the "2016 Implementing Regulations (ADD)" and the "2016 Implementing Regulations" ("CVD"): [16].

(8) On 5 March 2020, HMRC opened a post-clearance audit on Canadian Solar's imports: [17]. HMRC considered that the Solar Module Code had been wrongly applied with the result that ADD and CVD had not been paid because (on the assumption that the codes used were correct) no charges would have been due: [18]. On 29 September 2020, HMRC wrote to Canadian Solar notifying them of the errors which HMRC said they had discovered, and inviting Canadian Solar to comment and/or provide further information: [19]. It is unnecessary to go into detail as to how the audit progressed, save to note that:

(a) The charges were found to be due by HMRC: [21].

(b) A C18 Post Clearance Demand Note (the "C18") in these amounts was issued on 12 November 2020: [23].

(9) On 1 February 2021, Canadian Solar sent amended intercompany invoices to HMRC containing the signed declarations that would have been required by the UK Integrated Online Tariff had the Alternative Solar Module Code been applied: [24]. Canadian Solar sought remission of the charges on the basis of these invoices, which was refused by HMRC: [25].

(10) Given the complexity of the law in this area, it is unsurprising that Canadian Solar sought legal advice from their then solicitors, Sidley Austin. This advice is significant because (i) Canadian Solar sought advice on one of the very issues now in dispute before us (namely the interpretation issue), (ii) it did so before the Entries entered into the EU and (iii) it followed that advice in regard to the Entries. It is thus not surprising that the question of

legal advice loomed large before us, as it did before the FTT. It is therefore appropriate to set out the FTT's findings in this regard verbatim:

> [26] Ms Pflug, the General Manager of the Modules and Systems Solutions segment of the Canadian Solar group in Europe, the Middle East and Africa ("EMEA") and the Managing Director of [Canadian Solar], produced a witness statement on which she was not cross-examined.
>
> [27] Ms Pflug explained that [Canadian Solar] had used the law firm, Sidley Austin, as its primary adviser on topics including anti-dumping regulations, anti-subsidy regulations and anti-circumnavigation investigations. Sidley Austin advised Canadian Solar on these topics on a regular basis. Accordingly, Sidley Austin had kept [Canadian Solar] informed about the introduction of the 2016 Implementing Regulations.
>
> [28] In an email from Sven De Knop (Partner of Sidley Austin) to Ms Pflug on 12 February 2016, Sidley Austin confirmed to Canadian Solar that the 2016 Implementing Regulations had been published by the European Commission earlier that day and imposed "an anti-circumvention duty of 64.9% on imports of [solar] modules and cells consigned from Taiwan or Malaysia (i.e. the extended anti-dumping duty of 53.4% and countervailing duty of 11.5%)". The email also set out a list of "cell/module manufacturers that are exempted from the anti-circumvention duties…". This list included the four Taiwanese cell manufacturers that produced the cells within the solar modules that made up the consignments subject to these appeals, namely: Gintech Energy Corporation, Inventec Solar Energy Corporation, Motech Industries, Inc and TSEC Corporation.
>
> [29] While Ms Pflug understood that the 2016 Regulations only imposed ADD and CVD on the consignment of solar modules from Taiwan or Malaysia, and not on consignments of solar modules containing solar cells originating in Taiwan (if the solar module was in fact consigned from another country), due to the seriousness of these regulations, she ensured that [Canadian Solar] obtained confirmation from Sidley Austin as to their application.
>
> [30] In emails [dated] 15 February 2016, Ms Pflug asked a colleague, Ms Kirschenhofer, to ask Mr De Knop for confirmation that the 2016 Regulations "do not apply to modules incorporating Taiwanese cells". Mr De Knop confirmed that interpretation and said:
>
> "[Y]ou are correct, [solar] modules consigned from Vietnam and manufactured from cells originating in Taiwan should not be subject to the anti-circumvention measures."
>
> [31] Accordingly, with that confirmation, Ms Pflug was comforted that the 2016 Regulations did not apply to [Canadian Solar's] consignment of solar modules from Vietnam, which contained solar cells purchased from and originating in Taiwan. Therefore, [Canadian Solar] did not believe it to be necessary to make further inquiries with HMRC as to the applicability of the 2016 Regulations to [Canadian Solar's] imports of solar modules into the United Kingdom in 2017.
>
> [32] We accept Ms Pflug's evidence in relation to the advice received from Sidley Austin – her evidence was not challenged and, as we have said, she was not cross-examined.

(11) Although it is straying into law which we will have to consider later in this decision, it is relevant to note that Canadian Solar's present solicitors – Reed Smith – raised the question on which Ms Pflug had been advised by Sidley Austin with the EU Commission. Mr Elsen of the EU Commission provided the following response on 22 December 2020 ([38]):

> I understood that you already had a phone call with Per. I can confirm that your understanding is correct and that the modules made outside Taiwan from cells of a Taiwanese company which benefits from an exemption should not be subject to duties.
>
> As regards the practical issue, in particular the declaration which should accompany the commercial invoice: You can fill in the declaration/certification but you can only provide one additional TARIC code, i.e. the one of the Taiwanese producer of cells which benefits from an exemption. It is important to provide at least this code to customs, as this will allow national customs authorities to determine that the imports should not be made subject to duties. As you rightly point out, the module manufacturer (outside Taiwan) does not have its individual additional TARIC and one cannot be requested to provide something which does not exist. So giving the name of the module manufacturer outside Taiwan + the explanation that it does not have its individual TARIC code is all you can do and should normally be sufficient.
>
> Hope this helps, let me know if you have further questions…

This advice of course came after the event, and because of the HMRC audit. It did not inform Canadian Solar's conduct prior to the Entries, which was (as we have noted) governed by the advice received from Sidley Austin.

(12) A "**TARIC Code**" is a "TARif Intégré Communautaire" or an "Integrated Tariff of the European Communities" and it is designed to produce a means of coding particular entries so the correct duties are applied. TARIC Codes will be described in greater detail in this decision. Both the FTT and we were treated to a very helpful exposition of these codes during the course of the hearing, but we will leave the detailed description of the codes, and their importance, to later on in this decision. For present purposes, it is sufficient to note that the Solar Module Code, the Semi-Conductor Code and the Alternative Solar Module Code are all TARIC Codes as we use that term in this decision. (As became clear in the course of argument before us, there can be a degree of ambiguity in the term, which turns on the question of the varying significance of the ten digits that comprise the complete code. We will use the term TARIC Code to refer to all ten digits, and will use different designations when referring to the smaller elements that comprise the overall TARIC Code.)

(3) Additional facts and the structure of the FTT's Decision

9. These comprise the relevant background facts. Our consideration of the issues before us will oblige us to refer to other matters of fact and/or to expand upon the foregoing factual recitation. We want to make clear that such factual references are drawn from the Decision and we have not found any facts outside the Decision.

10. We make this point because one of HMRC's arguments in regard to the general equity issue was that the FTT's decision on this point was flawed because it was inadequately reasoned. In particular, it was said that it was not possible to understand the reasoned basis for the FTT's conclusion on the general equity issue. This is obviously a very serious criticism of the Decision, and we will come to it in due course. But it is appropriate now to provide an overview of the structure of the Decision insofar as it relates to the FTT's consideration of the general equity issue. All paragraph references are again to the Decision:

> (1) The facts and general legal background (which is, in this case, very difficult to separate from the facts, although the Decision helpfully uses headings and sub-headings) are generally stated in [6] to [70].
>
> (2) At [71], there is a summary of the main issues before the FTT, with the general equity issue being identified last (rightly so, if we may say so) at [71(5)].
>
> (3) Substantive consideration of the general equity issue begins at [128], and the Decision first sets out the relevant legal provisions: [128] to [132]. Thereafter, the submissions of Canadian Solar and HMRC are described, and described in some detail: [133] to [148]. The "discussion" section is slightly elided with the "submissions" section because of a minor typographical error whereby the title "Discussion" appears not as a title, but as the first word of [149]. Nevertheless it is absolutely clear that the FTT's determination of the general equity issue (i) appears at [149] to [159] and (ii) is (completely unsurprisingly) in large part based on the submissions section that precedes it.

11. We turn now to consider the three issues that are before us, beginning with the interpretation issue.

C. THE INTERPRETATION ISSUE

(1) TARIC Codes

12. The system was summarised in *Vital Nut Co Ltd v The Commissioners for Her Majesty's Revenue and Customs*, [2017] UKUT 192 (TCC), as follows:

> **[1]** The European Community is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System (the "Harmonised System"). The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System. All contracting states therefore use the headings and sub-headings of the Harmonised System.
>
> **[2]** The Harmonised System is administered by the World Customs Organisation in Brussels. It publishes explanatory notes to the Harmonised System, known as "Harmonised System Explanatory Notes" or "HSENs".
>
> **[3]** At Community level, the amount of customs duties on goods imported from outside the Community is determined by reference to the "Combined Nomenclature" or "CN"

established by Article 1 of Council Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:

(1) The nomenclature of the Harmonised System.

(2) Community sub-divisions to that nomenclature.

(3) The preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

[4] The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are "00". There may also be ninth and tenth digits, which identify further Community sub-headings, of which there are about eighteen thousand. For present purposes, it will only be necessary to refer to the first four digits of this numerical system.

[5] In addition to the Harmonised System Explanatory Notes or HSENs, the European Commission issues "Combined Nomenclature Explanatory Notes" or "CNENs".

13. Strictly speaking, therefore, TARIC Codes probably refer to the CN elements of the numerical designator (i.e. digits seven to ten) and not the Harmonised System numerical designators (i.e. digits one to six). We will continue to use our (wide) definition of TARIC Codes so as to refer to the entire number, because what matters is not the term used, but the fact the ten digits (there is an eleventh digit, which does not matter for these purposes) become increasingly specific in terms of the product being described. Thus, the first pair of digits ("1.2.") identify the relevant Chapter in the Harmonised System, the second pair of digits ("3.4.") identify the position in that Chapter, the third pair of digits ("5.6.") identify the sub-heading in the Harmonised System, after which the remaining digits derive from the EU's CN system ("7.8.9.10.").

(2) Rules of origin

14. Rules of origin matter greatly in international trade. They are used – these are examples only – (i) in charging differentiated tariffs or import duties which vary according to the country of origin and (ii) for the application of sanctions.

15. The TARIC Code may or may not say something about origin. But even where the TARIC Code says nothing about origin (e.g. it is simply a reference to a particular type of banana (to pick a product at random) produced anywhere in the world, TARIC Codes are vital in providing the language by which one can speak about origin.

16. In international trade, products are not simply transported or in transit: they are often worked upon during the course of their journey from initial manufacture to final sale to the ultimate consumer (being the person who buys to use for themselves and not on-sell). The present case is a case in point. As we have described (at [8(2)]), Canadian Solar acquired solar cells in Taiwan, incorporating

these into solar panels in Vietnam. The TARIC Codes differ according to whether the product in question is a "cell" or a "panel"; the TARIC Codes also differ (in the case of solar cells and solar panels) according to the place of origin.

17. This dual purpose use of the TARIC Code – to describe the product and to designate origin – is the source of the problems in this case, resulting in a system that is, when actually used by importers into the EU, incoherent and unsatisfactory. The relevant codes in this case are as follows:

TARIC Code	**Description** (This is a paraphrasing of the actual, rather more granular, detail contained in the UK Integrated Online Tariff database, which counsel for HMRC helpfully took both the FTT and us to. The granularity does not matter for these purposes: indeed, it obscures, rather than assists, hence the paraphrasing.)
8541 40 90 49	Solar modules consigned from anywhere other than China, Malaysia and Taiwan. This is referred to as the Solar Module Code at [8(3)(a)].
8541 40 90 53	Solar modules consigned from Taiwan. This is referred to as the Alternative Solar Module Code at [8(5)(a)].
8541 40 90 71	Solar cells consigned from anywhere other than China, Malaysia and Taiwan.
8541 40 90 73	Solar cells consigned from Taiwan.

18. The first eight digits in the TARIC Codes are exactly the same. The last two digits – "9.10." – do a lot of work. They differentiate between both product type and place of origin. Thus, the TARIC Codes ending in …71, …72 and …73 all describe cells but with different origins, as follows:

(1) …73 (cells consigned from Taiwan)

(2) …72 (cells consigned from Malaysia)

(3) …71 (cells consigned from the rest of the world)

We are not going to list all of the TARIC Codes concerning cells and modules, but the same or similar pattern can be discerned in the case of modules.

19. It is obvious that an importer – obliged to use the full TARIC Code for customs declaration purposes – is forced to make decisions as to whether the product is a "cell" or a "module" and its place of origin. The system grinds exceedingly small. That is apparent from the fact that the differences in classification only arise at digits 9.10: digits 1.2.3.4.5.6.7.8. are exactly the same.

20. Generally, the first four digits of the TARIC Code (digits 1.2.3.4) reflect more material differences than the later digits. Thus, a product originating from country *A* will continue to originate from country *A* even if work is done in country *B* unless that work is sufficient to cause the first four digits in the TARIC Code to change. It is not necessary for us to decide whether this is a general truth: what is important is that in the case of solar cells, their conversion or incorporation into modules does not change the place of origin and this is consistent with the first four digits being the same in the case of all the TARIC Codes here being considered. This point has been determined by the Court of Justice of the European Union (the "CJEU") in Case C-209/20, *Renesola UK Ltd v. The Commissioners of Her Majesty's Revenue and Customs*, ECLI:EU:C:2021:400 ("*Renesola*"), which held that solar modules whose production involves more than one country originate in the country from which their constituent solar cells come (*Renesola* at [25], [26], [47] to [49]). This is because origin is determined by the country where the product in question underwent its last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

21. It is clear that in this case the work done in converting cells into modules does not meet this test. It follows that in this case the modules' country of origin was determined by the cells incorporated into those modules, and that the country of origin for both the cells and the modules was Taiwan. This point was uncontroversial before us: but it is the single most important point in this appeal (as it was before the FTT) for it exposes a quite fundamental mismatch or tension between the rules determining origin and the TARIC Codes themselves. That is because the rules of origin do not differentiate between modules and cells (i.e. a module's origin is determined by its component cells), whereas the TARIC Codes differentiate between (to focus on the facts of this case): (i) modules consigned from Taiwan; (ii) modules consigned from "the rest of the world";[1] (iii) cells consigned from Taiwan; and (iv) cells consigned from "the rest of the world".

22. It is important to note the use of the words "consigned from" in the TARIC Codes. This reflects the wording of the anti-dumping and anti-circumvention rules to which we now will turn.

(3) The anti-dumping and anti-circumvention rules

23. There are four sets of rules that are relevant. More specifically:

(1) There are the 2016 Implementing Regulations (ADD) and the 2016 Implementing Regulations (CVD) referred to at [8(7)]. These are materially identical in terms (they simply relate to different charges, ADD in one case

[1] This is, strictly speaking, inaccurate, because there are special codes for eg Malaysia. The differentiation between countries arises out of anti-dumping rules and anti-circumvention rules to which we will come. For ease of exposition, this part of our decision simply differentiates between Taiwan and the "rest of the world".

and CVD in another), and it will only be necessary to refer to one set of rules.

(2) The 2016 Implementing Regulations contain what we term "anti-circumvention" rules. They are secondary to, and intended to support, "anti-dumping" rules against China which (as the EU Commission found) were being circumvented. The relevant anti-dumping rules are as follows:

(a) Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China ("Reg 1238/2013").

(b) Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China ("Reg 1239/2013).

24. It is necessary to refer only briefly to the anti-dumping rules, and we shall refer to Reg 1238/2013, there being for these purposes no material difference between Reg 1238/2013 and Reg 1239/2013. Essentially, anti-dumping duties are imposed (quoting from Article 1(1) of Reg 1238/2013) "on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels" falling within certain "CN codes" which we will not further specify "originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT [General Agreement on Tariffs and Trades]". Thus, certain products (defined by reference to what we call TARIC Codes), including in particular what we refer to as solar cells and solar modules, are subject to anti-dumping duties where they either originate in or are consigned from the People's Republic of China, subject to a limited "pure transit" exception, and certain limited producers set out (but not listed in this decision).

25. The EU Commission ascertained (we were referred to the extensive investigative work of the EU Commission in this regard, but need say no more in this decision) that these anti-dumping rules were being circumvented by products falling within these rules being consigned from other jurisdictions other than the People's Republic of China. One of these jurisdictions was Taiwan, and Taiwan is one of the jurisdictions subject to the 2016 Implementing Regulations.

26. As to these, and referring to the 2016 Implementing Regulation ADD (simply because that is the one we were generally taken to: there is no material difference):

(1) Article 1(1) provides:

The definitive anti-dumping duty applicable to "all other companies" imposed by Article 1(2) of [Reg 1238/213] on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the

People's Republic of China, unless they are in transit in the sense of Article V GATT is hereby extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan whether declared as originating in Malaysia and in Taiwan or not, currently falling within CN codes [which are then set out, and to which we will revert] with the exception of those produced by the companies listed below…" (emphasis added to original).

There then follows a table, to which we will also revert.

We have underlined some critical words in Article 1(1): the ambit of the anti-circumvention duty is limited to components consigned from Taiwan. Canadian Solar rightly made these words the central point of their submissions on the interpretation issue. We will come to those submissions in due course, but want to highlight that the critical words in Article 1(1) refer to consignment and not origin.

(2) Beginning with the "CN codes" – what we term TARIC Codes – one of these listed to an eight digit specificity is 8541 40 90, which embraces all of the TARIC Codes listed at [17] and [18] of this decision. The list, however, is more specific than this, and materially provides:

…ex 8541 40 90 (TARIC codes…8541 40 90 23, 8541 40 90 32…

The TARIC Codes ending …23 and …32 are unfamiliar. That is because at the time material to the Entries, they had been superseded. These commodity codes expired on 1 October 2017 (the Entries in this case began on 9 November 2017) and were replaced by the TARIC Codes described above. Unfortunately, the regulations we have been citing were not (and may never have been[2]) consequentially updated. Nothing turns on this, save that an additional layer of complexity and confusion is thereby introduced.

(3) Turning, then, to the table, this is what we term an "exceptions table". It lists a number of companies (classified by country: Malaysia or Taiwan) and provides for each company a "TARIC additional code". This is nothing to do with the TARIC Code we have been referencing, but is additional to the TARIC Code and specifies those companies not subject to the anti-circumvention duties imposed on companies not listed in the exceptions table.

(4) The FTT found (it was not disputed) that the cells here in issue (i.e. those incorporated in the modules that were the subject of the Entries) were all acquired by Canadian Solar from companies listed in the exceptions table. It was, therefore, common ground that provided Canadian Solar applied the importation rules correctly, the Entries would not be subject to the charges. In other words, the questions before us are (i) has a mistake been made, such that the importation rules have not been correctly applied (which is the interpretation issue) and (ii) if a mistake has been made, can it be/has it been

[2] In other words, the materials before us cited the publication of the regulations from the relevant issues of the *Official Journal*. We do not propose to explore this wrinkle any further, because no-one took any point on it.

rectified so that the charges can be remitted (which compendiously describes the correction issue and the general equity issue).

(5) Naturally, it is necessary to ensure, where there is an import of products that would be subject to the anti-circumvention duty but for the fact that the products have been acquired from a company listed in the exceptions table, that this is (i) properly documented and (ii) applied by the relevant customs authorities. This is the function of Articles 1(2) and 1(3), which we set out in full below:

(2) The application of exemptions granted to the companies specifically mentioned in paragraph 1 of this Article or authorised by the Commission in accordance with Article 2(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice issued by the producer or consignor, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function. In the case of crystalline silicon photovoltaic cells this declaration shall be drafted as follows:

> *I, the undersigned, certify that the (volume) of crystalline silicon photovoltaic cells sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.*

In the case of crystalline silicon photovoltaic modules this declaration shall be drafted as follows:

> *I, the undersigned, certify that the (volume) of crystalline silicon photovoltaic modules sold for export to the European Union covered by this invoice was manufactured*
>
> *(i) by (company name and address) (TARIC additional code) in (country concerned); OR*
>
> *(ii) by a subcontracted third party for (TARIC additional code) in (country concerned)*
>
> *(delete as appropriate one of the two above options)*
>
> *with the crystalline silicon photovoltaic cells manufactured by (company name and address) (TARIC additional code) [to be added if the country concerned is subject to original or anti-circumvention measures in force]) in (country concerned)…*
>
> *I declare that the information provided in this invoice is complete and correct.*

If no such invoice is presented and/or one or both of the TARIC additional codes are not provided in the above-mentioned declaration, the duty rate applicable to "all other companies" shall apply and shall require the declaration of TARIC additional code B999 in the customs declaration.

(3) The duty extended by paragraph 1 of this Article shall be collected on imports consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and Taiwan or not, registered in accordance with Article 2 of Commission Implementing Regulation (EU) 2015/833 and Articles 13(3) and 14(5) of

> Regulation (EC) No 1225/2009 with the exception of those produced by the companies listed in paragraph 1.

27. We are conscious that we have traversed, at unfortunate length, the very same provisions that the FTT considered in the Decision. Given that the question of construction which was before the FTT was squarely before us on this appeal, we have had little choice but to do so. We should, however, state that there is nothing in our exposition of the legal framework that is inconsistent with the Decision, nor do we consider that the Decision has misstated any aspect of the law. With that, we turn to the interpretation issue, setting out the parties' submissions and providing our analysis and decision on this point.

(4) Submissions, analysis and determination of the interpretation issue

(i) Introductory

28. We have referred to this issue as the "interpretation issue", but the real question is whether Canadian Solar used the correct TARIC Code when the Entries were shipped into the United Kingdom, then an EU Member State. As we have noted, the TARIC Code that was used was what we have referred to as the Solar Module Code (at [8(3)(a)] and [8(4)]).

29. HMRC could have limited their response to Canadian Solar to asserting that Canadian Solar had made a mistake, without advancing a positive case as to what the correct TARIC Code was. That would not have been an especially plausible case, even as regards the interpretation issue, but would have been quite damaging to HMRC's case on the general equity issue not to assert that the correct position was in fact clear, and Canadian Solar's mistake an obvious one.

30. HMRC, very capably represented by Ms Vicary, made no such mistake and asserted (both before the FTT and before us) (i) that the position was clear and (ii) was that the Alternative Solar Module Code (described at [8(5)(a)]) could and should have been used. Before the FTT, it was contended that Canadian Solar's error in this regard was "a basic and obvious error": Decision at [147].

31. For the present, we confine ourselves to the question of whether there was an error at all, for Canadian Solar's primary position – before the FTT and before us – was that the Solar Module Code had been the correct code for Canadian Solar to use.

32. There are, as it seems to us, a number of possible TARIC Codes that could potentially have been used when the Entries were imported into the United Kingdom. We consider them in the following paragraphs.

(ii) The Solar Module Code was the correct TARIC Code: Canadian Solar's submission

33. This would involve an assertion that the Entries were consigned from anywhere other than China, Malaysia and Taiwan: see [8(4)]. There are a number of points in favour of this construction:

(1) The TARIC Code refers to modules consigned from a particular place, not originating from a particular place: see [17]. In this, the TARIC Code follows the language of the anti-circumvention rules (see [26(1)], which could have (but does not) referred to products originating from Malaysia and Taiwan, but to (and here we are quoting from the words underlined in [26(1)]) modules and key components (i.e. cells) "consigned from Malaysia and Taiwan".

(2) In addition to not using the language of origin, the rules differentiate between modules and cells.

(3) In these circumstances, Mr Lyons, KC (for Canadian Solar) contended that the interpretation issue was straightforward in Canadian Solar's favour. The effect of the multiple different TARIC Codes described at [17] was that the importer was obliged to pick (of these various Codes) one Code that best described the Entry, these Codes obliging the importer to pick one that best fit with both product type and country of consignment. This is the point we make at [19].

(4) Given (i) the nature of the products in question (modules) and (ii) their country of consignment (Vietnam), a responsible importer could only select this TARIC Code.

(5) The fact that work on cells so as to convert them into a module does not change the origin of the product (which remains that of the cells: see *Renesola* described at [20] and [21]) fell – according to Mr Lyons, KC – into the "correct but irrelevant" category. The fact is that:

(a) The rules do not render place of origin a relevant factor, referring instead to consignment from a place.

(b) The TARIC Codes (see [17]) draw the clearest of distinctions between modules (e.g. Codes ending …49 and …53) and cells (e.g. Codes ending …71 and …73).

34. These are powerful points. The one point going against this contention is one of policy or purposive construction. This point, made with great force by Ms Vicary, was that this construction of the TARIC Codes rendered the rules of origin irrelevant and made it very easy to side-step or evade the anti-dumping and anti-circumvention rules. Inconsistently with *Renesola*, it would be possible to buy cells from Taiwanese companies not falling within the exceptions table (see 26(3)], consign them from Taiwan to (e.g.) Vietnam, convert them into modules (which would not change their origin) in Vietnam, and then consign them from Vietnam for import into the EU under the Solar Module Code. Although it was accepted that Canadian Solar had purchased cells from companies listed in the exemptions table, and were absolutely not seeking to evade the anti-dumping rules, the practical effect of this construction would be to create an "evaders' charter".

35. Beyond saying that this was the only possible interpretation of the TARIC Codes, Canadian Solar's answer to this point was that the abuse of law principle described in *Halifax* (Case C-255/02 *Halifax and ors v CCE*) was sufficient to prevent any abuse of the anti-dumping rules arising from Canadian Solar's interpretation. The FTT firmly rejected this argument at [110] of the Decision, in a passage with which we entirely agree:

> However, we accept Ms Vicary's argument that this would effectively be using the anti-abuse doctrine to disapply the words of the charging provision. Moreover, in construing the words "consigned from Malaysia and Taiwan" in Article 1(1) regard must be had to the purpose of the 2016 Implementing Regulations which was, as we have noted, to prevent the circumvention of the 2013 Implementing Regulations. To interpret the words "consigned from Malaysia and Taiwan" as meaning, effectively, "directly consigned" from those countries would throw the doors wide open to abuse. Mr Lyons' argument that such abuse could be countered by the *Halifax* doctrine left unanswered the practical question how it would be possible for HMRC to enforce the 2016 Implementing Regulations if, on his interpretation, they could be so easily side-stepped.

36. We should mention for completeness some other arguments raised by Mr Lyons KC. Certain of those arguments (reliance on the principle of legal certainty and a challenge to the power of the EU to implement the relevant regulations) were in our view outside the ambit of the grounds for which Canadian Solar had been granted permission to appeal, and we do not consider them further. A further argument, made before the FTT, was that the decision of the CJEU in Case T-152/16 *Megasol Energie AG v European Commission* determined that the 2016 Implementing Regulations did not apply to the imports made by Canadian Solar. Mr Lyons KC renewed that argument before us. We again agree with the FTT's conclusions on this argument, at [79]-[80] of the Decision:

> [79] It seems to us that it is impossible for us to conclude that *Megasol* should determine the outcome of these appeals. There is no detailed reasoning in the CJEU's Order, the point was not substantively addressed and the facts were not fully laid out (e.g. whether Megasol had complied or had failed to comply with necessary exemption formalities required by the 2016 Implementing Regulations). Moreover, the Court dismissed the application on the basis that Megasol had not shown that the regulations were, as Ms Vicary put it, causing it a problem. On that basis, the Court considered that the point being raised a hypothetical situation in respect of which Megasol was seeking a declaratory decision and therefore had not established that it had a sufficient interest in bringing the proceedings. We consider that it is unsafe to treat *Megasol* as authority for any proposition other than that Megasol had simply failed to demonstrate how the 2016 Implementing Regulations were or might be applicable to it and, therefore, the application was inadmissible.
>
> [80] Accordingly, we do not consider that that *Megasol* determines the position in these appeals.

(iii) The Alternative Solar Module Code was the correct TARIC Code: HMRC's positive case

37. HMRC have contended from the outset of this dispute that the Alternative Solar Module Code was the Code that should have been used: see [8(5)(a)]. This would involve a contention that modules had been consigned from Taiwan. The problems with this interpretation are self-evident:

> (1) The anti-circumvention rules clearly differentiate between cells and modules, as do the TARIC Codes.
>
> (2) In these circumstances, it is a complete misdescription to say that modules were consigned from Taiwan. There were no modules in existence in Taiwan (only cells). Modules only came into existence when they were produced in Vietnam and that is the place where the modules were consigned from.
>
> (3) Given the fact that the TARIC Codes (see [17]) themselves differentiate between cells and modules, it is difficult to see how a misdescription of modules as cells can be justified given the very clear language used in both the anti-circumvention rules and the TARIC Codes.

38. The only virtue in HMRC's construction is that it avoids the evaders' charter problem that we have referred to at [34]. However, this is in our judgement not enough to overcome the very clear language used in the rules, and we are obliged, for that reason, to reject HMRC's positive case.

(iv) The correct TARIC Code was Code 8541 40 90 73 (solar cells consigned from Taiwan): the FTT's conclusion

39. It is noteworthy that the analysis of the FTT in the Decision operates at the cell and not at the module level in terms of what product is being classified. Thus, the opening words of the Decision (at [1]) are as follows:

> One of the main issues in this appeal, beguiling in its simplicity, is whether solar cells used by [Canadian Solar] in the construction of solar panels, were "consigned from" Taiwan or whether they were consigned from Vietnam…

40. These opening words appear to capture the essence of the question of construction that is before us, and was before the FTT, with an economy and elegance that we can only praise. The same is true of the FTT's conclusion at [116] of the Decision:

> …we have come to the view that the words "consigned from Malaysia and Taiwan" in the 2016 Implementing Regulations, in circumstances in which the goods were originally consigned from Malaysia and Taiwan and where what occurs in the intermediate jurisdiction (Vietnam in the present case) is not sufficiently substantial to change the origin of the goods and thereby change the

> TARIC Code, means originally or indirectly consigned from Malaysia and Taiwan…

41. There is a great deal to be said for this construction, which would oblige an importer like Canadian Solar to use TARIC Code 8541 40 90 73 – solar cells consigned from Taiwan:

> (1) There is no misdescription of the products in question. The modules contain cells.
>
> (2) There is no violence done to the language "consigned from". That language appropriately describes the consignment of modules from Vietnam and appropriately described the indirect consignment of cells from Taiwan via Vietnam. The language is appropriate because the work done in Vietnam is insufficient to alter the country of origin of the cells and so of the modules.
>
> (3) This approach is thus consistent with and pays proper regard to the decision in *Renesola* as to the country of origin of cells and modules.
>
> (4) Moreover, this construction avoids the evaders' charter. The FTT was very much aware of this, as can be seen from the Decision at [106]:
>
> > The clear purpose of the 2016 Implementing Regulations was to prevent the circumvention of the 2013 Implementing Regulations. It is plain to us that the Council addressed the issue of the circumvention of the 2013 Implementing Regulations by introducing a blanket imposition of ADD and CVD in respect of all solar cells produced in Taiwan, save in respect of those produced by a specified list of Taiwanese manufacturers *and* where, in addition, there was compliance with the formalities specified in Article 1(2) of the 2016 Implementing Regulations, viz the production of a valid commercial invoice issued by the producer or consignor, on which appeared a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function.
>
> (5) This analysis is consistent with the approach put forward by Mr Elsen of the EU Commission in December 2020, set out at [8(11)]. This was that the additional TARIC code declared should be that of the exempt producer of the cells in Taiwan, with disclosure accompanying the declaration regarding the module manufacturer outside Taiwan.

42. Before us, HMRC contended against this construction and in favour of the construction that we have rejected (see [35] and [36]). The essence of HMRC's objection to this construction was this. It was necessary for an importer like Canadian Solar to describe the products being imported into the EU, and these products were modules and not cells. We are not persuaded by this point:

> (1) The fact is that the Entries were both cells and modules at one and the same time. As the FTT noted, and as we have recorded at [8(6)], the Entries had (as part of their import paperwork) Cell Certificates of Origin, confirming a Taiwan origin.
>
> (2) The point is that it is possible to make modules in a variety of places (cells being made in one place, modules in another), and the rules need to

be sufficiently flexible to accommodate this, consistently with the anti-dumping and anti-circumvention rules.

(3) In fact, as the FTT's reference to the declarations at Article 1(2) of the 2016 Implementing Regulations shows, required declarations do contain sufficient flexibility in this regard. As noted in [26(5)], Article 1(2) contains two forms of declaration. Before us, the parties focussed on the first declaration, when in fact they should have focussed on the second, which is appropriate to the present case. We have completed it, as best we can, below:

> *I, the undersigned, certify that the ~~(volume)~~ volumes contained in the Entries of crystalline silicon photovoltaic modules sold for export to the European Union covered by this invoice was manufactured:*
>
> *~~(i) by (company name and address) (TARIC additional code); OR~~*
>
> *(ii) by a subcontracted third party (TARIC additional code e.g. Inventec Solar Energy Corporation C083, to take an example from the exceptions table) in (~~country concerned~~ Taiwan)*
>
> *(delete as appropriate one of the two above options)*
>
> *with the crystalline silicon photovoltaic cells manufactured by (~~company name and address~~ Inventec Solar Energy Corporation) (TARIC additional code C083) [to be added if the country concerned is subject to original or anti-circumvention measures in force]) in (~~country concerned~~ Taiwan)*
>
> *I declare that the information provided in this invoice is complete and correct.*

(4) We fully appreciate that such a declaration is not ideally worded, and the two references to the same company in Taiwan may not be what the drafter intended. The form could equally well be completed by inserting the Vietnamese company into *(ii)*, and stating that there is no TARIC Code, because the company is Vietnamese.

43. In short, although the rules are undoubtedly unclear, and the declarations in those rules similarly so, the approach of the FTT to the interpretation issue is correct and cannot be faulted.

(v) Conclusion

44. For the reasons we have given, Canadian Solar's appeal in regard to the interpretation issue is rejected. The FTT's construction of the law was entirely correct, and it follows that the TARIC Code used by Canadian Solar in regard to the Entries was the wrong Code.

45. It is important, however, for us to record two further points:

(1) First, as the FTT itself recorded at [153] of the Decision:

> It is also important to consider the complexity of the provisions in question. We accept that the phrase "consigned from Malaysia or Taiwan" used in the 2016 Implementing Regulations is less than wholly clear in circumstances where the cells are manufactured and originate in Taiwan but are then

> shipped to Vietnam where they are incorporated into modules before being imported into the EU. A detailed study of the legislative provisions, including the recitals and the legislative background, has led us to the conclusion that the phrase "consigned from Malaysia or Taiwan" includes cases, such as the present, where the cells are shipped to another jurisdiction before being imported into the EU. We have to acknowledge, however, that we reached that conclusion after we had the benefit of more than two days of skilled legal argument. The inherent ambiguity as to whether "consigned" means directly or indirectly "consigned", as far as was drawn to our attention, was not specifically or clearly addressed in HMRC's public guidance. We note also that the Netherlands tax authorities and Mr Elsen of the Commission (and possibly the Amsterdam Court of Appeal) appear to have come to a different conclusion from that which we have reached. That, of itself, suggests that the conclusion reached by the Appellant was not obviously negligent.

This is relevant to the general equity issue, but it is appropriate to record our view now that although we are satisfied the FTT's construction was clearly right, reaching that conclusion has not been straightforward.

(2) That point is underlined by the fact that HMRC has consistently contended for a different interpretation of the rules, one that we have rejected.

D. THE CORRECTION ISSUE

46. The FTT rejected Canadian Solar's contention that the declarations that it had submitted in February 2021 (and a corrected declaration in May 2021) "corrected" any error that had been made. We consider that the FTT was correct in this determination, and can state our reasons shortly.

47. The error made by Canadian Solar in regard to the Entries was not in the failure to provide compliant declarations pursuant to the 2016 Implementing Regulations. Canadian Solar's error lay in the selection of the wrong TARIC Code. We have found, as did the FTT, that the Solar Module Code used by Canadian Solar was the wrong Code, and that the Code that should have been applied to the entries was TARIC Code 8541 40 90 73: [17] and [37] to [41].

48. As we have described, it was Canadian Solar's primary position both before the FTT and this tribunal that the Solar Module Code was the correct Code. As a result, Canadian Solar never (to this date) sought to correct the Code used in relation to the Entries. For that reason, declarations of the sort described by Article 1(2) of the 2016 Implementing Regulations were not required, on Canadian Solar's own case.

49. In order to make these declarations necessary, Canadian Solar needed to correct the TARIC Code, altering it from the Solar Module Code to Code 8541 40 90 73. Since Canadian Solar never sought to do so, the declarations were and are an irrelevance.

50. We should stress that had Canadian Solar sought subsequently to amend the TARIC Code applicable to the Entries, it would not have been permitted to do so. The Union Custom Code provides as follows at Article 173:

> **Amendment of a customs declaration**
>
> 1. The declarant shall, upon application, be permitted to amend one or more of the particulars of the customs declaration after that declaration has been accepted by customs. The amendment shall not render the customs declaration applicable to goods other than those which it originally covered.
>
> 2. No such amendment shall be permitted where it is applied for after any of the following events:
>
> (a) the customs authorities have informed the declarant that they intend to examine the goods;
>
> (b) the customs authorities have established that the particulars of the customs declaration are incorrect;
>
> (c) the customs authorities have released the goods.
>
> 3. Upon application by the declarant, within three years of the date of acceptance of the customs declaration, the amendment of the customs declaration may be permitted after the release of the goods in order for the declarant to comply with his or her obligations relating to the placing of the goods under the customs procedure concerned.

51. In this case, HMRC had established that the particulars of the customs declaration were incorrect by (at the latest) September 2020: see [8(8)]. As a result, by virtue of Article 173(2)(b) UCC, no amendment of the customs declaration was permitted, and it is not open to Canadian Solar now to contend that the correct Code is different to that declared in the relation to the Entries.

52. We should mention that Mr Lyons renewed the argument he made before the FTT to the effect that there was no time limit under the 2016 Regulations for the presentation of invoice declarations (relying in this respect on the decision in Case C-156/16 *Tigers GmbH Hauptzollamt Landshut*). The FTT rightly rejected this argument and we need say no more about it here.

53. For these reasons, the FTT was correct to conclude as it did, and Canadian Solar's cross-appeal in this regard is rejected.

E. THE GENERAL EQUITY ISSUE

(1) The relevant provision

54. Article 120 UCC relevantly provides:

> 1. …an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special

> circumstances in which no deception or obvious negligence may be attributed to the debtor.
>
> 2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty.

(2) Points in issue on this appeal

55. The following points emerge from this provision and from the points taken by the parties in this appeal:

(1) The provision is, quite clearly, a general equitable provision permitting the repayment or remission of a customs debt where "special circumstances" exist. As such, this is *par excellence* a case of a judicial discretion, where significant weight must attach to the judgement of the decision-maker – here, the FTT – and where an appellate tribunal may only interfere where there has been an error of law by the FTT in considering how its discretion should be exercised. In relation to "exceptional circumstances" for tariff purposes, this point was recently made in *Uflex Europe Ltd v HMRC* [2025] UKUT 00057 (TCC), at [29]-[32].

(2) Article 120 UCC structures the discretion in a number of ways:

(a) First, whatever the "special circumstances", repayment or remission of a duty is not permitted where there is (i) deception or (ii) obvious negligence attributable to the debtor (here: Canadian Solar). It was not contended, either before the FTT or this tribunal, that there was any deception on the part of Canadian Solar. It was contended, both before the FTT and this tribunal, that this was a case of obvious negligence attributable to the debtor, and that for this reason special circumstances could not be found. HMRC contended that the FTT erred in concluding, as it did, that there was no obvious negligence on the part of Canadian Solar.

(b) Secondly, special circumstances are deemed to exist "where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty": Article 120(2) UCC. Where it is clear that such circumstances pertain, the FTT is obliged to find special circumstances, but the wording of Article 120 UCC is unequivocal this is not the only case where special circumstances may be found to exist. Special circumstances are not exclusively defined in Article 120 UCC: all Article 120(2) UCC does is identify one case where "special circumstances" will be deemed to exist.

(3) Before us, HMRC appeared to contend that the only case of "special circumstances" was that described in Article 120(2) UCC, and that the FTT

had erred in concluding that this was a case of "deemed" special circumstance within Article 120(2) UCC. As to this:

(a) The FFT's conclusions on the question of special circumstances are set out in the following paragraphs:

> [156] We have come to the conclusion, considering all the relevant facts and circumstances, that the effect of the incorrect advice, together with the other factors we have mentioned, is to put [Canadian Solar] in a special situation, viz in an exceptional situation as compared with other operators engaged in the same business and that [Canadian Solar] was not obviously negligent. The Appellant had sought to understand its legal obligations, seeking advice from an appropriate quarter. In this connection, to be clear, we do not consider that it was necessary for [Canadian Solar] also to approach HMRC for clarification. If the law cannot be understood without recourse to governmental authorities then it cannot be said to be clear and comprehensible to the ordinary citizen. In this case, [Canadian Solar] had taken appropriate and sufficient steps to understand its legal obligations and had acted in accordance with its understanding. In our view, this acquits the Appellant of any obvious negligence and the other factors which we have mentioned reinforce this conclusion. As we have said, there is no suggestion of deception in the present case.
>
> [157] Ms Vicary criticised [Canadian Solar] for the apparent informality of an email exchange with its legal advisers. We do not agree that such an exchange was inappropriate – indeed, it is a commonplace occurrence of commercial legal practice, of which this Tribunal has considerable experience, that tax advice is frequently given by email.
>
> [158] Furthermore, we did not understand the final condition of Article 120 to be in dispute, viz that in the absence of such special circumstances, [Canadian Solar] would not have suffered disadvantage by the collection of the amount of import or export duty. Clearly, [Canadian Solar] would have been disadvantaged.
>
> [159] We have therefore reached the conclusion, in relation to remission of duty, that the duty should be remitted and that, therefore, the appeal against HMRC's decision of 1 July 2022, refusing to remit the total sum of duty (including import VAT) of £4,681,762.03, should be allowed.

(b) It is evident from this passage that the FTT was considering the application of Article 120 UCC in a "rolled up" way, dealing with (i) "deception", (ii) "obvious negligence" and (iii) "special circumstances". Given that this appears to be how the FTT was addressed in argument (see [133] to [148] of the Decision and [10(3)] of this decision), and given that a number of factual points go both to "obvious negligence" and "special circumstances", we do not consider that the FTT can be criticised for dealing with matters in a "rolled up" way although (as we shall see) that is one of the points HMRC relied upon in this appeal.

(c) Any consideration of "special circumstances" obviously ought to consider whether this is a case of "deemed" special circumstance, and the

FTT obviously did so in the passage we have quoted. But that does not preclude a wider investigation of what "special circumstances" may exist, and it is clear to us that the FTT was (as it was entitled to do) roaming more widely to consider facts and matters going to special circumstance beyond those relevant to any "deemed" special circumstance. Nor did the Tribunal actually say it was obliged to find "special circumstances", because such were "deemed" to exist. It seems to us that the Tribunal's consideration was of a wider range of factors, including the "deemed" circumstance, and that in light of these factors, the FTT concluded that remission of the charges was justified by virtue of Article 120 UCC.

(d) If and to the extent that HMRC were contending that the only "special circumstances" that could engage Article 120 UCC were the "deemed" special circumstances set out in Article 120(2) UCC, then we reject that contention. For the reasons given, "special circumstances" can exist even where "deemed special circumstances" do not exist: it is simply that the FTT's judicial discretion is wider in such cases to the extent that the FTT is not obliged to find that special circumstances exist.

56. HMRC appealed against the FTT's findings on Article 120 UCC on three grounds:

(1) Most seriously, it was contended that the Decision failed sufficiently to state the reasons for the FTT's conclusions, that the Decision was so deficient in this regard that it had to be set aside and the matter either remitted to the FTT or decided afresh by this tribunal.

(2) It was contended that the FTT erred in finding that there was no "obvious negligence" on the part of Canadian Solar. If there was obvious negligence attributable to Canadian Solar, then the FTT was not entitled to find that Article 120 UCC was engaged.

(3) It was contended that the FTT erred in finding that "special circumstances" existed, so as to entitle Canadian Solar to remission of the charges.

57. We consider these three points in the following order: (i) first, we consider whether the FTT erred in finding no "obvious negligence"; (ii) secondly, we consider whether the FTT erred in finding that "special circumstances" existed; (iii) thirdly, we consider whether the Decision sufficiently set out the reasons for the FTT's conclusion on Article 120 UCC. In a very real sense, this third point is determined by our consideration of points (i) and (ii). If we cannot discern the basis for the FTT's decision on these points, then it follows that the reasons are inadequately given. *Per contra*, if we find that the conclusions reached by the FTT are defensible, then it follows that the reasons for the decision are sufficiently clear from the Decision.

(3) No deception

58. The FTT recorded in the Decision that it was common ground that there had been no "deception" on the part of Canadian Solar (Decision at [137]), and

this finding was formally recorded in the FTT's conclusions at [157] of the Decision.

59. We appreciate that this was not a point that was taken before us: but given the attack on the manner in which the Decision was framed, it is appropriate for us to note that the FTT was alive to all of the elements relevant to the application of Article 120 UCC.

(4) No obvious negligence

60. As we indicated during the course of the hearing, we do not consider it to be arguable that Canadian Solar was obviously negligent, whether by itself or by attribution.

61. The Decision records the legal advice that Canadian Solar, sought, obtained, and acted upon prior to importing the Entries, and we have recorded the FFT's findings in this regard at [8(10)]. We consider that the question of legal advice is relevant to both the question of obvious negligence and to the question of special circumstances.

62. Confining ourselves, for the present, to the question of obvious negligence, the following points (found by the FTT in its Decision) demonstrate (i) that the FTT had concluded that there was no obvious negligence in this case, (ii) that the Tribunal had set out its reasons in this regard and (iii) those reasons were sufficient to justify the conclusion that the FTT reached. Indeed, we would go further, and say that the FTT was clearly correct in the conclusion that it reached. More specifically:

> (1) The negligence of the debtor – Canadian Solar – must be obvious, although the negligence can be attributed to it. Here, Canadian Solar were confronted with a question of TARIC Coding that was an extraordinarily difficult one: see the FTT's Decision at [153].
>
> (2) Canadian Solar (responsibly) had lawyers under instruction proactively to monitor their international trade compliance: Decision at [27], quoted at [8(10)].
>
> (3) Those lawyers gave advice to Canadian Solar, which (we have found) was wrong, but not negligent. The FTT found as a fact that Sidley Autin's advice to Canadian Solar was not culpable in this way: Decision at [153].
>
> (4) Canadian Solar followed that advice.

63. It cannot, in our judgement, be contended that there was any negligence on the part of Canadian Solar (including as regards the acts of agents, which might be attributed to it). Matters would be different if the question of classification and the right TARIC Code was obvious: but although that was HMRC's contention before the FTT, that contention was expressly rejected by the FTT at [153] of the Decision, and we have also rejected it.

(5) Special circumstances

64. We turn to the consideration of "special circumstances" by the FTT. The FTT's consideration begins at [149], where the FTT reminds itself that remission of import duties is an exception to the normal import duty regime, and therefore should be interpreted strictly.

65. The FTT then went on (at [150]) to note that there was a correlation between the care to be taken by a trader (when considering the negligence of a trader) and the complexity of the provisions having to be considered by that trader. This is an important point:

> (1) If the question of law or practice is obvious, then the trader might be excused not going to a lawyer, but would (in such circumstances) be liable to be found negligent if they got the answer to that question wrong.
>
> (2) On the other hand, if the question of law or practice was *hard*, the trader might well be excused getting the answer wrong, but would be liable to be found negligent if they did not take appropriate advice.
>
> (3) As the FTT noted, citing the decision in *Sohl & Söhlke v Hauptzollamt Bremen* C-48/98, where doubts exist, "the onus is on the trader to make inquiries and seek all possible clarification". It is to be stressed that this reference to seeking "all possible clarification" cannot be intended to impose upon the trader a counsel of perfection. That would be to contradict the requirement for no "obvious negligence". To the extent HMRC contended to the contrary, the FTT was right to reject that contention, which it did at [156], when rejecting the suggestion that Canadian Solar should have approached HMRC: the FTT there stated that "we do not consider that it was necessary for [Canadian Solar] also to approach HMRC for clarification".
>
> (4) Although these points are clearly relevant to the question of obvious negligence, they are also relevant to special circumstances. In this case, Canadian Solar were obviously <u>not</u> negligent. Canadian Solar took careful steps to attempt to ensure compliance with an impossibly difficult legal regime. This fact, rightly, weighted heavily with the FTT:
>
> (a) At [156], the FTT noted the importance – as a fundamental aspect of the rule of law – of legal clarity: that "[i]f the law cannot be understood without recourse to governmental authorities then it cannot be said to be clear and comprehensible to the ordinary citizen. In this case, [Canadian Solar] had taken appropriate and sufficient steps to understand its legal obligations and had acted in accordance with its understanding".
>
> (b) This is an important point going well beyond the question of "obvious negligence". The FTT was noting that Canadian Solar was holding itself to high standards in a difficult situation. The FTT might also have noted that <u>had</u> Canadian Solar approached HMRC for advice, it would have received the <u>wrong</u> advice.

The FTT clearly considered Canadian Solar's approach to the apparently intractable TARIC Code problem in this case to be a factor relevant not just to

obvious negligence, but also to special circumstances. We agree that this was a relevant factor to take into account.

66. At [151], the FTT reminded itself that it had to consider "all the relevant facts when considering the application of the general equity clause – Article 120 UCC – balancing, on the one hand, the interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk". This was a correct direction of the law, and the Tribunal rightly found that in this case the balance was in favour of the trader, Canadian Solar. At the risk of repetition, this is for the following reasons:

> (1) In this case, the respect to be accorded to the customs provisions is lessened by virtue of the fact that they are so difficult to comprehend. Moreover, HMRC itself had failed to comprehend them, for reasons we have described.
>
> (2) On the other hand, Canadian Solar had acted prudently and responsibly.
>
> (3) Moreover, in these difficult circumstances, not only had Canadian Solar acted reasonably and carefully in seeking legal advice, and taking it, but the application of the Solar Module Code was a very plausible reading of the rules: see [33] to [34] of this decision, as well as the reasoning in the Decision.
>
> (4) Indeed, Canadian Solar's subsequent attempts to ascertain the correct position – which the FTT also considered, and which consideration we have set out at [8(11)] – shows just how difficult a position Canadian Solar found itself in, through no fault of its own.

67. At [152] of the Decision, the FTT found that Canadian Solar was an experienced trader. It seems that the FTT may have seen this as a factor against Canadian Solar, because it went on to say at [152] that "there was no attempt by Mr Lyons to argue otherwise". In fact, we see it as cutting both ways. On the one hand, it might hold Canadian Solar to a higher expected standard of diligence compared to an inexperienced trader. However, it could also be a factor in favour of special circumstances existing: where an experienced trader, taking legal advice, nevertheless gets it wrong, then clearly something exceptional is going on. The FTT does not say how they weighted this factor, but it was plainly not an irrelevant factor. If the FTT considered that it weighed in favour of Canadian Solar's contentions, then we consider that to have been correct. As a counsel of perfection, the FTT could have been clearer on what they made of this point.

68. At [153] of the Decision, the FTT emphasises once again the very difficult position that Canadian Solar found itself in. It is worth quoting this paragraph in its entirety:

> It is also important to consider the complexity of the provisions in question. We accept that the phrase "consigned from Malaysia or Taiwan" used in the 2016 Implementing Regulations is less than wholly clear in

> circumstances where the cells are manufactured and originate in Taiwan but are then shipped to Vietnam where they are incorporated into modules before being imported into the EU. A detailed study of the legislative provisions, including the recitals and the legislative background, has led us to the conclusion that the phrase "consigned from Malaysia or Taiwan" includes cases, such as the present, where the cells are shipped to another jurisdiction before being imported into the EU. We have to acknowledge, however, that we reached that conclusion after we had the benefit of more than two days of skilled legal argument. The inherent ambiguity as to whether "consigned" means directly or indirectly "consigned", as far as was drawn to our attention, was not specifically or clearly addressed in HMRC's public guidance. We note also, that the Netherlands tax authorities and Mr Elsen of the Commission (and possibly the Amsterdam Court of Appeal) appear to have come to a different conclusion from that which we have reached. That, of itself, suggests that the conclusion reached by the Appellant was not obviously negligent.

Although there is some conflation of the "obviously negligent" and "special circumstances" elements of Article 120 UCC, we consider that the FTT cannot be criticised for such conflation. The fact is that this evidence goes to both factors and more to the second than the first, simply because the question of negligence is so easily rebutted. What we see here is conduct on the part of Canadian Solar that was prudent and responsible, but nevertheless resulting in serious commercial damage to Canadian Solar.

69. At [154] of the Decision, the FTT notes the uncontroversial point that we have just made: namely that in rendering itself liable to the charges, Canadian Solar will suffer unjustified commercial loss unless remission under Article 120 UCC is triggered. The FTT carefully weighed this factor, concluding that "[t]his is a relevant, but not a major consideration, although it is one which is to be weighed in the overall evaluative exercise".

70. At [155] of the Decision, the FTT considers the fact that Canadian Solar sought the advice of Sidley Austin. We have already considered this significance of this: it was, we consider, an obviously relevant factor for the FTT to take into account.

71. We have already quoted [156]ff of the Decision. We consider that the conclusion expressed at [156], namely that Canadian Solar was "in a special situation, viz in an exceptional situation as compared with other operators engaged in the same business" to be well within the findings a properly advised tribunal could have made. We go further, and consider the finding to be obviously right. HMRC's position was that "[t]he relevant comparator was other traders importing solar cells into the EU": [147]. Such traders might acquire their cells from many different sources, and might assemble such cells into modules in countries other than Vietnam". True it is that Canadian Solar did not adduce in evidence a market study showing how unique it was compared to other traders. We do not consider that such evidence needs to be adduced when considering the

trite proposition that where there are anti-dumping provisions and anti-circumvention provision in place, rendering it necessary to draw fine distinctions between countries of origin and countries of consignment, where the law is unclear (as it is here) there is a significant difference between traders capable of amounting to exceptionality. That is the finding of the FTT and we consider it to be both defensible and right.

72. We reject HMRC's appeal on this point. The FTT's conclusion on "special circumstances" is unimpeachable.

(6) Inadequate reasoning

73. As we foreshadowed, this ground of appeal is dealt with by our earlier consideration. The reasoning of the FTT is clear and evident from the face of the Decision. We say no more, save that this ground of appeal is rejected.

F. DISPOSITION

74. We uphold the Decision of the FTT, for the reasons given. HMRC's various grounds of appeal are rejected, as is Canadian Solar's cross-appeal.

The Honourable Mr Justice Marcus Smith
Judge Thomas Scott

Judges of the Upper Tribunal

Release Date: 2 May 2025.