Ref: 132TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This matter comes before the Tax Appeals Commission by way of two appeals arising from an alleged failure by the Appellant to comply with the conditions under which it was authorised to operate a suspensive customs procedure known as processing under customs control, which is hereinafter referred to as **"PCC"**.

2. The first appeal is against a decision made on the 9th of December 2014 by [redacted], as a Designated Appeal Officer under Regulation 4 of the European Communities (Customs Appeals) Regulations 1995 (S.I. 355/95), upholding a decision made by the Respondent on the 10th of October 2014 assessing the Appellant to a Common Customs Tariff liability of €357,036.42 pursuant to Article 204(b) of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter **"the Customs Code"**).

3. The second appeal is against a decision made on the 1st of December 2014 by [redacted] as a Designated Appeal Officer under Regulation 4 of the aforesaid 1995 Customs Appeals Regulations, upholding the decision of the Respondent to reject the Appellant's request for retrospective amendment of its PCC Authorisation Number IE[redacted].

4. As the same factual background gives rise to both appeals, it was agreed by the parties that I would hear both appeals together and this Determination disposes of both appeals.

B. Factual Background

5. The Appellant is a company based in [redacted], County [redacted] which is engaged in the production of [redacted] products, primarily [redacted] and [redacted].

6. PCC is a suspensive customs procedure which allows goods to be imported from outside the European Union for processing operations which change their nature or state. Duty becomes payable when the finished product is put on the Community market, and duty is payable on the finished product as if it had been imported directly. This can lead to a cashflow advantage for the taxpayer due to the suspension of the duty liability and can also result in a saving to the taxpayer if the rate of duty on the finished products is lower than the rate of duty or average rate of duty on the imported goods used in the production of the finished products.

7. The Appellant imports approximately one third of the raw materials it uses in the manufacture of [redacted] products from outside the EU. In this appeal, the average rate

of duty on the imported goods used for production was 6.5% and the rate of duty on the finished products was 0%.

8. Taxpayers operate PCC on foot of an Authorisation granted by national Revenue authorities, generally for a period of three years. On the [redacted]th of [redacted] 2007, the Appellant applied to the Respondent for PCC Authorisation in respect of the importation of certain goods to be used in the production of its finished goods. In accordance with Article 497 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter **"the Implementing Regulation"**), the Appellant applied using a form based on the model contained in Annex 67 to the Implementing Regulation. The form required the Appellant to furnish details of the quantity and value of the goods to be placed under the customs procedure and the period for discharge, and the explanatory notes to the form clarified that what was required of the Appellant was the estimated quantity of the goods, the estimated value of the goods and the estimated period needed for the operations to be carried out.

9. The Appellant's application was successful and its first PCC Authorisation, bearing No. IE[redacted], was granted by the Respondent on the [redacted]rd of [redacted] 2007. The Authorisation was valid from the [redacted]th of [redacted] 2007 to the [redacted]th of [redacted] 2010. It detailed in Annex 1 the goods to be processed, including the quantity and value of each type of good, and detailed in Annex 2 the "compensating products", namely the finished products manufactured using the goods detailed in Annex 1. The Authorisation further recorded the Period of Discharge as being 3 months.

10. The Authorisation, covering letter and the general conditions were sent by the Respondent's Economic Procedures Unit in Nenagh to its Customs Division in

Castlebar for onwards transmission to the Appellant. The Respondent's internal letter stated *inter alia:-*

> *"This company should be advised that this authorisation is limited to the quantities and values shown and in order to increase these amounts and values, an application must be made direct to Customs Division, Economic Procedures Unit, Nenagh. The company should also be advised that in order to use the PCC procedure they must be in possession, at all times, of a valid PCC Authorisation."*

11. The covering letter sent by the Respondent to the Appellant on the 23rd of April 2007 enclosing the authorisation began as follows:-

> *"Dear Sir,*
>
> *I refer to your application to the Revenue Commissioners for a Processing Under Customs Control Authorisation.* ***I now enclose an Authorisation valid from [redacted] 2007 to [redacted] 2010 for the quantities and values shown.***
>
> *You should now notify your customs agents, suppliers and other interested parties of your Authorisation Number. Care should also be taken to ensure that your PCC Authorisation number and your VAT registration number are clearly and correctly shown on all customs entries. These precautions will help in avoiding delays in the clearance of your goods.*
>
> *The following points should be noted carefully by your company:-*
>
> 1. *To add further goods to your Authorisation, or to increase the authorised quantities and values of the goods to be processed, an application should be made to the Revenue Commissioners* ***in advance of importation.*** *Failure to acquire prior approval from the Revenue Commissioners and subsequent*

amended authorisations from this office will result in your company becoming liable to a customs debt.

2. *To engage in the Processing Under Customs Control Procedure, you must be in possession of a valid authorisation at all times. Unauthorised operation of Processing under Customs Control will result in your company becoming liable to a customs debt.* ***This authorisation expires on*** [redacted] ***2010****. An application for Renewal should be made to the Economic Procedures Unit, Nenagh at least two months prior to that date.*

Please note that under the EU Customs Code it is the clear responsibility of your company to ensure that at all times the conditions set out at 1 and 2 above are complied with.*"* [original emphasis]

12. The Authorisation had attached an Annex listing 22 "*General Conditions to be observed by persons authorised to engage in a Processing Under Customs Control arrangement.*" The general conditions included the following:-

"4. The Authorisation holder is responsible for ensuring that the tariff code numbers quoted on the Authorisation are correct.

5. The Authorisation holder is agreeable to the transmission by the Revenue Commissioners of statistical information relating to goods imported under the arrangement to the EU Commission.

6. The Authorisation must be produced if required to the proper Revenue Official with the customs entry or other declaration placing the goods under the arrangement. It must also be produced at any time (if so required) for inspection by any Officer of the Revenue Commissioners.

7. Each consignment of goods imported under a processing under customs control arrangement must be entered on a SAD declaration, or on the Automated Entry Processing (AEP) System completed in accordance with the AEP Trader Guide. The appropriate procedure code (first two digits: 91) must be entered into box 37 of the SAD. The Authorisation Number must be quoted in box 44 of the SAD. The entry must bear a declaration that the goods entered thereon are being imported for processing in accordance with an Authorisation issued by the Revenue Commissioners. The entry must be supported by an invoice(s), in duplicate, showing the total value and quantity of goods in the consignment.

…

15. Duty must be paid on demand on any dutiable goods which at any time are not shown to have been processed and the arrangement discharged under these conditions to the satisfaction of the Revenue Commissioners."

13. Two directors of the Appellant signed a certificate confirming that the 22 general conditions were accepted and undertaking that the Appellant would comply with same.

14. It was a condition of the Authorisation that the Appellant obtain a bond from a financial institution which would be available to meet any customs duty liability which the Appellant was unable to pay to the Respondent. The bond sought from and obtained by the Appellant was in the amount of €170,000.

15. The Appellant's Authorisation was amended from time to time on foot of applications made by the Appellant. These amendments were sought when, for example a Combined Nomenclature (**"CN"**) classification code was changed, or when the

Appellant sought to add additional products to either Annex 1 or Annex 2 of the Authorisation.

16. A new PCC Authorisation bearing number IE[redacted] was issued by the Respondent on the [redacted]th of [redacted] 2010. Both the Authorisation and the covering letter sending same to the Appellant mistakenly stated that the Authorisation was valid from the [redacted]st of [redacted] 2010 to the [redacted]st of [redacted] 2013. In fact, both documents should have stated that the Authorisation was valid only to the [redacted]st of [redacted] 2012, in keeping with the practice of Authorisations being issued for a three-year period only.

17. The wording of the covering letter enclosing the new Authorisation was effectively identical to that sent to the Appellant on the [redacted]rd of [redacted] 2007, the relevant portion of which is quoted at paragraph 11 above.

18. The period of discharge was recorded in the new Authorisation as being 12 months, an increase from the three-month period allowed under the first Authorisation. The Appellant had requested this change in circumstances where the addition of new lines of business had resulted in a small number of products not being used in the production processes within the shorter period allowed by the original Authorisation.

19. The total value of the Annex 1 products listed in the Authorisation amounted to €13,362,602 and Annex 2 recorded that the Compensating Products would be [redacted], [redacted] and [redacted].

20. The Respondent's Economic Procedures Unit wrote to the Local Control Officer dealing with the Appellant on the [redacted]th of [redacted] 2010, enclosing a copy of the new Authorisation and advising him that:-

"1. The Authorisation expires on [redacted] ***2013****.*

2. The Company is authorised to import goods within the quantity limits specified and subject to a total value limit of ***€13,362,602.00 for 3 years****.*

These limits should be strictly adhered to, but where it is anticipated that they will be exceeded, the company should be advised to apply to this Unit for an increase in their authorised amounts." [original emphasis]

21. Between the 25th and the 27th of May 2010, the Respondent carried out an audit of the Appellant. In or around early July 2010, the auditors met with representatives of the Appellant and the Appellant was informed *inter alia* that there was an issue in relation to the amount of the Appellant's bond. The Appellant was informed that the increase in the period of discharge from three months to 12 months had necessitated an increase in the level of the bond.

22. By letter dated the 20th of July 2010, the Respondent's auditors wrote to the Appellant's Financial Director and stated *inter alia* as follows:-

*"****Audit Strategy***

The auditors examined the operation of the PCC authorisation and the [redacted] *In addition to this a selection of import and export sads for 2009 were examined.*

PCC Authorisation

It is noted that Bills of Discharge in respect of the PCC authorisation issued in 2007 were not submitted to Revenue until late 2009. The bills of Discharge which were presented in 2009 were examined. The auditors were able to trace the sads entered to PCC through this Bill of Discharge. The auditors are satisfied that the systems and records held at the traders premises are robust and adequately record the movement of product through their plant.

The following recommendations are made to ensure compliance going forward:

1) *The bond is currently insufficient and should be increased. Based on the current Annex 1 values and the period of discharge of one year it is recommended that this bond be increased from €170,000 to €520,000. This should be done in consultation with the local control officer.*
2) *Quantities and values were exceeded. Retrospection has been allowed by Customs Division, Nenagh. The new quantities should be monitored closely.*
3) *Bills of Discharge are to be submitted to the local control officer on a monthly basis. The BOD's should contain the information as per Article 521 of Commission regulation (EEC) No 2454/93. In addition this BOD should be submitted in hard copy format as well as electronically and should be signed by the trader and should include the diminishing balances of the quantities and values."*

23. Following the audit, the Appellant advised the Respondent that its Standard Operating Procedures had been amended to include the following commitment:-

"The Master Specialist will monitor the quantities and values declared at import for PCC to ensure they do not exceed the quantities and values on the PCCA. In the event that the quantities or values are likely to be exceeded, the Master Data Specialist will apply to Revenue, Nenagh to have the PCCA modified to reflect the increase in the quantities and values. In the event the level of the bond may have to be increased the Finance Department will contact C&E at [redacted]*."*

24. The Appellant did not at this time take any steps on foot of the recommendation that the bond be increased to €520,000. Shortly after the letter of the 20th of July 2010, it

applied to increase the value of Annex 1 products it was importing under the PCC Authorisation from €13,362,602 to €17,680,622 and this application was granted by the Respondent on the [redacted]th of [redacted] 2010.

25. In July of 2012, the Appellant again wished to increase the overall value of the Annex 1 goods it was importing under the PCC Authorisation. A change in the Appellant's supply chain meant that it would thereafter be importing significantly increased quantities of [redacted] and [redacted] (hereinafter collectively referred to as the "[redacted] **goods**"). Accordingly, the Appellant's agent wrote to the Respondent on the 17th of July requesting an amendment to Annex 1 of the PCC Authorisation, increasing the value of the [redacted] goods permitted to be imported under the Authorisation from €50,765 to €8,050,765.

26. The Respondent replied by email the following day, stating *inter alia*:-

> *"Also, as a result of an audit carried out in 2010, it was recommended that the existing bond should be increased to cover existing imports. The amendment request below would increase the value by a further €8,000,000. Can you advise please as to the current position regarding the revised bond amount."*

27. The Appellant's agent replied later that day, stating "*I was unaware that the bond needed to be increased and if we can agree the bond amount I will request* [redacted] *to amend the bond accordingly."*

28. These emails were copied to the Appellant's local control officer but it appears that he did not engage with the Appellant or its representatives in relation to an increase in the amount of the bond, notwithstanding an email to him from the Respondent's Economic Procedures Unit in Nenagh on the 30th of August 2012 which stated *Inter alia*:-

"With reference to the PCC Operational Instructions, I am now reminding you of the importance of checking that the conditions of this authorisation are being observed and, in particular, that the authorised limits for the values and quantities of goods which may be imported are not being exceeded.

Any significant deviation from the conditions of this authorisation especially in relation to quantities and values should be notified to this Unit immediately together with an indication of your proposed response."

29. The Appellant sought to pursue the issue in November and December 2012 but experienced some difficulties in making contact with the local control officer.

30. In [redacted] of 2013, the Appellant became aware that its PCC Authorisation had expired, notwithstanding it stating on its face that it was valid until the end of [redacted] 2013. The Appellant's agent wrote to the Respondent on the 22nd of January requesting a renewal of the Authorisation.

31. The Respondent's Economic Procedures Section replied by email the following day, stating as follows:-

"It has been brought to my attention that the request for an increase to [redacted]'s bond has still not been put in place. As you are aware the request submitted by you last July, for the increase in value and quantity of CN code [redacted] was not granted due to the fact that the existing bond wasn't sufficient to cover the authorisation as it stood, therefore no increase in any value or quantity could be allowed.

We have now received an application for renewal of this authorisation (expiry date [redacted]2012), and in light of the fact that an increase to the bond was

requested as far back as 2010, we have no choice but to delay renewal until such time as the bond situation is rectified."

32. The Appellant's agent replied later that day, stating:-

"Attached is the amended Annex 1 values and quantities for 2013 to 2015 as discussed. I would suggest that we use these values to set the level of the bond. I would appreciate it if you could send this Annex to [redacted] *and request that he set the level of the bond required. I will contact* [redacted] *(LC) and ask his opinion re the revised bond figure also. Once the new bond figure is communicated to me I will contact* [redacted] *and instruct them to initiate the bond increase immediately.*

I would also appreciate if you could amend the values and quantities for the above authorisation as per my email of the 17th of July 2012."

33. A temporary Authorisation was issued to the Appellant on the 31st of January 2013 and on the 7th of February 2013 the local control officer wrote to the Appellant's agent stating:-

"Following examination of your recent application for Processing under Customs Control for the above company, a revised bond is required to secure any liabilities that may arise.

The bond has been calculated from information that was supplied with the application.

The revised bond figure is (€880,000) eight hundred and eighty thousand euro.

Please arrange without delay to put the bond in place in order to authorise approval of your application."

34. It took the Appellant some time to put the increased bond in place and the Appellant's agent sought a further temporary extension of the existing Authorisation while the revised bond was being arranged. On the 1st of March 2013, the Respondent's Economic Procedures Section wrote to the Appellant's agent, stating as follows:-

> *"As you are aware this company was audited on 25th and 26th May 2010, and as a result it was found that the bond in place for €170,000 was grossly insufficient to cover the customs liability. The company was asked to put a new bond in place for €520,000 and despite numerous communications with the company a new bond was not put in place.*
>
> *In the renewal application there is significant increase in quantities and values, and the bond requirement has now increased to €880,000. In light of the following facts:*
> *Almost three years has elapsed and the company have made no effort to put in place the required bond resulting from the audit:*
> *That the customs liability has now greatly increased: and,*
> *We have extended this authorisation twice already,*
>
> *No further extension will be given. In the emails below I see no solid proof that the cover note will be here in the next week. It is only anticipated by the company, therefore we cannot put an authorisation in place until the required security has been set up.*
>
> *As this issue is now ongoing for three years and the risk to Revenue has increased we have no choice but to wait for the new cover note."*

35. The Appellant replied to this on the 4th of March, taking issue with the first paragraph and stating:-

"While I accept that there was a recommendation to increase the bond, I have not received any subsequent communication making this request
This recommendation was made as a very high level estimate and assumes that the majority of our inventory is held for the total PCC period.

At [redacted] our integrity is very important to us, had we been made aware that this was an issue we would have put this in place immediately.
Apologies if there was a misunderstanding on our behalf."

36. The new bond in the amount of €880,000 was in place by the [redacted]th of [redacted] 2013 and a new PCC Authorisation bearing Number IE[redacted] was issued by the Respondent the following day.

37. A new audit of the Appellant was commenced by the Respondent on the 2nd of July 2013. In the course of the audit, the Appellant was advised that certain quantity and value limits in the PCC Authorisation for 2010 to 2012 had been exceeded. By email dated the 19th of September 2013, the Appellant applied to increase the quantities and values of certain Annex 1 products, noting that the overall value would remain the same.

38. After clarifying certain of the CN codes in the application, the Respondent replied on the 23rd of September. Their response stated that retrospective amendments were limited to a period of 12 months prior to the date of the application, and on that basis they could consider amending the values for the period from the 19th of September 2012 to the end of the Authorisation on the [redacted]st of [redacted] 2012. The Respondent sought the relevant values for that period.

39. The Appellant replied the following day, stating as follows:-

"I have added another tab with an additional column which shows the receipts from Sept 19th – [redacted]st 2012. (And updated the column 'value in Euro for 3 years) There are 6 codes which I marked in red which are below the quantity we need. Is it possible to go back to July 1st 2012 in which case the full quantities will have been received.

2012 was a very busy year For [redacted] in 2010 our PCC imports was €3.8 million, 2011 €4.4 million and 2012 increased to over €8 million, almost all of this in the 2nd half of the year.

Because we renewed our PCC in [redacted] 2013, I didn't realise that I need to get a retrospective amendment on the old PCC"

40. On the 24th of September 2013, the Respondent's auditor wrote to the Appellant listing 29 separate items that had been audited. The letter stated that the Authorisation limits had been exceeded in the case of 8 of those items, and that this would have duty implications for the Appellant, subject to the Appellant's application for retrospective amendment which was acknowledged in his letter.

41. On the 26th of September 2013, the Respondent's auditor wrote to its Economic Procedures Unit and stated as follows:-

"On 17th July 2012 [redacted] made a request to increase the value limits on commodity code [redacted] to €8,050,765.00. On 18th July 2012 [redacted] requested the new bond amount. There is no indication on the file that a new bond amount was agreed with the company. Large Cases Division commenced an audit of [redacted] and this audit started on the 20th September 2013. The focus of the audit was on the PCC Authorisation held by [redacted] for the period [redacted]st [redacted] 2010 to [redacted]st [redacted] 2012. We observed that a number of headings on their authorisation had exceeded the authorisation limits.

[redacted] *was of the opinion that their request to increase the limits in July of the previous year was accepted by Revenue. They had no correspondence to indicate their request was rejected. Likewise there is no indication on the file that new limits were granted or a new bond figure was agreed.*

I would recommend that the application made by [redacted] *in July 2012 to increase the limits should be reactivated. In the absence of reactivation should be calculate the duty exposure on the amount in excess of the limits on the authorisation."*

42. On the 12th of November 2013, the Appellant's agent responded to auditor's letter suggesting duty implications because of the breaches of value limits in the PCC Authorisation. His email reiterated the Appellant's view that there was no provision in the Customs Code or the Implementing Regulation that allowed for a quantitative limit to be applied to a PCC Authorisation, and accordingly that the Appellant did not agree that it had any duty liability.

43. The Respondent's auditor replied on the 14th of November 2013, stating that the Respondent's position was that the Appellant had failed to comply with Article 87(1) and (2) of the Customs Code, and that accordingly Article 204(1)(b) meant that a customs debt on importation had been incurred because of the Appellant's non-compliance with a condition governing the placing of the goods under the PCC procedure.

44. There followed an exchange of communications over the following months between the Appellant's agent and the Respondent, in which each set forth their respective positions on whether or not the Appellant had a duty liability arising from the breaches of the quantities and values detailed in Annex 1 of the PCC Authorisation.

The Appellant's agent premised his arguments in large part on the opinion of the Advocate General and the decision in **Case C-437/93 *Hauptzollamt Heilbronn –v- Temic Telefunken Microelectronic GmbH*** (hereinafter referred to as ***Temic***) but the Respondent asserted the decision was not applicable to the Appellant's position. The Appellant's agent further argued that the provision by an applicant for Authorisation of estimated quantities and values of the goods to be imported could not constitute an application by an economic operator for those quantities and values, and disputed that the listing of the estimated quantities and values on a PCC Authorisation could automatically make those estimates a quantitative limit on the Authorisation. The Appellant's agent submitted that the estimates were only required as part of the application in order that the revenue authorities could be satisfied that the economic conditions test had been met.

45. On the 10th of April 2014, the Respondent advised the Appellant that its application for retrospective amendment of the PCC Authorisation had been refused. The Respondent's e-mail stated:-

> *"During the validity period of this authorisation the bond in place was €170,000 and was not sufficient to cover the duty at risk for the original values on the authorisation. We are not in a position to allow increased values on the authorisation and are therefore not granting the requested amendments."*

46. The Appellant responded by email dated the 6th of May 2014, attaching details of the dutiable inventory held by the Appellant during the period of the Authorisation. The Appellant stated that the attached details showed that the maximum duty liability at any time during the currency of the Authorisation was €123,579, which was well within the bond of €170,000 in place at the time. The Appellant requested the Respondent to reconsider the retrospective amendment application, without

prejudice to the Appellant's position that a quantitative limit could not be applied to a PCC Authorisation.

47. No agreement could be reached between the Appellant and the Respondent on either the duty liability which the Respondent contended had arisen on foot of the 8 breaches of the quantities and values listed in the PCC Authorisation or the Appellant's application for retrospective amendment of the PCC Authorisation. On the 30th of May 2014, the Respondent stated in relation to the request for retrospective amendment of the Authorisation:-

> *"In considering this request we looked at the legal basis for doing so. Article 508 of the Customs Code Implementing Provisions allows for retrospective authorisations to be issued under certain conditions and in exceptional circumstances, but no longer than one year from the date of application.*
>
> *We have examined this request and find that no circumstances which could be deemed to be exceptional have been put forward. Article 87 of the Customs Code states that the conditions under which the procedure is used shall be set out in the authorisation. Furthermore it also states that the authorisation holder shall notify the customs authorities of all factors arising after the issue of the authorisation which may influence its continuation or content. When issuing new and renewed authorisations we clearly state that quantities and values must be monitored."* [original emphasis]

48. The Appellant replied by email dated the 13th of June 2014, stating that there had been no previous indication by the Respondent that the Appellant had to show exceptional circumstances to justify a retrospective amendment, and that the Respondent had previously stated that the application for such amendment could not be granted because of the insufficiency of the bond in place at the relevant time. The Appellant

stated that it was extremely disappointed that a new reason for refusal was being advanced at a late stage of the discussions, and disputed that the legislation and guidelines required that exceptional circumstances be outlined in an application for amendment. Nonetheless, the Appellant stated that exceptional circumstances did exist, namely:-

> *"Due to the commercial success of our* [redacted] *product range we had to rapidly increase our production output and raw material imports in 2012. This increase was not anticipated at the time of our PCC application. In addition in 2012 we added a supplier to our authorisation which also increased our import levels. Your office was notified of this change in July 2012. We would also like to point out that even though the individual values increased, the overall value did not change. Consequently there was no duty at risk. We note your new requirement regarding the monitoring of quantities and values and can confirm that your Office was notified of such increases in the past and in this instance dating back to July 2012."*

49. By letter dated the 26th of June 2014, the Respondent rejected the Appellant's arguments and stated that it was rejecting the Appellant's application for amendment of the PCC Authorisation with retrospective effect because a grant of retrospection was not possible under Article 508 of the Customs Code having regard to the circumstances pertaining in the case.

50. The Appellant's agent replied on the 3rd of July and pointed out that the Appellant had first applied for an amendment of the PCC Authorisation on the 17th of July 2012. He expressed dissatisfaction that the Appellant had been advised by the Respondent's auditor in September 2013 to make an application for retrospective amendment but was not advised that certain conditions had to be satisfied for the retrospective amendment application to be granted. He pointed out that when the Respondent had

first refused to grant the retrospective amendment in April 2014, it did so on the grounds that the bond in place had been insufficient. When the Appellant had replied to show that the bond exceeded the maximum duty liability during the period of the Authorisation, the Respondent had said for the first time on the 30th of May 2014 that the application was being refused because the Appellant had not shown that exceptional circumstances existed. When the Appellant had explained the special circumstances which it believed pertained, the Respondent had said the application was being refused in reliance on a general reference to Article 508. The Appellant's agent therefore requested specific reasons for why the application was being rejected.

51. The Respondent replied the following day, stating as follows:-

> *"Under Article 508(1) CCIP, a retrospective authorisation 'may' be issued. However, it must be considered in the context of all the conditions set out in Article 508. If these conditions are met, the authorisation can be issued with retrospective effect. It is not an automatic entitlement based on the fact that an application has been made.*
>
> *Article 508(3) states that, where exceptional circumstances exist, the customs authorities may consider retrospection beyond the date on which the application was lodged, albeit not more than one year before the date of aid application, subject to the proviso that the application cannot be related to obvious negligence.*
>
> *In 2010 an audit was carried out on your company. It was found that the company had exceeded the quantities and values set down in the authorisation and in respect of which authorisation was originally sought by* [redacted]*. Furthermore, based on these figures, it was clear that the bond cover was grossly*

insufficient. The findings of the audit were outlined to [redacted] *with the recommendation that the quantities and values should be monitored and the bond cover increased as necessary. In 2012* [sic] *a further audit was carried out and it was found that* [redacted] *had continued to exceed the quantities and values set down in the authorisation and that the bond had not been increased.*

When we issued your authorisation and subsequent renewals we stressed the importance of monitoring all quantities and values contained in the authorisation. This was also brought to your attention by the auditors. Based on this failure to monitor the quantities and values and the fact that this failure is what has necessitated the application for a retroactive authorisation, [redacted] *is considered to be non compliant with Article 508(3)(a).*

As stated previously, it is not possible to grant a retroactive authorisation unless ***ALL*** *of the conditions set down in Article 508(3) have been met.*

As [redacted] *have not met the conditions set down in Article 508(3), our decision of 26 June 2014 was to reject the application for an amendment, with retrospective effect, of PCC authorisation IE*[redacted]*. You may, if you wish, appeal this decision…"*

52. The Appellant responded on the 1st of August 2014. The letter expressed disappointment at the decision to reject the application for retrospective amendment on the grounds of obvious negligence, and stated that neither the Respondent's own guidance document nor the EU Commission's Guidelines on retrospective authorisations made any reference to obvious negligence. The letter expressed dissatisfaction with the manner in which the matter had been dealt with by the

Respondent and requested a review under the Revenue Complaint and Review procedures.

53. The letter further stated that the Appellant had in fact monitored the values under the Authorisation but did so on the basis of the total value under the Authorisation rather than at individual item level. The Appellant had further monitored the level of the bond and was satisfied that it was always at a sufficient level to cover any duty considered to be at risk. The Appellant had submitted bills of discharge on a monthly basis through which the Respondent's local control officer would have been fully aware of the values at item level. The letter further pointed out that the Respondent's own internal instructions manual stated that the local control officer should monitor the PCC quantities and values to ensure that they were not likely to be exceeded, and conduct compliance checks at least once every six months. Notwithstanding this, the Appellant had received no correspondence from the local control officer in relation to the monitored quantities and values and no control visits had been carried out during the period of the Authorisation. The Appellant submitted that this was not consistent with obvious negligence on its part.

54. The Respondent treated this request as an appeal to a designated appeal officer. On the 1st of December 2014, the Respondent's designated appeal officer for this appeal decided not to uphold the appeal. The Appellant duly appealed that decision to this forum.

55. On the 6th of October 2014, the Respondent's auditor wrote to the Appellant advising that it had a customs duty of liability of €357,036.42. By further letter dated the 10th of October 2014, the Respondent's auditor further advised that the Appellant had failed to operate PCC in accordance with the conditions under which it was granted and had failed to comply with Article 87(2) of the Customs Code, and consequently a

customs debt had arisen pursuant to Article 204. The letter further stated that the ***Temic*** decision was of no relevance because it referred to quantitative limits imposed by a customs authority. In the instant case, the quantities and values which the Appellant had applied for had been granted, and therefore no limits had been imposed by the Respondent.

56. The decision of the 10th of October was duly appealed by the Appellant to the Respondent and on the 9th of December 2014, the Respondent's designated appeal officer for this appeal rejected the appeal. The Appellant then appealed the decision to this forum.

C. Grounds of Appeal

57. The Grounds of Appeal advanced by the Appellant in relation to the first appeal against the imposition of a customs duty liability of €357,036.42 were stated to be as follows:-

(i) CJEU Case 437/93 makes it clear that no quantitative limit/threshold applies to PCC authorisation and accordingly no duty liability can arise because the values or quantities (estimated) on the authorisation are exceeded;

(ii) The quantities and values as set out in the Authorisation are estimates as required by the model for an application for a procedure with economic impact as set out in Annex 67 on Commission Regulation 2454/93;

(iii) The conditions of the Authorisation do not impose a quantitative or value limit;

(iv) The Appellant notified Revenue in July 2012 of a value increase on the PCC Authorisation;

(v) The amendment of July 2012 should have been granted on the basis that the bond was always sufficient;

(vi) The Economic Conditions were satisfied at all times during the life of PCC Authorisation IE[redacted]; and,

(vii) The Appellant was not consulted during the Designated Appeal Officer's review although Revenue officials were.

58. In the Appellant's Outline of Arguments and in the course of the hearings before me, the aforesaid grounds of appeal were netted down to two main grounds, namely:-

(i) Quantity and value limits, which the Respondent purports to be conditions governing the Appellant's PCC Authorisation, are not valid conditions under E.C. law (referring to the ***Temic*** case). As such, there was no breach of a condition as set out in Article 204; and,

(ii) Without prejudice to the above submission, in July 2012 amended and increased authorisation was in fact sought in respect of one product, namely [redacted] and [redacted] supplied by the [redacted] Company (**"the [redacted] Products"**). In this regard, the Appellant submits:-

(a) No decision – and specifically no refusal – was made by the Respondent in respect of this application prior to the renewal by the Respondent of the Appellant's PCC Authorisation in [redacted] 2013. The Appellant submits that it held a legitimate expectation that the renewal of the PCC Authorisation determined its earlier application for

amendment, with retroactive effect to the date of application, as per the terms of Article 508(1) of the Implementing Regulation; and,

(b) Without prejudice to the preceding argument, if the Appellant's application for amendment was refused, the decision to do so was invalid, on the basis that the sole ground advanced by the Respondent, namely insufficiency of bond security, is at odds with the Respondent's own online Instruction Manual relating to the manner of calculation of same.

59. In relation to the second appeal against the Respondent's refusal to grant retrospective amendment of the PCC Authorisation, the Grounds of Appeal advanced by the Appellant were:-

(i) No obvious negligence was or can be attributed to the Appellant;

(ii) Bonds are calculated on the average stock turnover time as per the Respondent's internal instructions manual and not on the Period of Discharge in the Authorisation;

(iii) The bond was always sufficient to cover the suspended duty; and,

(iv) No control visits or communication from the Respondent's local control officer took place until January 2013.

D. <u>Relevant Legislation & Materials</u>

60. The recitals to the Custom Code record that the Code must contain the general rules and procedures which ensure the implementation of the Tariff and other measures

introduced at Community level in connection with trade in goods between the Community and third countries; that customs authorities must be granted extensive powers of control and traders granted a right of appeal; and that the utmost care must be taken to prevent any fraud or irregularity liable to affect adversely the General Budget of the European Communities.

61. Article 2(1) of the Customs Code provides that:-

> *"Save as otherwise provided, either under international conventions or customary practices of a limited geographic and economic scope or under autonomous Community measures, Community customs rules shall apply uniformly throughout the customs territory of the Community."*

62. Chapter 3 of the Customs Code deals with the value of goods for customs purposes and Articles 28 and 29 provide that:-

> *"The provisions of this Chapter shall determine the customs value for the purposes of applying the Customs Tariff of the European Communities and non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods.*
>
> *Article 29*
>
> *1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33…"*

63. Article 59(1) provides that:-

> *"All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure."*

64. Article 84 provides that where the term "*procedure*" is used, it is understood as applying the case of non-Community goods, to processing under customs control amongst other arrangements. Article 85 further provides that the use of any customs procedure with economic impact shall be conditional upon authorisation being issued by the customs authorities.

65. Article 86 provides that:-

> *"Without prejudice to the additional special conditions governing the procedure in question, the authorisation referred to in Article 85 and that referred to in Article 100(1) shall be granted only:*
>
> - *to persons who offer every guarantee necessary for the proper conduct of the operations;*
> - *where the customs authorities can supervise and monitor the procedure without having to introduce administrative arrangements disproportionate to the economic needs involved."*

66. Article 87 provides as follows:-

> *"1. The conditions under which the procedure in question is used shall be set out in the authorisation.*
>
> *2. The holder of the authorisation shall notify the customs authorities of all factors arising after the authorisation was granted which may influence its continuation or content."*

67. Article 88 then provides that:-

"The customs authorities may make the placing of goods under a suspensive arrangement conditional upon the provision of security in order to ensure that any customs debt which may be incurred in respect of those goods will be paid.

Special provisions concerning the provision of security may be laid down in the context of a specific suspensive arrangement."

68. Article 89(1) provides that:-

"A suspensive arrangement with economic impact shall be discharged when a new customs-approved treatment use is assigned either to the goods placed under that arrangement or to compensating or processed products placed under it."

69. Articles 130 to 133 provide as follows:-

"Article 130

The procedure for processing under customs control shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them. Such products shall be termed processed products.

Article 131

The list of cases in which the procedure for processing under customs control may be used shall be determined in accordance with the committee procedure.

Article 132

Authorisation for processing under customs control shall be granted at the request of the person who carries out the processing or arranges for it to be carried out.

Article 133

Authorisation shall be granted only:

(a) to persons established in the Community;

(b) where the import goods can be identified in the processed products;

(c) where the goods cannot be economically restored after processing to their description or state as it was when they were placed under the procedure;

(d) where use of the procedure cannot result in circumvention of the effect of the rules concerning origin and quantitative restrictions applicable to the imported goods;

(e) where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled."

70. Article 189(1) deals with security to cover customs debt and provides that:-

"Where, in accordance with customs rules, the customs authorities require security to be provided in order to ensure payment of the customs debt, such security shall be provided by the person who is liable or who may become liable for that debt."

71. Article 204 of the Customs Code provides that:-

"1. A customs debt on importation shall be incurred through:

…

(b) non-compliance with the conditions governing the placing of the goods under the procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that the condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

72. Finally, Article 239(1) provides that:-

"Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, 238:

- *to be determined in accordance with the procedure of the committee;*
- *resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. Situations in which this provision may be applied and the procedures to be followed to that end shall be defined*

in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions."

73. Title III of the Implementing Regulation deals with customs procedures with economic impact and Article 496 defines "*authorisation*" as meaning permission by the customs authorities to use a customs procedure with economic impact, and defines "*period for discharge*" as meaning:-

"the time by which the goods or products must have been assigned new permitted customs-approved treatment or use including, as the case may be, in order to claim repayment of import duties after inward processing (drawback system), or in order to obtain total or partial relief from import duties upon release for free circulation after outward processing."

74. Article 497 provides *inter alia* that:-

"1. Application for authorisation shall be made in writing using the model set out in Annex 67.

2. The customs authorities may permit renewal or modification of an authorisation to be applied for by simple written request…"

75. Article 502 provides that:-

"1. Except where the economic conditions are deemed to be fulfilled pursuant to Chapters 3, 4 or 6, the authorisation shall not be granted without examination of the economic conditions by the customs authorities.

…

3. For the processing under customs control arrangements (Chapter 4), the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community."

76. Article 505 provides that:-

> *"Customs authorities competent to decide shall grant the authorisation as follows:*
>
> *(a) for an application under Article 497(1), using the model set out in Annex 67;*
>
> *(b) for an application under Article 497 (3), by acceptance of the customs declaration;*
>
> *(c) for an application for renewal or modification, by any appropriate act."*

77. Article 506 provides that:-

> *"The applicant shall be informed of the decision to issue an authorisation, or the reasons why the application was rejected, within 30 days or 60 days in the case of the customs warehousing arrangements, of the date the application was lodged or the date any requested outstanding or additional information is received by the customs authorities.*
>
> *These periods shall not apply in the case of a single authorisation unless it is issued under Article 501."*

78. Article 508 deals with retroactive authorisations and provides as follows:-

> *"1. Except for the customs warehousing arrangements, the customs authorities may issue a retroactive authorisation.*
>
> *Without prejudice to paragraphs 2 and 3, retroactive authorisation shall take effect at the earliest on the date on which the application was submitted.*

2. If an application concerns renewal of an authorisation for the same kind of operation and goods, and authorisation may be granted with retroactive effect from the date the original authorisation expired.

3. In exceptional circumstances, the retroactive effect of an authorisation may be extended further, but not more than one year before the date the application was submitted, provided a proven economic need exists and:

(a) the application is not related to attempted deception or to obvious negligence;

(b) the period of validity which would have been granted under Article 507 is not exceeded;

(c) the applicant's accounts confirm that all the requirements of the arrangements can be deemed to be met and, where appropriate, the goods can be identified for the period involved, and such accounts allow the arrangements to be controlled; and

(d) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the declaration."

79. In Chapter 4 of the Implementing Regulation, which deals with processing under customs control, Article 552(1) provides that:-

"For the type of goods and operations mentioned in Annex 76, Part A, the economic conditions shall be deemed to be fulfilled.

For other types of goods and operations examination of the economic conditions shall take place."

80. Annex 67 of the Implant and Regulation contains a form headed "*Authorisation to use a customs procedure with economic impact/end-use*", which is the application form

used to apply for a PCC Authorisation. Section 7 of the form requires an applicant to enter the quantity and value of the goods to be placed under the customs procedure and section 13 requires the applicant to enter the period for discharge in months. The explanatory notes to the form states that the applicant is to enter "*the estimated quantity of goods to be placed under the customs procedure*" and "*the estimated value in Euro or another currency of the goods intended to be placed under the customs procedure*." In relation to the period for discharge, the explanatory notes state that the applicant is to enter "*the estimated period needed for the operations to be carried out or use within the customs procedure(s) applied for.*"

81. I was also referred by the Appellant to the February and September 2015 versions of the Respondent's Instruction Manual on Processing under Customs Control. The front page of the Manual stated that it provided a guide to the interpretation of the law governing Processing under Customs Control, referred to the Customs Code and the Implementing Regulation, and said that the Instruction Manual should be read in conjunction with those Regulations.

82. Paragraph 2.3 of the Manual deals with security and the beginning thereof states as follows:-

> *"(Customs Code, Article 88)*
>
> *An Authorisation will not be issued until appropriate security has been provided to cover the duty suspended on the import goods. [Note however that where the trader is an Authorised Economic Operator (AEO), it will be possible to consider the possibility of not requiring a bond. In such a case the Control Officer should discuss with Customs Division as to whether or not a bond should be sought.]*

Normally, security is provided in the form of a bond issued by a bank or insurance company. During the first visit the Control Officer should emphasise the importance of putting security in place.

The purpose of the bond is to secure duties suspended and goods imported under a PCC Authorisation and to ensure compliance by the trader with the conditions attached to the Authorisation.

The amounts secured by the bond, referred to as the bond penalty, is calculated on the basis of the average rate of duty on imports during the average stock turnover period. The following is an example of a bond calculation:

Annual imports-	*€500,000*
Turnover period-	*Seven months*
Imports during turnover period taken as seven twelfths of annual imports-	*€291,667*
Duty @ 9.0% on €291,667	*€26,250*
Bond penalty-	*€27,000*

Bond penalties should be rounded up to the nearest thousand euros and a minimum penalty of €7,000 should be applied in all cases."

83. Paragraph 3.4 of the Manual deals with retrospective authorisation in the first part of same and states as follows:-

"(Article 508 Implementing Provisions)

As a general rule prior Authorisation is required for PCC, however a retrospective Authorisation may be issued in exceptional circumstances. The period of retrospection, either for a new Authorisation or amendment to an existing Authorisation, may not extend beyond one year before the application for Authorisation or amendment was lodged. Such retrospective Authorisations are only possible where:

i) there is no attempted deception or no negligence involved;

ii) the trader's accounts show that the conditions of the procedure can be met and;

iii) the situation of the import goods can be regularised including the invalidation of the relevant declarations."

84. The Appellant submitted that there had been an amendment to paragraph 2.3 of the Instruction Manual which changed the reference to "*average stock turnover period*" to "*period of discharge*". The Respondent disputed that any such amendment had been made, and said that a draft document which referred to "*period of discharge*", prepared for internal discussion purposes within Revenue, had been inadvertently released to the Revenue website. It was the Respondent's position that at all material times the Instruction Manual referred only to the bond level been calculated on the basis of the "*average stock turnover period*".

E. Evidence given on behalf of the Appellant

85. At the hearing of the appeal, I heard evidence on Oath from four witnesses on behalf of the Appellant, namely:-

(i) Ms [redacted] ("**Witness 1**");

(ii) Mr [redacted] ("**Witness 2**");

(iii) Mr [redacted] ("**Witness 3**"); and,

(iv) Mr [redacted] ("**Witness 4**").

Witness 1's Evidence

86. Witness 1 was the Financial Controller of the Appellant and gave evidence in relation to the history and activities of the company. She testified that the Appellant's tax compliance record was absolutely exemplary, and that it invariably overpaid tax because it took a very conservative approach.

87. She testified that most of the Appellant's competitors were based in China and that the industry sector was very competitive. Accordingly, PCC Authorisation was very important to the Appellant because it enabled a 6% or 6.5% saving on the cost of the [redacted] raw materials.

88. She testified that the Appellant had increased the period of discharge from three months in the first PCC Authorisation it obtained in 2007 to 12 months in the second PCC Authorisation it obtained in 2010. This was because the Appellant had developed a new product in 2009 which required the use of new raw materials in its manufacture. The Appellant's suppliers required orders of these raw materials to be of a certain minimum size, which in turn meant that some of those raw materials would not be consumed within a three-month period.

89. She testified that the Appellant did not realise that the change in the period of discharge had any implication for the level of bond required. She said that had they realised that, or if the Appellant had been notified that, it would result in a higher level

of bond being required, the Appellant would have taken out an increased bond; the level of bond had never been an issue for the Appellant.

90. The witness testified that the July 2010 audit was the Appellant's first audit and was a big learning curve for the company. She stated that the auditors had recommended a number of changes, including consolidating the number of items listed in the Authorisation. She said that the auditors told the Appellant that it was to stay within the quantity and value limits in the Authorisation and that she understood that this meant that the Appellant had to stay within the overall limits allowed by the Authorisation.

91. She testified that the auditors had also recommended that the Appellant review the amount of the bond, and that they had calculated that it needed to be increased to €520,000. She said that the Appellant had queried their calculation and it transpired that it was calculating on the basis of approximately €24 million of goods being imported and the Appellant requiring a 12-month period of discharge. The witness testified that she explained to the auditors her belief that this was incorrect, and that a bond level of approximately €260,000 was all that was required. She said that it was her understanding that no final decision was reached in relation to the level of bond that was required, that the figure of €520,000 was just a recommendation, and that the Respondent's local control officer would work with the Appellant to establish what level of bond was required.

92. The witness testified that in the two months subsequent to the 2010 audit, the Appellant consolidated the CN codes it was bringing in and reduced the number of import agents from ten down to one. The Appellant also applied to increase the overall value limit of the Authorisation from €13 million to €17 million. The Appellant also implemented the submission of a monthly Bill of Discharge.

93. The witness further testified that neither she nor any other person within the Appellant had any interaction with the Respondent's local control officer arising from the 2010 audit.

94. The witness next discussed the application made on the 17th of July 2012 by the Appellant's agent to increase the amount of [redacted] goods covered by the authorisation. She said this application was made because the Appellant was importing a lot of [redacted] goods and the customs duty thereon was 6.5%. She said that the Appellant worked with its suppliers to establish a bonded warehouse, so that the [redacted] goods could then be imported under the PCC procedure, and thereby achieve a 6.5% reduction in the costs coming from that supplier.

95. Asked about the Respondent's response on the 18th of July stating that the bond level needed to be increased, the witness testified that she had had no correspondence in relation to a request to change the bond level. The only thing of which the Appellant was aware was the recommendation of €520,000 following the 2010 audit, which the Appellant believed could not be correct. The witness testified that her understanding was that because the Appellant had changed the authorisation subsequent to the 2010 audit, and because there had been no correspondence in relation to a need to increase the bond level, the Respondent must have based the bond requirement on the average inventory holding, which accorded with her understanding of the risk.

96. The witness testified that she was unaware of the July exchange between the Respondent and the Appellant's agent in relation to the need to increase the bond. The first time she became aware of the Respondent's requirements in this regard was in December 2012, when a Revenue official asked her to contact the local control officer, saying that his approval was required for the amendment application and that the Revenue official had been unable to contact him.

97. The witness testified that she had tried to contact the local control officer by email and by phone on a number of occasions on and after the 4th of December and finally spoke to him on the 10th of December. She told him that the amendment application was awaiting his authorisation and he indicated that he wasn't aware that any action was required from him. He said that he would look into the matter straightaway and revert to the witness if he had any issues.

98. The witness stated that the Appellant first became aware in January 2013 that its second PCC Authorisation had expired at the end of [redacted] 2012. The Authorisation had stated on its face that was valid until [redacted] 2013 and the Appellant only became aware that this was incorrect when a supplier contacted the witness in late January 2013 to say that the Authorisation had expired.

99. The Appellant had applied through its agent for a renewal of the Authorisation. The Respondent's Economic Procedures Unit had replied on the 23rd of January 2013, stating that the "*request*" for an increase to the Appellant's bond had still not been put in place, and that the amendment application submitted in July 2012 was not granted due to the fact that the existing bond was insufficient. The Respondent stated that it had no choice but to delay renewal of the Authorisation until such time as the bond situation was rectified.

100. The witness testified that her email of the 4th of March 2013 (discussed at paragraph 35 *supra*) was written to set the record straight, because the Appellant was quite indignant at the assertions made by the Respondent. She said that only a recommendation had been made, the suggested figure of €520,000 was made as a very high level estimate and assumed that the majority of the Appellant's inventory was held for the total PCC period. The suggested figure had been calculated on the basis that the Appellant was holding all of its imported inventory for a full 12 months,

when in fact the Appellant held such inventory for between 40 and 45 days on average.

101. The witness explained that it had taken approximately six weeks to put the new bond in place, because the bond was obtained from a non-Irish bank and there were a number of legal and procedural requirements which had to be satisfied. She testified that the Appellant had done everything possible to expedite putting the bond in place and had treated the matter as urgent.

102. The witness further testified that she had attended a meeting with officials of the Respondent on the 19th of February 2014. It was at this meeting that the Appellant saw for the first time the letters from the Respondent's Economic Procedures Unit to its local control officer dated the 18th of January 2010 and the 30th of August 2012 (discussed at paragraphs 20 and 28 *supra*).

103. The witness confirmed that she had prepared the calculation of the maximum duty liability of €123,500 between January 2010 and December 2012 which had been sent to the Respondent on the 6th of May 2014 (discussed at paragraph 46 *supra*). The witness stated that 90% of the goods the Appellant imported under the PCC Authorisation were consumed within a very short timeframe, in the region of 30 days. She therefore sought to establish whether the Appellant had had a sufficient bond in place for 2010 to 2012. She therefore took the live Bill of Discharge which was submitted to the Respondent every month and established the closing inventory value of all imported items on the Authorisation in order to calculate the risk to the Respondent in each month during the period of the Authorisation. She said that the highest level of inventory was in December 2012, when the Appellant was holding €1.962 million of imported goods. As the average duty rate for those goods was approximately 6%, she had calculated that the potential duty risk to the Respondent

was €123,579, and therefore the bond of €170,000 that was in place was sufficient to protect the Respondent from any default on the part of the Appellant.

104. In cross-examination, the witness was asked about the July 2012 application to increase the value of the [redacted] goods imported under the PCC Authorisation from €50,000 to €8,050,000. She confirmed that the application was made with a view to saving the 6.5% duty the Appellant had formerly been paying in respect of those goods. She accepted that the Appellant had begun importing those goods in October 2012 notwithstanding that it had not received any formal response from the Respondent in relation to the amendment application.

105. She further accepted that the Appellant had begun using a firm called [redacted] as a customs warehouse in [redacted] 2012 but did not apply to add [redacted] as an operator to its PCC Authorisation until May 2013.

106. The witness accepted that the Respondent's letter of the 23rd of April 2007 enclosing its first PCC Authorisation had stated that in order to add further goods to the Authorisation, or to increase the authorised quantities or values of the goods to be processed, an application should be made to the Respondent in advance of importation, and that failure to acquire prior approval would result in the Appellant becoming liable to a customs debt. The witness was challenged as to why the Appellant believed it was appropriate to begin importing increased levels of [redacted] goods when the amendment application had not been approved by the Respondent. The witness stated that the Appellant had notified the Respondent of the proposed change in the authorisation four months in advance of the first importation, and that she had made every effort to contact the local control officer as soon as she became aware in November 2012 that the [redacted] goods being imported were not covered by the Authorisation.

107. The witness accepted that the Appellant was aware of the limits of the Authorisation. She said that a lot of points had been raised during the 2010 audit and the Appellant had put new processes in place to make their systems more robust, compliant and collaborative. She stated that the Appellant was dependent on the local control officer to advise them in relation to the correct practices and she said that all of his recommendations were put in place.

108. The witness accepted that the Appellant's Standard Operating Procedure had been amended following the 2010 audit to state that an amendment application would be made to the Respondent in the event that quantities or values were likely to be exceeded. She said that she did not realise that increasing the period of discharge to 12 months would trigger a requirement to increase the bond; six changes had been made to the 2010 authorisation without any requirement to change the bond.

109. The witness further did not accept that the Appellant would been aware that the increase in the period of discharge would necessarily result in a need to increase the level of the bond because the original Authorisation had a value limit of €24 million but this had been reduced to €17 million by the time of the 2010 audit.

110. In relation to the Respondent's auditors' recommendation that the bond be increased to €520,000, the witness stated that this was mistaken because it was based on an overall value of €24 million, not €13 million. She said that she had discussed this with the auditors and pointed out that their figure was based on an incorrect overall value and was furthermore based on a full 12-month period of discharge, when the Respondent's own guidance indicated that it was to be calculated on the basis of the average inventory holding. She said that the auditors told her that they could not clarify the issue at that time but that it would be followed up with the

Appellant's local control officer. She said that the Appellant subsequently made two changes to the Authorisation and there was no contact from the local control officer, so she came to the conclusion that the Respondent was satisfied that the bond was sufficient at the level of €170,000.

111. The witness reiterated that her belief was that the risk to the Respondent which the bond was intended to cover was based on the Appellant's live inventory balance, or the amount of imported goods that the Appellant had in stock at any point in time multiplied by the average rate of duty. It was on this basis that she had calculated the maximum risk as being €123,579 in December 2012 and she believed that this was consistent with the Respondent's Instruction Manual. It was for this reason that the Appellant had believed that the Respondent must have accepted that the bond of €170,000 was sufficient, notwithstanding the 2010 audit recommendation.

Witness 2's evidence

112. I next heard evidence from Mr [redacted] who was the Appellant's Supply Chain Manager and who was responsible for management and monitoring of raw materials and the submission of the monthly Bills of Discharge to the Respondent.

113. The witness testified that he had attended the pre-recommendations meeting with the Respondent's auditors in July 2010. He reiterated that it was the view of the Appellant at this time that the bond of €170,000 was sufficient to cover any duty liability that might arise.

114. He further testified that he had no interaction whatsoever with the Respondent's local control officer.

115. In relation to the July 2012 application to amend the Authorisation to allow for increased quantities and values of [redacted] goods, he testified that this had come about because the goods were being supplied by [redacted] America to [redacted] Europe, who in turn supplied them to the Appellant. The Appellant's agent had identified that the Appellant's Authorisation could be extended to cover the direct importation of the goods, which would save the Appellant the 6.5% duty which was being passed on to the Appellant by [redacted] Europe.

116. He said that it was his understanding that it was not necessary to add [redacted] as an operator to the Authorisation, in circumstances where the [redacted] goods were already covered by the Authorisation, albeit in significantly lesser quantities and values than the Appellant was now applying for. The increase in values and quantities would push the value of imported goods above the overall limit of €17.6 million on the Authorisation, and accordingly the Respondent was notified of the proposed increase.

117. The witness further testified that he had attended the meeting with the Respondent on the 19th of February 2014. One of the issues which arose at that meeting was a discrepancy between the Appellant's Bills of Discharge showing the levels of imports versus the actual SADs that were completed and recorded on the Respondent's systems. He said that the meeting had discussed the reasons why there might be a difference between the numbers recorded on the two systems.

118. In cross-examination, the witness stated that he was aware that [redacted] would effectively be operating a form of customs warehouse in relation to imports of the [redacted] goods which had previously been subject to customs duty on import. The Appellant was aware that [redacted] was the logistics provider for [redacted] in Dublin but the Appellant's commercial relationship was with [redacted], and [redacted] was essentially just a third party.

119. The witness further testified that he began to enquire into the July 2012 application for amendment of the Authorisation in or around November 2012 when he saw the [redacted] imports on the Bill of Discharge for October 2012. He said that it would not be unusual for the Appellant to have to wait for a couple of months for a decision on an amendment application; he said he felt at the time that a decision was in process and expected that it would be approved. It was only when they received the first Bill of Discharge that he realised that the Appellant actually did not have an authorisation for the [redacted] goods being imported. He accepted that the Appellant was aware that an amended authorisation had not been received at the time the Appellant commenced importing the increased quantities of [redacted] goods.

120. The witness further accepted that the 2013 audit disclosed that there was a discrepancy between the Respondent's figures based on the Single Administrative Documents that the Appellant had submitted for the imports in question and the Bills of Discharge that the Appellant was submitting to the Respondent. He stated that at the meeting in February 2014 following the 2013 audit, the Appellant had requested that the Bill of Discharge figures be used to calculate any duty liability because the Appellant believed the figures therein presented a more accurate view of the level of imports.

Witness 3's evidence

121. I next heard evidence from Mr [redacted] who testified that he had worked for the Respondent in its Customs division for 35 years.

122. The witness testified that the reason security in the form of bonds was sought from traders operating the PCC system was to secure the duty that was outstanding,

and that this was based on the stock turnover period, namely the amount of goods that the trader had on hand for a particular time. He said that average turnover was used to calculate the level of duty because that was where the duty would be outstanding, and that was the debt that would be held by the trader.

123. In relation to the economic conditions test, the witness testified that an applicant had to prove that there was an economic need for the procedures to take place. He said that the criteria for satisfying the economic conditions test were "*pretty broad*" and he had never seen an application refused on the grounds that the economic conditions test had not been satisfied.

124. Although the witness testified in direct examination that it was the Respondent that needed to be satisfied that the economic conditions test had been met, he accepted in cross-examination that the decision was in fact taken by the Department of Jobs, Enterprise and Innovation. He accepted that he was not familiar with the documentation and proofs that were submitted to the Department in relation to the economic conditions test, and he had not been aware that the Department had to be satisfied both in relation to applications for authorisations and in relation to applications to amend authorisations.

Witness 4's evidence

125. I further heard evidence from Mr [redacted] a Customs Consultant who had been advising the Appellant on customs issues since mid-2009.

126. The witness testified that he had recommended that the Appellant apply to increase the period of discharge from three months to 12 months when it was applying for its second Authorisation in 2010. He felt that this would allow the

Appellant ample time to import, process and discharge all of the raw materials imported under the PCC Authorisation.

127. The witness testified that he did not believe that the increase in the period of discharge would have any impact on the bond required to be given, because in his experience bonds were generally calculated on the basis of the average stock turnover time rather than the period of discharge. His view in this regard was based on his experience in dealing with other traders, with other economic procedures and on the Respondent's Instructions Manual and the Respondent's Traders' PCC Guide, which stated that a bond was calculated on the basis of average stock turnover time rather than anything else. He testified that between 1997 and 2009, he had advised some 20 or 30 firms in relation to economic procedures authorisations and in every case the level of bond was set on the base of the average stock turnover time rather than the period of discharge.

128. The witness further testified that he was not aware of any case where an application for PCC Authorisation had been refused on the application of the economic conditions test. He said that his experience of the procedure was that a trader's application was submitted to the Respondent, it was copied to the local control officer and then the economic conditions test was carried out by the Department of Jobs, Enterprise and Innovation.

129. In relation to the July 2012 Authorisation amendment application, he said that until October 2012 the [redacted] goods supplied to the Appellant were supplied in free circulation. [redacted] imported the material, paid the duty on import and the goods were physically stored in the [redacted] warehouse, from where they were dispatched to the Appellant as required. He testified that the Appellant never had, and still did not have, a direct relationship with [redacted].

130. The witness testified that the Respondent would been aware of the levels of imports undertaken by a trader at any given period of time under the Authorised Entries Processing system; the imported goods were recorded against the trader's VAT number or TAN number. In addition, monthly Bills of Discharge were submitted to the local control officer, who would therefore have sight of what was imported in a particular period, what was consumed in production, what was actually produced in a particular period, and what was left in stock in that particular period.

131. Cross-examined in relation to the July 2012 amendment application, the witness testified that [redacted] was authorised in its own right by the Respondent to operate the warehousing procedure as a specific customs suspension procedure. He clarified that the May 2013 application to have [redacted] listed as an operator on the Appellant's PCC Authorisation was to facilitate the return of faulty material to [redacted] for destruction. When asked whether he believed it would have been appropriate to inform the Respondent that [redacted] were being used to accept imported goods under the Appellant's PCC Authorisation, the witness testified that the Appellant's local control officer had been informed, and that [redacted]'s local control officer would also have been aware of the situation.

132. In relation to average stock turnover, the witness testified that this was calculated on the basis of the cost of goods sold divided by the stock on hand at any particular time. He stated that the increase in 2010 of the Appellant's period of discharge from three months to 12 months was to give sufficient time in the event that there was stock that was slow-moving or wasn't consumed in the manufacturing process within the three month period. He said that it was simply a prudent step to take in case there was slow-moving stock which might otherwise attract a charge to duty.

133. When asked if the fact that the Appellant did have some slow-moving stock was not indicative in itself that there was a greater risk to the Respondent which would require an increase in the level of bond, the witness reiterated that the bond was always calculated on the average stock turnover regardless of the period of discharge. Even if there were certain items of slow-moving stock, most of the stock was turned over approximately every 40 days so the risk in real terms was minimal. He said that on occasion stock might not be used within a three month period because of issues such as cancelled orders or quality issues. He reiterated his belief that the bond of €170,000 that was in place when the amendment application was made in July 2012 was sufficient to cover the risk to the Respondent notwithstanding the proposed substantial increase in the quantity and value of the [redacted] goods to be imported.

134. The witness accepted that the approach of the Respondent had begun to change in 2010 and thereafter bonds began to be calculated on the basis of period of discharge rather than on average stock turnover time. He accepted that there is no reference in the Customs Code to average stock turnover but said that his experience was that until 2010 the local control officer normally set the level of the bond based on the average stock turnover period.

F. <u>Evidence given on behalf of the Respondent</u>

135. I heard evidence from two witnesses on behalf of the Respondent, namely Miss [redacted] (**"Witness 5"**) and [redacted] (**"Witness 6"**).

Witness 5's evidence

136. The witness testified that she was the manager of the Special Customs Procedure Unit of the Respondent in Nenagh and had held that position since September 2008. She explained that this unit issued the authorisations for special procedures including warehousing, inward processing and processing under customs control. It was also the Respondent's policy unit for the legislation governing those particular procedures.

137. Having explained the PCC procedure, the witness testified that an application for PCC authorisation would set out exactly what the applicant required under the particular procedure and that would then be examined by her unit to make sure it complied with the relevant legislation and, once that had been ascertained, the application would be sent to the Department of Enterprise, Trade and Employment which would decide whether there was an economic need for the authorisation. The Department would carry out their own examination as to whether European producers or Irish producers might be adversely affected by the issue of the authorisation. If the Department came back to the Respondent with a positive result, the Respondent would make sure that the appropriate security was put in place and an authorisation would then be issued. In essence, her unit ensured that the various conditions in the legislation, and in particular the provisions of the Implementing Regulation, were complied with and liaised with the Department of Jobs, Enterprise and Innovation in relation to its role in that process.

138. She further testified that an application for an amendment of an existing authorisation would again be examined by her unit and, once it had been found to be a viable option, it would be sent to the Department for its examination of the economic needs criteria. She confirmed that all of the amendment applications made

by the Appellant would have been sent to the Department for its review and consideration. However, the amendment application made by the Appellant in July 2012 was not sent to the Department because the Respondent's review of same indicated that the level of guarantee was not sufficient.

139. In relation to the policy role carried out by her unit, she explained that it had responsibility for the interpretation of the legislation and that interpretation was based on Commission interpretation. A special expert group met approximately every two months with a view to establishing a common policy so that all Member States had uniformity in their interpretation of the legislation. These interpretations were communicated to the Respondent's officials and to taxpayers by the publication on the Respondent's website of Traders' Guidelines and the Respondent's Instruction Manual.

140. The witness testified that the Traders' Guidelines were published in July 2009 for the benefit of people operating special customs procedures. The Instruction Manual, in contrast, was written for the Respondent's supervising control officers and went into far more detail than the Traders' Guide.

141. The witness testified that there was no reference in the legislation to stock turnover periods; the only block of time relevant to the operation of special procedures was the period of discharge. She stated that the reference in the Respondent's Instruction Manual to stock turnover periods was the result of a desire to ensure that common language was used so that the concept would be better understood. She testified that control officers had always been aware that stock turnover meant stock turnover under the PCC system, which was in effect the period of discharge. She testified that for the purposes of the governing legislation, stock turnover and period of discharge meant one and the same thing.

142. The witness testified that under the PCC legislation the stock turnover was the length of time that imported goods were in under the procedure and this was determined by a control officer on the advice of the trader. The bond was then calculated on the basis of the period of discharge and she testified that it had been calculated using the same formula for a period of some 20 years prior to the change of the legislation. The calculation had always been 100% based on the period of discharge, which the Respondent deemed to be the same thing as the stock turnover period. The period of discharge used by the Respondent to calculate the level of security required was the period of discharge specified by the applicant for authorisation. She clarified that the period of discharge given by an applicant would be checked by the control officer to ensure that it wasn't longer than necessary and that applicants would be advised that the period of discharge would affect the level of bond required.

143. The witness further testified that the period of discharge was the time taken to bring in the imported goods, process the product and then discharge them from the procedure. Entry to the procedure was by declaration and exit from the procedure was either by a declaration or a Bill of Discharge confirming that the goods had been released from the procedure. The applicant would specify that length of time in their application form and would furnish the Respondent with the quantity and value figures for the duration of the authorisation, and the Respondent would then calculate the level of security required based on those two pieces of information. Accordingly, the longer the period of discharge, the greater the level of bond that would be required because a longer period of time would result in a greater risk in relation to the suspension of customs duties.

144. In relation to the version of the Respondent's Instruction Manual which made reference to period of discharge rather than stock turnover period, the witness testified that the PCC Instruction Manual had been used as a base for certain proposed changes which the Respondent was going to make to their operational instruction manuals in anticipation of the introduction of the Uniform Customs Code in 2016. She confirmed that it had been published by mistake and did not reflect a change in policy or interpretation by the Respondent.

145. In relation to the provisions of Article 88 of the Customs code allowing suspensive procedure authorisations being made conditional upon the provision of security, the witness testified that, contrary to the view expressed by Witness 4, her understanding was that almost all Member States other than the United Kingdom had some form of security requirements in place. This was because the customs duty involved was European Union money and was collected by the Respondent on behalf of the EU. Accordingly, the State would have a liability to the Commission in the event that customs duty due was not collected. She testified that the Commission carried out regular audits of the application of special customs procedures by national customs authorities.

146. In relation to the Authorisations issued to the Appellant, the witness testified that the Authorisation itself contained the conditions of the authorisation. She confirmed that the covering letter of the [redacted]rd of [redacted] 2007 sent with the original Authorisation was a standard letter which referred to standard conditions which had to be carefully noted by the recipient. Three documents were always sent to an authorisation holder, namely the covering letter, the actual authorisation and the set of 22 general conditions which were to be signed by the authorisation holder. The witness confirmed that the same covering letter was sent to all authorisation holders because the authorisation had been granted on the basis of the information contained

in the application. Any changes to the authorisation would have to be approved in advance because if something had not been approved it was outside of the authorisation. Any amendment, other than a name change or a VAT change, would have to be sent to the Department for approval.

147. The witness confirmed that she had permitted a retrospective amendment of the original Authorisation in May of 2010 to cover the Appellant having exceeded quantities and value limits. She testified that she had done this because the Respondent's auditor had formed the view that the Appellant had grounds for exceptional circumstances. She further confirmed that the decision to grant that retrospection was also approved by the Department in relation to the economic conditions requirement.

148. In relation to the recommendation arising from the 2010 audit that the Appellant submits monthly Bills of Discharge including the diminishing balances of the quantities and values, the witness testified that this was essentially a recommendation that the Appellant use the Bills of Discharge method as a means of identifying well in advance when issues might arise with limits being reached under the Authorisation.

149. In relation to the July 2012 application for amendment of the Authorisation, the witness stated that the Respondent had informed the Appellant's agent that the guarantee was insufficient. She understood that the Appellant's agent was to look into the situation but the Respondent had heard nothing further from anybody in relation to the guarantee, and so the Authorisation was not updated. She stated that notwithstanding the email from the Appellant's agent of the 18th of July 2012 (discussed at paragraph 27 *supra*), the existing bond was still in place when the application for renewal of the Authorisation was received in January 2013.

150. The witness testified that the Appellant had been given a temporary authorisation when the second Authorisation expired because the Authorisation had an error on its face as to its expiry date. She stated that the Respondent had spotted the error towards the end of 2012 and contacted the Appellant's agent and told him that the Appellant would be given a further 60 days to submit a new application.

151. The witness further testified that the application for retrospective amendment made in September 2013 arose from the finding of the 2013 audit that quantity and value limits had been exceeded in relation to a number of items. Among the items on which there was an excess were the [redacted] goods which had been the subject of the earlier application in July of 2012.

152. The witness testified that the September 2013 amendment application was refused because the Respondent was not satisfied that there existed the exceptional circumstances necessary to allow the application. She stated that retrospective amendment and been granted in 2010 because the Respondent's auditor felt that exceptional circumstances did exist and he was satisfied that all of the issues identified in the audit would be addressed going forward. However, when the 2013 audit had identified the same type of non-compliance issues, the Respondent formed the view that exceptional circumstances could not be said to exist. She further testified that she felt she could not say that there had been no obvious negligence on the part of the Appellant in relation to the breaches of the quantity and value limits. She stated that she had also had regard to the Appellant's failure to submit Bills of Discharge in a timely manner showing the reducing quantities and values limits.

153. In cross-examination, the witness accepted that the Respondent's Instruction Manual was available to the public and could be used and considered by members of the public.

154. The witness did not accept that there was a history of the Respondent calculating the level of bond required on the basis of average stock turnover rather than the period of discharge; she stated that the view of the Respondent was that stock turnover period meant one and the same thing as period of discharge. Stock turnover was used as a "*simplistic term*" for the period of discharge, and the calculation of the security required had always been done on the basis of the actual period of discharge.

155. The witness testified that she was not in a position to comment on whether or not there had been adequate contact between the Respondent's local control officer and the Appellant in relation to agreeing a new bond level following the 2010 audit. However, she stated that her belief was that responsibility for implementing the audit recommendation that the bond be increased lay first and foremost with the Appellant. It appeared to her that the Appellant had agreed to implement the audit recommendations but had done nothing about doing so.

156. In relation to the use of the word "*recommendation*" in the audit letter, she said that this was simply a polite word but it was a strong recommendation and it was the Appellant's responsibility to ensure that it was in compliance with the conditions of its Authorisation. The witness did not accept that the amendments to the Authorisation, including an increase in the value limits, approved by the Respondent subsequent to July 2010 affected the position in this regard.

Evidence of Witness 6

157. I heard evidence from [redacted] a former Customs Officer with the Respondent, who had been both the Patrol Officer and the Case Officer in relation to audits in the Respondent's Large Cases Division.

158. The witness testified that he had been one of the two auditors who carried out the audit of the Appellant in 2013. He stated that the Appellant had effectively been given a degree of leniency by the Respondent in being allowed to rely upon Bills of Discharge rather than SADs when calculating its compliance with quantity and value limits. The witness testified that he had requested documentation and supporting documentation in relation to 49 SADs that he had identified for the company and, having examined same, he wrote his letter of the 24th of September 2013 (discussed at paragraph 40 *supra*). That letter identified some 29 issues, and some of those issues required a reconciliation between the Appellant's figures and the figures contained in the SADs.

159. Item 14 in the letter referred to the [redacted] goods and noted that the Appellant had requested new authorisation limits of €8.05 million in July 2012. The witness testified that the auditors were waiting for a decision from Nenagh as to whether or not the Appellant's general retrospection application would be granted, and that this was conditional on the bond being put in place. He testified that the Appellant had applied for retrospection on the 19th of September 2013, after the auditors had verbally flagged the issues identified in his letter.

160. The witness confirmed that the email from the Appellant's agent of the 12th of November 2013 did not dispute the auditors' calculation of the quantum of the duty liability arising from the breaches of the value limits but instead asserted that there was no provision in the legislation which allowed for a quantitative limit to be applied

to a PCC Authorisation. The witness stated that he had replied to the agent, stating that a duty liability arose pursuant to Article 204(1)(b) of the Customs Code.

161. The witness further discussed an email which he had sent the Appellant's agent on the 4th of December 2013, which recorded the fact that the Appellant had confirmed in the course of the audit that the Bills of Discharge which the Appellant was supposedly relying upon were incorrect; while the Appellant had given a monthly breakdown of the figures for 2012, the breakdown for 2010 and 2011 was still outstanding as of December 2013. The discrepancy between the figures on the SADs and the Bills of Discharge had still not been reconciled as of February 2014 and so the witness agreed to a meeting with the Appellant and its agent to discuss the audit. The witness confirmed that, following that meeting, the Appellant had confirmed by email dated the 28th of February 2014 that the Appellant was not taking any issue with the Respondent's calculation of the duty liability of €357,036.42 but had reiterated its position that no duty liability could exist were quantities and/or values on a PCC Authorisation had been exceeded.

162. The witness further confirmed that by his letter of the 10th of October 2014, he had formally raised the Common Customs Tariff debt of €357,036.42 on the Appellant.

163. The witness accepted in cross-examination that the request for retrospective amendment made by the Appellant in September 2013 was made because the Appellant had breached individual quantity and value limits in respect of seven items, and not because there had been a breach of the overall value limit in the Authorisation.

164. The witness confirmed that his email dated the 26th of September 2013 (discussed at paragraph 41 *supra*) was written in response to a request from the

Respondent's unit in Nenagh for his recommendation in relation to the Appellant's September 2013 application for retrospective amendment of the Authorisation. He confirmed that his email recorded that the Appellant had requested the Respondent to provide the new bond amount on the 18th of July 2012, and that he was familiar with that request as a result of his preparation for the audit. He stated that he had discussed the July 2012 amendment request with Nenagh while preparing for the audit. His understanding was that the processing of the request had been "*frozen*" pending an increased bond being put in place, and he testified that he was not aware at the time of the audit of any refusal by the Respondent of the Appellant's July 2012 request. He testified that it was correct that the Appellant had received no correspondence to indicate that the July 2012 request had been rejected; at the time of the commencement of the audit, the Appellant had requested an amendment but they had not received a decision one way or the other. He accepted that this was surprising, and that he would have expected a response from the Respondent.

165. The witness testified that he saw no reason, because of the increased trade that the Appellant was operating, that the Appellant's request for an increased level of authorisation made in July 2012 should be refused. He had therefore recommended to Nenagh that the July 2012 application for amendment should be "*reactivated*" and "*looked at*".

166. The witness confirmed that the original 2007 Authorisation granted by the Respondent recorded a period of discharge of three months, and that he understood this to mean that imported goods had to be fully discharged and put through processing or manufacturing within a period of three months from the date of their arrival as recorded on the Customs SAD. He said that this was a maximum period, subject to the Appellant looking for an extension of time. He stated that he understood that the average stock turnover period was the same as the period of

discharge; he stated that the former was "*a trade description rather than a customs thing*". He accepted, however, that the Respondent's Instruction Manuals on Processing under Customs Control made reference to the average stock turnover period.

G. ***Submissions of the Appellant***

The First Appeal – Customs Duty Liability

167. In relation to the first appeal against the imposition of a customs debt of €357,036.42 because of an alleged failure on the part of the Appellant to comply with the conditions of the PCC Authorisation, the Appellant submitted that its first ground of appeal was that the condition which was allegedly breached was a numerical quantity and value limit which the Respondent purported to apply to the Authorisation. The Appellant submitted that as a matter of EU law, having regard in particular to the judgement of the Court of Justice and the opinion of the Advocate General in ***Temic***, it is not possible to impose a quantitative or value limit on a PCC Authorisation.

168. Secondly, and without prejudice to the first ground, the Appellant contended that no decision was made by the Respondent in relation to its application in July 2012 to increase its Authorisation in respect of the [redacted] goods, which would have had the effect of increasing the overall value limit of the Authorisation. On the 7th of March 2013, the Appellant had its Authorisation renewed by the Respondent. That provided for an increased bond and the levels sought by the Appellant, and the Appellant had

a legitimate expectation that the renewal of the Authorisation had in effect determined the application for amendment in its favour.

169. In the alternative, if the Respondent had refused the July 2012 application for amendment, the decision to refuse was made on the basis of the Appellant having had an insufficient bond in place. The Appellant submitted that the manner in which the increased bond level was calculated was inconsistent with the Respondent's own Instruction Manual in relation to bond calculation and inconsistent with the manner in which bonds had been calculated in the past. The Appellant submitted that there is a distinction between the average stock turnover period, which was the concept referred to in the Respondent's Instruction Manual at the relevant time, and the period for discharge which was the maximum period for which one could keep products within the PCC system. The Appellant submitted that there was an increase in the period for discharge between the 2007 Authorisation and the 2010 Authorisation, but this did not mean that there was a consequent need for an increase the level of the bond.

170. Counsel for the Appellant emphasised that the letter sent by the Respondent's auditors on the 20th of July 2010 following the first audit made reference to "*recommendations*" to ensure compliance going forward. He submitted that the Respondent had made a number of subsequent attempts to elevate the status of those recommendations; the decision ultimately reached by the Respondent's Designated Appeal Officer on the 9th of December 2014 effectively re-characterised the recommendations as requirements.

171. The auditors had recommended that the level of the bond be increased from €170,000 to €520,000, and that this should be done in consultation with the local control officer. Counsel for the Appellant pointed out that the evidence of Witness 1 had been that the suggested figure of €520,000 could not have been correct. He

further pointed out that the evidence was that there had not been any interaction or consultation with the Respondent's local control officer in terms of that recommendation to increase the level of the bond.

172. Counsel for the Appellant further pointed out that in August of 2010, the Appellant had sought and obtained an amendment to its PCC Authorisation. There was a consolidation of the tariff codes in Annex 1 and an increase in certain quantities and values listed therein. Counsel said it was significant that this amendment had been granted without any requirement for an increased level of bond, notwithstanding the recommendation following the 2010 audit. Similarly, the Appellant had been granted retroactive authorisation pursuant to Article 508 of the Implementing Regulation following the 2010 audit, again without having to first increase the level of the bond.

173. The covering letter enclosing the second Authorisation granted to the Appellant for 2010 to 2012 (albeit the letter and the Authorisation both mistakenly recorded that it would expire on the [redacted]st of [redacted] 2013) stated that the Appellant should carefully note that in order to add further goods to the Authorisation, or to increase the authorised quantities and values of the goods to be processed, an application would have to be made to the Respondent in advance of importation. A failure to make a timely application might result in the Appellant becoming liable to a customs debt. Furthermore, to engage in Processing under Customs Control, the Appellant was required to be in possession of a valid authorisation at all times.

174. Counsel submitted that the Appellant had subsequent to the 2010 audit imported goods pursuant to the Authorisation. While the Respondent's local control officer was supposed to be involved in the monitoring process, the evidence had shown that he was not.

175. Turning to the July 2012 amendment application, Counsel submitted that on making the application the Appellant's agent had been asked to advise as to the current position regarding the revised bond amount. The Appellant's agent had replied that he was unaware that the bond needed to be increased but that if the bond level could be agreed, he would request the Appellant to amend the bond accordingly. Matters appeared to have rested there. The evidence of Witness 1 was that she had endeavoured to ascertain the current position in December 2012 but the Respondent now accepted that no formal decision was ever made in relation to the amendment application; no new bond amount was ever agreed with the Appellant and there was no refusal by the Respondent to grant the increased quantity and value limits in respect of the [redacted] goods.

176. The issue arose again following the Appellant's application for a new Authorisation in January of 2013. Witness 5 had emailed the Appellant's agent on the 23rd of January 2013 to say that what she characterised as "*a request*" for an increase to the Appellant's bond had still not been put in place. She further stated that the amendment application submitted in July 2012 for an increase in the value and quantity of the [redacted] goods had not been granted because of the fact that the existing bond was insufficient to cover the Authorisation as it stood, and therefore no increase in any value or quantity could be allowed. Counsel for the Appellant submitted that this was incorrect in the sense that there had been no formal communication on the part of the Respondent to the Appellant or its agent, and similarly it was incorrect to say that there had been a formal refusal or decision not to grant the increase in quantity and value.

177. Counsel pointed out that the Appellant's agent had replied suggesting that the amended Annex 1 values and quantities for 2013 to 2015 be used to set the level of the bond. He had asked that the Annex be sent to the Respondent's local control

officer with the request that he set the level of the bond required. Similarly, the agent would contact the Respondent's Large Cases Division and ask their opinion regarding the revised bond figure. He stated that once the new bond figure was communicated to him, he would contact the Appellant and instruct it to initiate the bond increase immediately. Counsel submitted that this demonstrated the *bona fides* of the Appellant; there was no unwillingness on the part of the Appellant to fix an increased bond amount if same was requested, and the Appellant's agent had proactively suggested the values and quantities that might be used to set the level of the bond and requested that the local control officer set the amount required.

178. Counsel further submitted that the Respondent, in forming the view that the level of the bond was insufficient, believed that the level of the bond should be calculated by working out the average rate of duty on total imports during the period for discharge permitted by the Authorisation. It was the Appellant's case that there was a clear difference between the period for discharge on the one hand and the average stock turnover period on the other. The first was the maximum time period within which products could be retained within the PCC system without them becoming liable to duty. The second was the average period of time it took for authorised goods to go through the production process. Counsel submitted that the Respondent's Instruction Manuals in 2009, 2012 and 2015 had consistently stated that average stock turnover period, and not the period for discharge, was the appropriate time period by which to calculate the level of bond security.

179. Notwithstanding the Respondent's own guidance, the Respondent had taken the view in 2013 that the bond level needed to be increased to €880,000. The Appellant had complied with this, and the increased bond had been put in place as quickly as the Appellant was able. Counsel submitted that this again showed that the Appellant was acting in good faith.

180. Counsel further submitted that following the grant of the third Authorisation on the 7th of March 2013, with effect from the [redacted]st of [redacted]2013, the Appellant believed that all outstanding issues relating to its PCC Authorisation from July 2012 to that point had been resolved. The Respondent had not raised any issue in this regard until the commencement of the second audit in September 2013.

181. There had been extensive communications between the Appellant, the Appellant's agent and the Respondent following the September 2013 audit. The Appellant and its agent had consistently expressed its view that the relevant legislation did not contain any provision which would permit a quantitative restriction or limit to be applied to a PCC authorisation. Counsel submitted that as value limits could only have a relevance to the calculation of the bond penalty, and because the bond was only required as security in the event of a failure to meet an obligation to pay customs duty, it was somewhat illogical for the Respondent to contend that the level of the bond could be an issue when amending an authorisation for a retrospective period during which no such failure occurred.

182. Counsel noted that the exchange of correspondence showed that the Respondent believed that the ***Temic*** ruling was not of relevance because it dealt with the customs legislation in place prior to the enactment of the Customs Code and the Implementing Regulation. However, the Customs Code had simply consolidated the existing customs legislation and did not make any substantive amendment to the existing provisions in relation to quantitative limits.

183. Counsel pointed out that the correspondence also recorded the Respondent's view that the ***Temic*** decision merely applied to quantitative limits imposed by a customs authority. The Respondent had stated that no such limits had been imposed by Customs; the quantities and values applied for by the Appellant were granted and

therefore the ruling had no relevance. The Appellant's position was that it had not applied for the quantities or values listed in the Authorisation; it had instead provided, as required by the application form, the "*estimated value*" of the goods to be placed under the procedure. Counsel submitted that an estimated value could not be intended to be a quantitative limit and, if it was, then it was being imposed by the customs authority because there was nothing in the Customs Code or the Implementing Regulation that provided for such a limitation.

184. Counsel submitted that at the conclusion of the 2013 audit, the Appellant had been informed that the quantity and value limits for 7 of the goods authorised for processing under customs control had been exceeded, and that it should therefore apply for retroactive authorisation pursuant to Article 508(3) of the Implementing Regulation. The Appellant had duly made that application on the 19th of September 2013. The Respondent had emailed the Appellant on the 23rd of September to state that retrospective amendments were limited to a period of 12 months prior to the date of application, and therefore it could only consider amending the values in the Authorisation for the period from the 19th of September 2012 to the end of the Authorisation on the [redacted]st of [redacted] 2012. The Appellant had replied the following day, stating that because it had renewed the PCC Authorisation in [redacted] 2013, it did not realise that it needed to get a retrospective amendment on the old Authorisation.

185. The Respondent had then sent an email on the 10th of April 2014, stating that the application for retrospective amendment could not be granted because the bond of €170,000 in place during the second Authorisation was not sufficient to cover the duty at risk for the original values. Counsel stated that the evidence of Witness 1 had been that the Appellant had replied to the Respondent showing that the bond in place had at all times been of a sufficient level to cover the risk to the Respondent. The highest level of stock had been €1.962 million in December 2012, consistent with the

increase in the Appellant's trade in the second half of 2012. Applying the average rate of duty to that figure, the maximum duty liability during the currency of the Authorisation was €123,579, which was well within the level of the bond.

186. On the 8th of May 2014, Witness 6 had written to the Appellant stating that he had determined that the Appellant had exceeded thresholds in respect of its PCC Authorisation during the period from July to December 2012 and listing the seven goods the subject of the alleged breach. Witness 6 indicated the possibility of an adverse decision and asked the Appellant to give reasons why a customs debt should not be established.

187. Counsel for the Appellant then took me through the subsequent exchanges of correspondence dealing with both the alleged breach of quantity and value limits and the Appellant's application for retrospective amendment of the Authorisation.

188. Having highlighted what the Appellant submitted were the key aspects of the evidence given on its behalf, Counsel then addressed me on the principles of statutory interpretation I ought to apply in determining the appeals. He submitted that in interpreting the relevant provisions of the Customs Code and the Implementing Regulation, my starting point should be the wording of the legislation itself. He further submitted that the Appellant was relying on the principle against doubtful penalisation. He further submitted that I was entitled to take a teleological or purposive approach when interpreting the Customs Code and the provisions governing the PCC procedure.

189. Counsel then referred me to Articles 84, 87 and 88, and pointed out that Article 87(1) provides that the conditions under which the procedure in question is used shall be set out in the authorisation. He further emphasised that the wording of Article 88 made it clear that the purpose of the provision of security by a trader was

to ensure that any customs debt which might be incurred in respect of goods would be paid.

190. Counsel next referred me to Articles 130 to 133. He referred to the five conditions for authorisation listed in Article 133, and in particular that listed in subparagraph (e), and submitted that it was clear therefrom that the function of the PCC system was to enable the creation and maintenance of processing activities within the Community.

191. Counsel further referred me to Article 189, and noted that the security to cover a customs debt is to be provided by the person who is or may become liable for that debt, and that the customs authorities were only permitted to require one security in respect of each customs debt. Counsel further referred me to the provisions of Article 204(1)(b), which provides that a customs debt on importation shall arise through non-compliance with a condition governing the placing of goods under a suspensive customs procedure.

192. Turning to the Implementing Regulation, Counsel referred me to Article 496(m) and the definition of "*period for discharge*" contained therein. While the Appellant accepted that there was no reference in the legislation to average stock turnover period, Counsel submitted that there was equally nothing in the legislation which stated or suggested that period for discharge was the appropriate time period to be used when calculating the appropriate level of a bond.

193. Counsel reiterated that the Appellant believed that the period for discharge was not the appropriate way to calculate the level of a bond because the purpose of security like a bond was to secure sums of customs duty which might be at issue. In this regard, it was only the stock which a trader held under the PCC system at any particular period of time in respect of which a bonding requirement might be

required. The period for discharge was the maximum period for which stock can be held under the PCC system, but the length of the period for discharge did not impact on the amount of stock which a trader held at any particular period of time and, consequently, on the level of security which might be appropriate to put in place.

194. Counsel emphasised that the uncontradicted evidence of Witness 1 was that the level of bond throughout the currency of the second Authorisation was adequate to cover any risk to the Respondent and, furthermore, was calculated correctly in accordance with the Respondent's own guidance. He submitted that the Respondent's view that there was an inadequacy in the bond, which had permeated all of its later dealings with the Appellant, was simply incorrect.

195. Article 497 provides that an application for authorisation was to be made in writing using the model set out in Annex 67.

196. Counsel further referred me to Article 502 dealing with the economic conditions test, and noted that Article 502(3) provided that for processing under customs control arrangements, the examination of the economic conditions had to establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community.

197. Counsel referred me to Article 506, which requires an applicant to be informed of the reasons for the rejection of an application for use of the PCC system within a period of 30 days. He further referred me to the provisions of Article 508, which permits the granting of a retroactive authorisation which can, in exceptional circumstances, be for up to one year before the date the application is submitted, provided there is a proven economic need and provided the application is not related to attempted deception or to obvious negligence.

198. Turning to the Respondent's Instruction Manual, Counsel submitted that it was available generally online and was not exclusively available to officials of the Respondent. He noted that it was described as "*a guide to the interpretation of the law governing Processing under Customs Control*" and was to be read in conjunction with the Customs Code and the Implementing Regulation. Counsel further referred me paragraph 2.3 of the Manual, which stated:-

> *"The purpose of a bond is to secure duties suspended on goods imported under a PCC Authorisation and to ensure compliance by the trader with the conditions attached to the Authorisation."*

199. Counsel submitted that it was clear that the Respondent accepted that a revised version of the Manual had been published online, albeit inadvertently and apparently for a short period, which had made reference to the level of bond being calculated by reference to the period for discharge rather than to the stock turnover period. He submitted that this was clearly relevant to the issue of whether there were exceptional circumstances in relation to the Appellant's application for retroactive authorisation and, furthermore, to the question of whether there had been obvious negligence on the part of the Appellant.

200. More fundamentally, however, Counsel submitted that the function of the bond was to secure outstanding amounts and the evidence before me was that the bond which was in place was at all times sufficient to secure the payment of outstanding amounts. Furthermore, the amount of the bond was consistent with the Respondent's own documentation and, in particular, with the Instruction Manual.

201. Counsel submitted that, notwithstanding the evidence given on behalf of the Respondent, there is a clear distinction to be drawn between the concepts of the average stock turnover period and the period for discharge. He submitted that it was

clear from the definition in the Customs Code that the period for discharge meant the maximum period under which goods could remain under the PCC system, and Witness 6 had confirmed that this was the case.

202. In contrast, he submitted that the average stock turnover period was a relatively clear concept and meant the average amount of time that goods remained in the PCC system prior to being discharged. He stated that the Respondent's Instruction Manual made it clear that it was the average stock turnover period that was used to calculate the appropriate amount of security, and that the uncontroverted evidence of Witness 3 and Witness 4 was that it was an established practice to use the average stock turnover period when calculating the level of security required. Counsel submitted that this was entirely logical in circumstances where the function of any bond or security bolster secure the payment of outstanding duty.

203. Counsel submitted that it was clear from the email sent by Witness 2 on the 6th of May 2014 with the appended calculations prepared by Witness 1 that, notwithstanding the increase in the Appellant's turnover in the second half of 2010, the bond in place was at all times sufficient to cover the duty potentially payable on the goods held under the PCC Authorisation. Counsel pointed out that this position was maintained by Witness 1 and Witness 2 at the meeting they had with the Respondent's auditors in July 2010, at which they had indicated that €520,000 could not be the correct level for the bond. He stated that their uncontradicted evidence was that they believed that there would be further liaison with the Respondent in relation to setting the correct level of the bond but there had however been no contact with the Respondent's local control officer, who was charged with engaging with the Appellant in relation to the bond level.

204. Counsel submitted that it was clear from the evidence that in January 2013, Witness 5 had an incorrect understanding that something had been conveyed to the Appellant to the effect that authorisation was being refused in circumstances where the level of its bond was insufficient. This in turn has led to the further interactions between the parties up to and including the actual decisions in December 2014 the subject of these appeals. Counsel submitted that the decisions being appealed effectively elevated the significance of the recommendations made at the end of the 2010 audit into requirements with which the Appellant was purportedly non-compliant.

205. Counsel submitted that the decision in ***Temic***, when read in conjunction with the Opinion in the case of the Advocate General, was of considerable relevance to the issue of quantitative restrictions. The facts in the case were that the taxpayer was involved in recovering precious metals from defective electrical and electronic circuits. The relevant German customs authority had sought to impose a limit on the quantity of goods that could be imported for inward processing and discharged by way of PCC by the taxpayer; the authorisation limited the quantity of goods which would be subject to PCC for the purpose of recovering the precious metals so that that quantity would be proportionate to the number of usable circuits that were being exported. The question for consideration was whether such a restriction was lawful.

206. The facts of the case were set out in more detail in paragraph 2 of the Advocate General's Opinion, which stated that in January 1991 the German customs authority had granted the taxpayer an authorisation for inward processing, under the suspension system, of unmeasured integrated circuits from the Far East. The processing of those products by the taxpayer consisted in testing or measuring them, after which the usable circuits were identified and separated from those which were defective. The usable circuits ("A goods") were for the most part intended for re-

export from the Community. For the unusable circuits ("B goods"), the taxpayer had been granted authorisation for them to be placed under the system of processing under customs control for the purpose of recovering the precious metals they contained. The second authorisation, however, was granted by the customs authority only for a quantity of B goods proportional to the quantity of A goods actually re-exported. It was against that limitation that the taxpayer commenced legal proceedings, claiming that it was entitled to an authorisation without any quantitative limits.

207. Having outlined the relevant legislative provisions, which Counsel submitted were materially identical to the legislation under consideration in these appeals, the Advocate General opined as follows:-

> *"10. Against that background, we come to the essential issue in the case, namely the scope of the authorisation referred to in Article 18 of the basic regulation.*
>
> *That provision, in providing as a possible alternative way of discharging the inward processing arrangements for, inter alia, placing of the compensating products under the system of processing under customs control, requires that in such cases an appropriate authorisation be granted by the competent authority. Also, under that provision, the authorisations are to be granted 'where circumstances so warrant'.*
>
> *11. It is common ground that the provision imposes no obligation on the customs authority to grant the authorisation in question only for a quantity of goods proportional to the quantity of goods re-exported. Still less does the provision explicitly entitle the authority to do so.*

The all too broad formulation of the last sentence of paragraph 3 ('shall grant this authorisation where circumstances so warrant') relates to the conditions for issue of the authorisation, but neither requires nor expressly allows it to be limited quantitatively by reference to any particular criterion. The authorisation therefore appears, at least where the relevant conditions are fulfilled, to constitute an unconditional measure.

12. The preliminary problem therefore arises of establishing, in the absence of an express provision, what those conditions are. In other words, it is necessary to ask of what conditions the competent authority must verify fulfilment before granting the authorisation.

I think it is reasonable in that connection to state that the circumstances are the same as those which must exist for goods to qualify in general for the system of processing under customs control, as indicated in Article 4 of Regulation No 2763/83. The conditions are of a personal and substantive nature, being intended to ensure that application of the system does not lead to an unjustified advantage for the holder of the authorisation at the expense of Community producers of competing goods and of the finances of the Community. There is no reason to conclude that those conditions should not necessarily exist, as a precondition for eligibility, even where the goods for which the benefit of the system is sought have previously been subject to inward processing arrangements.

However, where those conditions are fulfilled, it seems to me that the authorisation must be granted. Indeed, it would be unthinkable for the authority with responsibility for granting authorisation to enjoy discretion. Otherwise applicants would be exposed to the risk of differences of treatment which would

be incompatible with the purposes and functioning of the system and with one or more fundamental principles of Community law.

13. Having regard to the principle whereby the authorisation is granted when the preconditions are fulfilled, but is withheld when they are not, I find it difficult to imagine that the authority requested to issue the authorisation could have any right to impose quantitative limits on it. "

208. Counsel submitted that this view had been echoed by the Court of Justice in its decision, where it stated in paragraphs 25 and 26 that:-

"Moreover, it must be pointed out, as the Advocate General does in paragraph 11 of his Opinion, that the formulation of the first subparagraph of Article 18(3) of Regulation No 1999/85 neither requires nor entitles the customs authority to attach any quantitative limit to the authorisation.

In providing that the customs authority may grant authorisation for other ways of discharge where circumstances so warrant, the first subparagraph of Article 18(3) of Regulation No 1999/85 hardly leaves the customs authority any discretion to restrict the scope of that authorisation but makes its grant somewhat automatic: if the customs authority finds that alternative ways of discharging the inward processing relief arrangements provided for in points (c) to (f) of Article 18(2) are not likely to lead to abuse by, for example, conferring an unjustified customs advantage on the beneficiary, it must grant the authorisation; if not, it can only refuse it. "

209. Counsel submitted that it was clear from the Opinion of the Advocate General and also from the decision of the Court of Justice that a quantitative restriction cannot

and should not be imposed on a PCC Authorisation, but this was precisely what the Respondent was seeking to do in the appeals before me.

210. Counsel further submitted that it was clear from Article 497 of the Implementing Regulation that applications for authorisation had to be made in writing using the model set out in Annex 67. The explanatory notes to the relevant form made it clear that an applicant had to enter the "*estimated quantity*" and the "*estimated value*" of the goods intended to be placed under the customs procedure. Counsel submitted that it was necessary to give the estimated quantity and values in order that a relevant customs authority could satisfy itself that the economic conditions test was met. He submitted, however, that it could not be used and did not result in quantitative limits being imposed. The imposition of quantitative limits as a consequence of an applicant giving estimates would be inconsistent with the logic and the reasoning of the Advocate General and the Court of Justice in ***Temic***.

211. Insofar as the Respondent had suggested that the estimates given by an applicant for PCC authorisation when completing the form in Annex 67 did not amount to a limit on the level of imports because a trader could apply for increased quantities and values if and when necessary, Counsel submitted that they were in fact a quantitative limit. The Respondent was saying in effect that once an estimate had been given, the trader was stuck quantitatively to the estimate and if the trader wanted numbers and values held within the PCC system which exceeded those estimates, a new application had to be made; similarly, if a trader did not make that application in advance of importation, it had to bring itself within the conditions for retroactive approval. He submitted that this was clearly a quantitative limit in the sense that the trader was limited numerically to the estimates which it had given and, if it went above those estimates, the Respondent said it lost the benefit of the PCC system.

212. Counsel further referred me to the decision of the Court of Justice in **Case C-8/74** ***Procureur du Roi –v- Dassonville***, which he submitted was a helpful decision in explaining the breadth of what could constitute a quantitative restriction under EU law. The case involved the importation of whiskey into Belgium. Belgian national law had a rule which prohibited the importation of goods which bore a designation of origin where the goods were not accompanied by an official document issued by the government of the exporting country confirming the right to such designation. The Court was asked to decide whether such a national provision constituted a measure of having an effect equivalent to a quantitative restriction. Counsel referred me to paragraph 5 of the decision which stated:-

> *"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."*

213. Counsel accepted that the context of ***Dassonville*** was clearly different from that of the appeals before me, but submitted that it was still good authority for the proposition that any trading rule capable of hindering, directly or indirectly, actually or potentially, the relevant trade amounted to a quantitative restriction. Counsel submitted that the decisions of the Court of Justice in **Cases C-51 to 54/71** ***International Fruit Company NV –v- Produktschaap voor Groeten en Fruit*** and **Case C-68/76** ***Commission –v- France*** gave further support for that proposition. He submitted that the concept of a quantitative restriction was very broad one and, if and insofar as the Appellant was required by the Respondent to meet the quantity and value limits in the Authorisations, that was for all intents and purposes equivalent to a quantitative restriction.

214. Turning to the economic conditions test, Counsel submitted that Article 502(3) of the Implementing Regulation made it clear that, in the case of applications for Processing under Customs Control authorisations, the economic conditions test had to establish "*whether the use of non-community sources enables processing activities to be created or maintained in the Community.*" The Appellant cited **Case C-11/05 *Friesland Coberco Dairy Foods BV –v- Inspecteur van de Belastingdienst*** as authority for the proposition that in assessing this, the relevant authority had to balance the benefits brought about by permitting traders to import goods under the procedure from outside the Community against the rights of existing producers within the EU. Relevant considerations include the nature of the imported goods, the number of jobs created on account of the processing activities envisaged, the value of the investment made and the permanence of the activity envisaged.

215. The Appellant submitted that it was a manufacturer of [redacted] products with a large production plant in [redacted] employing in excess of [redacted] people. The products which it imported were either not available to buy from European producers or were not available to a sufficient quality or at a competitive price. Accordingly, it submitted that it clearly satisfied the economic conditions test.

216. Counsel for the Appellant next addressed the issue of legitimate expectations and referred me in this regard to the decisions in ***Webb –v- Ireland*** **[1988] IR 343**, ***Glencar Exploration –v- Mayo County Council*** **[2002] I.R. 84** and ***Tara Prospecting Ltd –v- Minister for Energy*** **[1993] I.L.R.M. 770.**

217. Turning to the application of the law to the facts of the appeals, Counsel submitted that it was clear from Witness 6's letter of the 10th of October 2014 finding the Appellant was liable to customs debt was wholly based on a finding that the Appellant had failed to comply with "*the conditions under which* [the Authorisation]

was granted." The conditions of authorisation alleged to have been breached were the quantities and values set out in the Authorisation.

218. Counsel submitted that the decision of the Designated Appeal Officer made on the 9th of December 2014 on the initial appeal against the finding of a customs liability was made on the same basis. He had stated that:-

> *"Once the quantity/values in your authorisation were exceeded this invalidated the terms under which authorisation was granted in respect of those additional goods. The issuing of an authorisation for PCC can never be open-ended in terms of quantity/values because of the need to comply with the economic test and the required level of bond penalty. I accept that the quantity/values in your application were the best estimates available to you at the time of application. However, the quantity/values in the authorisation could have been increased on application and prior notification of your intentions in that regard and subject to the economic test being satisfied and your compliance with bond penalty levels… The quantity/values in the PCC authorisation are not limits imposed by Customs but simply indicate the threshold up to which the authorisation is valid based on the data supplied in the original application. Quantity/values above the threshold are not covered by the authorisation unless application for amendment is made and approved."*

219. Counsel for the Appellant submitted that no quantitative conditions attached to its Authorisation and that, to the extent that the Respondent purports that such limits exist, this was impermissible under EU law. He submitted that Article 133 of the Customs Code clearly sets out the conditions which must be met for PCC authorisation. He submitted that these conditions were in substance and effect the same as those which pertained under the old PCC Regulation (No 2763/83) and which were considered by the Advocate General and the Court of Justice in ***Temic***.

Counsel submitted that the statement of the law given in that case was entirely in keeping with the Customs Code and the Implementing Regulation, and emphasised that neither piece of legislation made any reference to a condition limiting quantity or limiting value; instead, the prescribed form explicitly required only that estimates be given.

220. Counsel further submitted that any legal ambiguity as to whether or not value and quantity limits were permissible under the Regulations should be resolved in favour of the Appellant on the basis of the principle against doubtful penalisation.

221. Counsel further submitted that it was inevitable that traders engaged in processing would need to vary the quantity of goods they imported in order to react to market conditions and remain competitive. In many instances, such fluctuations would be sudden and unexpected, and the Appellant submitted that the absence of quantitative limits in the Customs Code and the Implementing Regulation reflected this.

222. The Appellant submitted that, whether read literally or purposively, the Customs Code and Incrementing Regulation neither envisaged nor permitted the imposition of quantitative restrictions.

223. While the Respondent's Designated Appeal Officer had decided that quantity and value limits were essential to ensure compliance with the economic conditions test, the Appellant submitted that the estimate of the quantity and value of goods to be imported was only one of the criteria to be assessed when deciding whether the economic test was met. The overall aim of the test was to establish if granting PCC authorisation would enable processing activities to be created or maintained in the EU, and this would result in an examination of the nature of the goods to be imported, the number of jobs created and the permanence of the enterprise in question. The

Appellant further submitted that the economic test was only one of several conditions listed in Article 133, and its purpose was to carry out a broad assessment of the suitability of the PCC procedure. The Appellant contended that the legislation did not intend that an increase in quantity and value should trigger the invalidity of an existing economic assessment thereby necessitating limits on the same.

224. Counsel for the Appellant further submitted that the 3-year time limit on authorisation was apposite as it was a clearly enumerated limiting condition attached to PCC. He submitted that if quantity restrictions had been considered desirable by the legislature, the power to impose same would have been set out in clear terms by the relevant legislation. The fact that no such power was contained in the Regulations was entirely consistent with the views of the Advocate General and the Court of Justice in ***Temic*** that such restrictions give rise to a grave and unacceptable risk of differences in treatment between operators within the EU. Insofar as the Respondent sought to limit the application of the ***Temic*** decision on the grounds that it applied to the old system of discharging an inward processing arrangement by way of PCC, the Appellant pointed out that paragraph 12 of the Opinion of the Advocate General made it clear that the conditions attaching to PCC in the context of inward processing were the same as those attaching to the PCC system in general.

225. The Respondent's Designated Appeal Officer had stated in his decision of the 9th of December 2014 that "*the approval of* [the Appellant's] *authorisation was subject to the economic test and bond penalty conditions being respected based on the estimates in your application.*" In relation to compliance with bond penalty conditions, the Appellant submitted that Article 7 of the old PCC Regulation also allowed for the provision of security upon authorisation for a suspensive arrangement. It was clear from the Advocate General's Opinion that he did not consider this provision to be grounds for the imposition of a quantitative limit for goods imported for PCC, and the

Appellant submitted that Article 88 of the Customs Code should be similarly interpreted.

226. The Appellant further submitted that there was no reason why the need to provide security should result in the imposition of a quantitative limit for goods imported. The Appellant submitted that the Respondent maintained control over the PCC process through its local control officer. Accordingly, any required increase in bond level could be carried out without any need to amend the actual Authorisation.

227. Without prejudice to the foregoing arguments, Counsel for the Appellant went on to make submissions in respect of the duty assessed on the [redacted] goods. The Respondent's Designated Appeal Officer had given as one ground for refusing the Appellant's initial appeal the fact that it was always open to the Appellant to have sought an increase in respect of the values and quantities of the [redacted] goods being imported. The Appellant submitted that this was in fact done in July 2012 and that consequently no duty liability should have been assessed in respect of same.

228. While correspondence from the Respondent had asserted that the July 2012 application for amendment had been refused, Counsel for the Appellant stated that the evidence before me and the position taken by the Respondent at the hearing made it clear that no formal decision on the application was ever made. The bond issue was not revisited until early 2013, when the Appellant increased the level of the bond, following which the third Authorisation was granted. Counsel for the Appellant submitted that the Appellant had an understanding or, in the alternative, a legitimate expectation that the increase sought in July 2012 had in fact been granted. The Appellant pointed out that retroactive amendment pursuant to Article 508(2) of the Implementing Regulation permits retrospective effect to the date an application is made. It further submitted that the Respondent could have granted the application in January of 2012.

229. Counsel for the Appellant pointed out that the sole reason given by the Respondent for the refusal to grant the July 2012 amendment application was the purported insufficiency of the bond amount. Counsel submitted that any refusal based on that ground would have been an incorrect refusal because the bond was at all times sufficient to cover the suspended duty, which was the key function of the bond. The level of the bond had been calculated by the Appellant by reference to the average stock turnover period, which was entirely logical, in keeping with the Respondent's Instruction Manual and, the Appellant submitted, consistent with Article 88 of the Customs Code.

The Second Appeal – Refusal of Retrospective Amendment

230. Counsel for the Appellant stated that its submissions dealing with the second appeal were made without prejudice to the first appeal, as the second appeal only arose if the Appellant was unsuccessful in respect of the first.

231. Counsel submitted that it was a mixed question of fact and law as to whether or not the Appellant satisfied the legal test for retroaction pursuant to Article 508(3) of the Implementing Regulation, which required that:-

(a) exceptional circumstances be present; and,

(b) the application not relate to obvious negligence.

232. The Appellant had applied through its agent on the 17th of July 2012 for an amendment of its PCC Authorisation. The Respondent's Economic Procedures Unit had requested that the Appellant advise as to the current position regarding the revised bond amount. The Appellant's agent stated that he was unaware that the bond needed to be increased and, if the bond amount could be agreed, he would

request the Appellant to amend the bond accordingly. The Appellant believed at this time that the bond level was sufficient because its calculations, carried out in accordance with the Instruction Manual, indicated that the bond was more than sufficient to cover any risk to the Respondent.

233. On the 23rd of January 2013, in response to the Appellant's application for renewal of its PCC Authorisation, Witness 5 stated that the application for renewal had to be delayed because of the continued insufficiency of the bond. While the Appellant did not believe that an increase in the bond level was necessary, it agreed to increase the level of the bond to €880,000. The Appellant's request for renewal of its Authorisation was then granted with increased quantities and values.

234. In the course of the 2013 audit of the Appellant, Witness 6 concluded that quantities and values allowed by the PCC Authorisation had been exceeded and he advised the Appellant to seek retroactive authorisation for the additional goods. This application was duly made by the Appellant on the 19th of September 2013.

235. On the 10th of April 2014, the Respondent replied to the Appellant stating that:-

> *"During the validity period of this authorisation the bond in place was €170,000 and was not sufficient to cover the duty risk for the original values on the authorisation. We are not in a position to allow increased values on the authorisation and are therefore not granting the requested amendments."*

236. Witness 2 had replied by email dated the 6th of May 2014, attaching the calculations of the dutiable inventory carried out by Witness 1, and pointing out that the maximum duty liability during the period of authorisation was, in the Appellant's view, €123,500, which was well within the bond provided of €170,000.

237. Witness 5 had replied, and had not adverted to the Appellant's submission that the bond was in fact adequate. Instead, she indicated that retroaction could only occur in exceptional circumstances, which she deemed not to be present. The Appellant submitted that it believed following this exchange that the Respondent now accepted that the bond was sufficient.

238. Witness 2 had replied on the 13th of June 2014, pointing out that the need to show exceptional circumstances and not been referred to previously, with the insufficiency of the bond instead being the point raised. Nonetheless, he pointed to an unprecedented increase in demand for certain products and further pointed out that even though the individual values were sought to be increased, the overall value did not change. Consequently, there was no duty at risk. He further pointed out that the Respondent was notified of the proposed increases as far back as July of 2012.

239. The subsequent exchanges of correspondence between the Appellant and the Respondent culminated in the appeal decision of the Respondent's Designated Appeal Officer dated the 1st of December 2014. The Appellant submitted that her decision focused in particular on three main factors, namely:-

(a) commercial success could not constitute exceptional circumstances;

(b) the Appellant's monitoring process had failed; and,

(c) bonds are calculated on the basis of the average rate of duty on imports during "*the stock turnover period or period of* [sic] *discharge*". The period for discharge in the Appellant's application for authorisation was 12 months and therefore the bond had to cover the average duty that would be due on imports covered by the authorisation over 12 months. Consequently, the bond in place in July 2012 was not sufficient to cover existing imports.

240. Counsel for the Appellant accepted that as the application for retroactive amendment was made on the 19th of September 2013, the appeal could only be allowed in respect of excess goods imported during the period from the 19th of September of 2012 to the [redacted]st of [redacted] 2012, being the last date of validity of the Authorisation.

241. The Appellant submitted that the requirements set out in Article 508 mirrored in substance those set out in Article 239 of the Customs Code. Pursuant to Article 239 import duties or export duties may be repaid or remitted in "*special situations*" other than those referred to in Articles 236, 237 and 238. In addition to the need for special circumstances, no deception or obvious negligence can be present.

242. Counsel submitted that the case law relating to the application of Article 239 therefore provided a clear guide as to the correct application of the retroaction provisions contained in Article 508(3). He referred me in this regard to the decision of the Court of Justice in **Case C-48/98** ***Firma Söhl & Söhlke –v- Hauptzollamt Bremen***. In that case, the taxpayer had incurred a customs debt because the time limits allowed for customs clearance of goods in temporary storage had been exceeded and the taxpayer made several requests for the time limits to be extended, referring to a considerable backlog of work that had unforeseeably arisen as a result of the computerisation of its accounting procedures and staff shortages due to illness. The question before the Court was whether those could be considered exceptional circumstances and it stated:-

> *"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.

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.

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.

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

243. The Appellant further referred me to the decision in **Case T-330/99** ***Spedition Wilhelm Rotermund GmbH*** as authority for the proposition that in order to determine whether facts can constitute a special situation, the decision maker must, in the context of the broad margin of assessment, assess all the facts and balance the Community interest in ensuring that the customs provisions are respected against the interest of the economic operator acting in good faith not to suffer harm beyond normal commercial risk.

244. Council referred me also to paragraph 43 of the Commission Guidelines for the Implementing Regulation which provides that:-

"'Obvious negligence' may be attributed to a person, in particular where a person, or his/her representative, has failed to comply with the procedural requirements which in principle are a condition for granting an authorisation

although this person could have been aware of their existence or has already been in a similar situation and was consequently aware of the legal requirements for obtaining such an authorisation."

245. I was also referred to the decision in **Case C-156/00** ***Kingdom of the Netherlands –v- Commission of the European Communities*** which held that the key considerations when assessing whether or not an error was detectable by a trader are **(a)** the complexity of the applicable rules, and **(b)** the trader's experience and diligence.

246. Counsel submitted that the foregoing authorities established that I should consider the overall circumstances which applied in the appeal and consider whether they were liable to put the Appellant in an exceptional situation relative to other traders, and whether they were circumstances which were not events which would normally confront a trader in the exercise of its occupation. He further submitted that a broad measure of discretion was conferred upon me in this regard.

247. He submitted that I should have regard to the Appellant's evidence in relation to the discussions had by the Appellant with the Respondent's auditors in relation to the correct level of the bond. While the auditors had recommended an increase in the level of the bond to €520,000, there was a reasonable belief on the part of the Appellant that such an increase was unwarranted having regard to the function of the bond and the manner in which it was to be calculated. Furthermore, it was the Appellant's belief that any amendment to the bond was going to be done in consultation with the Respondent's local control officer, and the evidence was that there had been a complete absence of engagement or consultation on the part of the local control officer.

248. Counsel further submitted that I should have regard to the evidence of Witness 1 that the launch of the Appellant's new [redacted] product had resulted in a significant increase in the level of business. The increase in demand for the various products had never before been experienced by the Appellant. The Appellant had, by its agent, engaged proactively with the Respondent in July of 2012 and the agent had indicated willingness on the part of the Appellant to increase the bond if the bond amount could be agreed. He submitted that there was thereafter a failure on the part of the Respondent to engage with the Appellant in relation to the bond. Counsel referred me to the evidence from Witness 6 to the effect that he was surprised by the failure of the Respondent to engage in relation to the amendment application.

249. Witness 5 had informed the Appellant in January of 2013 that the amendment request had not been granted because the existing bond was insufficient. Counsel submitted that this was not in fact consistent with what had occurred but the Appellant had nonetheless agreed to put in place a new bond at the increased level of €880,000. The Appellant understood as of March 2013, when the new bond had been put into place, that all matters had been resolved and that the issues relating to the July 2012 amendment application were incorporated in that resolution.

250. The second audit of the Appellant then took place in August of 2013. When the Appellant was advised to apply for retrospective amendment of the old Authorisation to deal with breaches of quantity and value limits, it did so promptly. That application was initially refused by reference to a perceived inadequacy of the bond. Counsel submitted that whether the bond level was calculated in accordance with the Respondent's Instruction Manual, or whether the bond was calculated with regard to its function, namely to protect the potential duty liability at risk, it was clear that the bond was at all material times sufficient to protect the Respondent. Counsel further submitted that I should also have regard to the fact that, while it was sought

to increase individual quantities and values under the Authorisation, the overall value level of the Authorisation was going to remain the same.

251. Counsel submitted that, having regard to the totality of the evidence, it is clear that the Appellant had faced a unique set of hurdles and had acted in good faith throughout. He submitted that it was clear that there was no obvious negligence on the part of the Appellant. There had been good faith and proactive engagement by the Appellant, its employees and its agent throughout the relevant time period and, whenever something was required of the Appellant, it took steps to put that in place.

H. Submissions of the Respondent

252. Counsel for the Respondent submitted that the Appellant's main appeal was premised on an argument that the requirement that the holder of an authorisation notify the Respondent of changes, be they upwards or downwards, of quantities or values in relation to particular commodity lines somehow constituted a form of quantitative restriction in the sense envisaged by the court in ***Temic***.

253. Counsel submitted that a strict or literal interpretation was not necessarily the correct approach when interpreting European legislation. The correct approach was instead to not only look at the wording of the legislation but also to consider the objective and, particularly as revealed through the recitals, the overall context of the provisions also.

254. He submitted that I should bear in mind the fact that special customs procedures, such as Processing under Customs Control, were derogations. As a

general rule, goods coming from third countries were subject as a matter of principle to customs duties and anything that derogated from that rule was a concession granted for a specific and limited purpose. He submitted that it followed as a matter of logic that if a trader was in a special customs regime and failed to comply with all the conditions of that regime, it could no longer avail of the benefits of same.

255. He submitted that, contrary to the picture painted by the Appellant, the Respondent had shown extreme leniency to the Appellant, particularly in relation to the issues identified in the 2010 audit. The Respondent had allowed retrospection to cover breaches of the first Authorisation and the Appellant had agreed to a new Standard Operating Procedure to ensure that such breaches did not re-occur. Nonetheless, the 2013 audit had revealed that, in addition to the [redacted] goods, the Appellant had exceeded quantity and/or value limits in relation to another eight or nine commodity lines between 2010 and 2012. While the Appellant had sought to excuse this on the basis that the overall value level of the Authorisation was never actually exceeded, Counsel submitted that it was clear from the Authorisation that the value and quantity limits for each individual commodity were relevant because it was on that basis that the application for authorisation had been considered and granted.

256. Counsel for the Respondent said that while the objective of the PCC system was to ensure that processing operations could take place within the European Union, it could only be permitted where no harm was caused to Community producers by granting such an authorisation. He submitted that it was clear from the ***Coberco*** decision that the Court of Justice gave a very broad definition to "community producers", and included not just the Community producers of the finished product in question but also the potential Community producers of all the raw materials, because these were the goods that were allowed to come in without paying the

otherwise appropriate customs duty. He submitted that this illustrated the exceptional nature of the PCC procedure.

257. Counsel further submitted that in circumstances where the Appellant had been found to have breached the terms of its first licence, and had been allowed retrospective amendment to cover those breaches, and had then been found at the end of the second Authorisation to have again committed very substantial breaches, it could not be said that exceptional circumstances existed, nor could it be said that there was no obvious negligence on the part of the Appellant.

258. Counsel referred to the fact that the recitals to the Customs Code recorded that the customs authorities must be granted extensive powers of control. The suspensive procedure under consideration in this appeal referred in its title to customs control, namely control exercised by the customs authorities. He pointed out that Article 4(13) defined "*supervision by the customs authorities*" as meaning action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision were observed. He submitted that the Appellant had repeatedly failed to comply with the controls imposed by the Authorisations, and had failed to comply with the Standard Operating Procedure put in place following consultation with the Respondent's local control officer.

259. He further referred to the recital recording that in implementing the Customs Code, the utmost care had to be taken to prevent any irregularity liable to affect adversely the general budget of the European Union and said that the evidence of Witness 5 in relation to the oversight exercised by the European Commission in relation to the Respondent's operation of suspensive procedures was of relevance in this regard.

260. Counsel further referred me to the requirement in Article 2(1) of the Customs Code that Community customs rules apply uniformly throughout the customs territory of the Community. He submitted that upholding the Appellant's argument that treating quantity and value limits in an authorisation as quantitative restrictions could clearly result in the State taking a different approach to that adopted in other Member States.

261. Counsel submitted that both the letter enclosing the Appellant's first Authorisation granted in April of 2007 and that enclosing the second Authorisation in January of 2010 had emphasised two information points to be noted carefully by the Appellant. The first was that in order to add further goods to the Authorisation, or to increase the authorised quantities and values of the goods to be processed, an application should be made to the Respondent in advance of importation. Failure to make a timely application might result in the Appellant becoming liable to a customs debt. The second was that in order to engage in the PCC procedure, the Appellant had to be in possession of a valid authorisation at all times. An application for renewal had to be made to the Respondent's Economic Procedures Unit at least two months prior to the expiry. The letters had stated in bold type that "*... under the EU Customs Code it is the responsibility of your Company to ensure that at all times the conditions set out at 1 and 2 above are complied with.*"

262. Counsel submitted that it was absolutely clear that it was an express condition of the Authorisation that the Appellant identify in advance if there was likely to be a quantity or value excess in respect of any particular commodity. If there was likely to be an excess, the Appellant had to apply in advance to the Respondent so that the Respondent could satisfy itself that all of the conditions for the Authorisation were met in relation to the increase being sought in relation to a particular commodity line. This obligation was placed on the trader because the trader was getting a special

concession in being relieved of the obligation to pay the customs duty that would otherwise be incurred.

263. Counsel referred me to Article 85, which provides that the use of any customs procedures with economic impact shall be conditional upon authorisation from the customs authorities, and Article 87(1) which provides that the conditions under which the procedure in question is used shall be set out in the authorisation. He submitted it was clear that no discretion was afforded to the customs authorities in this regard.

264. Equally, Article 87(2) provides that the holder of the authorisation shall notify the customs authority of all factors arising after the authorisation was granted which might influence its continuation or content. He submitted that the inclusion of such a provision in the legislation was manifestly irreconcilable with the Appellant's argument that an increase in quantity or values did not require any further authorisation, and with the argument that quantity or value limits in an Authorisation amounted to quantitative restrictions.

265. Counsel further referred me to Article 88 of the Customs Code which empowered customs authorities to require the provision of security "*in order to ensure that any customs debt which may be incurred*" in respect of goods placed under suspensive arrangement will be paid. He submitted it was clear that the security was to cover any customs debt that might arise, and that this therefore meant any debt that might arise during the period for discharge. The Respondent's position was that period for discharge meant and the same thing as average stock turnover period; the legislation only referred to a period for discharge and this was therefore the only time period that could be considered by the Respondent.

266. Counsel further submitted that while the Appellant might have taken what he characterised as a "*commercial approach*" to assessing the risk to the Respondent of customs duty not being paid, effectively looking at the average inventory levels at any given time, he submitted that such an approach was simply not permissible under the legislation. It was the entirety of the potential debt that could arise over the entire period of the Authorisation that was relevant, and it was not appropriate to instead have regard to a particular monthly period calculated on the basis of an inventory of the stock had been turned over.

267. Counsel pointed out that Articles 114 to 129 were provisions specific to inward processing arrangements, which was the suspensive procedure under consideration in the ***Temic*** case. He submitted that it was clearly a separate and distinct procedure to processing under customs control.

268. Counsel further pointed out that Article 132 provided that authorisation for processing under customs control is granted at the request of the person who carries out the processing. He then referred to the five cumulative conditions listed in Article 133 and submitted that the economic conditions test in subparagraph (e) was critical to the instant appeals. He further submitted that Article 508 of the Implementing Regulation had to be interpreted in the light of those cumulative requirements.

269. Counsel next referred me to Article 204(1)(b) which provides that a customs debt on importation shall be incurred through non-compliance with a condition governing the placing of goods under that procedure. He submitted that it was this provision which had been relied upon by the Respondent in deciding that the Appellant was liable to pay customs duty.

270. Turning to the Implementing Regulation, Counsel pointed out that Article 496(b) defined "*authorisation*" as meaning permission by the customs authorities to

use arrangements, namely a customs procedure with economic impact. He further referred me to the definition of "*period for discharge*" in subparagraph (m), which in the instant appeals meant the time by which the goods or products had been released for free circulation. He emphasised that there was no reference in either the Customs Code or the Implementing Regulation to "average stock turnover period", and the phrase therefore did not have any status in European Union customs law. The Respondent had no power to depart from the wording of the legislation which referred solely to the period for discharge.

271. In response to the Appellant's argument that it had a legitimate expectation that its July 2012 amendment application had been determined with retroactive effect when its PCC Authorisation was renewed in January 2013, Counsel for the Respondent submitted firstly that I did not have jurisdiction to consider a legitimate expectation argument. Even if I did, Counsel submitted that there simply could not be legitimate expectation in this case because the conditions for the grant of an amendment to the Authorisation were made very clear from the outset and the Appellant had regularly failed to comply with those conditions.

272. Counsel next referred me to Article 502(1) which provides that, save where economic conditions are deemed to be fulfilled, an authorisation shall not be granted without examination of the economic conditions by the customs authorities. Subparagraph (3) provides that in the case of processing under customs control arrangements, the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community.

273. Counsel further referred me to the provisions of Article 508 dealing with retroactive authorisations, and in particular subparagraph (3). He submitted that the key considerations in these appeals are whether exceptional circumstances existed, whether a proven economic need existed, and whether there is obvious negligence on

the part of the Appellant. He submitted that the requirement to establish a proven economic need was consistent with the requirements of Article 502 and Article 552(1).

274. Counsel next turned to the application for authorisation to use a customs procedure with economic impact contained in Annex 67 and the guidance notes in relation to same. He submitted that the references in the guidance notes to "*estimated quantity*" and "*estimated value*" were simply reflective of the fact that a trader was not bound for the duration of an authorisation to the quantity and value limits contained therein. The legislature had recognised that circumstances might change over the life of an authorisation, which could be up to 3 years, and therefore anticipated that a trader might apply to revise quantities and values either upwards or downwards.

275. He further submitted that the requirement to give estimated quantities and estimated values of commodities was necessary to enable a customs authority or Member State to carry out the economic conditions test. The potential impact on Community producers of commodities could not be assessed without that information and it therefore had to be submitted by an applicant, both in seeking an initial authorisation and when seeking an amendment of a granted authorisation.

276. Counsel further submitted that it also followed that a trader could not disregard or overlook breaches of quantity or value limits in respect of a particular commodity line simply because the overall value limit of an authorisation had not been exceeded. An increase in the value or quantity of a particular commodity could have an impact on other Community producers, and therefore it had to be assessed when deciding whether or not an authorisation should be granted or amended.

277. Counsel next referred me to the decision of the Court of Justice in ***Friesland Coberco*** which, as he pointed out, post-dated the entering into force of the Customs

Code and the Implementing Regulation. The case concerned an application for the grant of a PCC authorisation by the Dutch customs authorities. Counsel submitted that ***Temic*** was materially different in this regard because the issue in that case concerned the compensation in relation to the inward processing authorisation.

278. The relevant facts in ***Friesland Coberco*** were set out in paragraphs 17 and 18 of the judgment, which stated:-

> *"Coberco Dairy Foods produces fruit drinks using as raw materials fruit juice concentrates, sugars, flavourings, minerals and vitamins, purchased from companies, some of which are established in Member States and others in third countries. Processing consists largely of mixing the fruit juices with water and sugar, pasteurising the product and then packaging it.*
>
> *In accordance with Article 132 of the Customs Code, on 23 July 2002, Coberco Dairy Foods made an application for authorisation for processing under customs control to the Dutch customs authorities in respect of three products: apple juice containing added sugar, orange juice containing added sugar and white sugar, other than cane sugar. It was stated in that application, under the heading of economic conditions, that the use of materials from third countries enabled processing activities to be maintained in the Community."*

279. The application was refused and the matter was referred to the Court of Justice for a preliminary ruling. The first question referred to the Court was as follows:-

> *"How should the words "without adversely affecting the essential interests of Community producers of similar goods" in Article 133(e) [of the Customs Code] be interpreted? Can only the market for the finished product be considered or must the economic situation with regard to the raw materials for processing under customs control also be investigated?"*

280. The Court stated that by the first question, the national court was essentially asking whether in assessing an application for authorisation for processing under customs control, account must be taken not only of the market for the finished products but also the economic conditions of the market for raw materials used to produce those goods. The Court answered that question as follows:-

> *"47. It must be observed that the wording of Article 133(e) of the Customs Code, which refers to the 'essential interests of Community producers of similar goods' without stating whether it refers to producers of finished products or whether it also includes producers of raw materials used to produce those goods, does not provide a clear answer to the question referred, so that the context of that provision must be taken into account, namely the customs procedure with economic impact to which that provision applies and the objectives pursued by that procedure.*
>
> *…*
>
> *49. The arrangements for processing under customs control were adopted in order to avoid negative consequences for processing operations in the Community from an automatic application of the Community Customs Tariff. However, by conferring an advantage on Community processors, who are not, under those arrangements, bound to pay customs duties on goods imported from third countries, those arrangements may nonetheless adversely affect the essential interests of any Community producers of the raw materials used in the processing.*
>
> *50. Given that potential conflict of interests, it is clear that the examination of the economic conditions laid down in Article 133(e) of the Customs Code is intended to take account of those various interests, namely those of the processors of raw materials and those of Community producers of similar goods.*

The objective of that provision is, as the Commission rightly submits, that the advantages of an authorisation for processing under customs control in respect of processing operations should be assessed in the light of the potential impact of the issue of such an authorisation on the situation of the community producers of goods similar to those being processed.

51. That interpretation of the objective pursued by Article 133(e), that the interests of all Community producers must be protected, namely both those of the producers of finished products and those of the producers of raw materials used to produce those products, is, moreover, the only interpretation capable of taking account of the requirements of the common Community policies, including those of the common agricultural policy, as required by the third and fourth recitals in the preamble to the Customs Code."

281. Counsel for the Respondent submitted that it was clear from that decision that an assessment of the possible impact of an authorisation for processing under customs control necessitated a consideration of the possible impact of the authorisation on Community producers of raw materials as well as Community producers of finished products. He submitted that this could not be considered, either on an application for a grant of authorisation or for an amendment of an existing authorisation, unless the applicant gave details of the quantities and values of the raw materials intended to be imported under the authorisation.

282. Counsel further submitted that even if I was to accept the Appellant's argument that the estimates given in an application for the grant or amendment of an authorisation could not operate as quantitative restrictions because doing so would be contrary to the decision in ***Temic***, such an inconsistency would not necessarily arise because the Implementing Regulation was enacted subsequent to the decision

of the Court of Justice and the European Union legislature was free to change the Regulations that applied.

283. Counsel next referred me to the decision of the Court of Justice in ***Temic*** and noted that in paragraph 4 of the judgement the Court had stated:-

> *"Inward processing relief arrangements enable goods imported from non-member countries to escape customs duties if they undergo in the Community certain working or processing operations defined in Article 1(3)(h) of Regulation No 1999/85 and are then re-exported as compensating products outside the Community."*

284. Counsel pointed out that there are various differences between the inward processing procedure and the PCC procedure, and one significant difference was the re-exportation outside the Community as part of the inward processing procedure. He further submitted that it was clear from the Court's analysis of the Regulations that the inward processing regime was far more complex and narrower in scope than the PCC system.

285. Counsel further submitted that it was clear from the judgement that the Court, in answering the first two questions referred by the German Court, believed that the answer to those questions depended on the interpretation of Articles 18 to 21 of the inward processing Regulation then in force. He further submitted that it was apparent from the questions referred that the quantitative restriction under consideration in the case was on the amount of secondary compensating products that could be processed under customs control in order to reduce the amount of duty payable on exportation, which was a requirement under the inward processing procedure. As Counsel put it, the restriction was a limitation on the use of PCC as a means of paying or reducing the customs debt which would otherwise be payable under the inward processing arrangements.

286. The Court had summarised the three questions referred to it in paragraph 17 of the judgement as whether the provisions of Articles 18 and 21 of the inward processing Regulation were to be interpreted as meaning that a quantitative limitation may be attached to an authorisation for application of the system of processing under customs control as a way of discharging the inward processing relief arrangements. Counsel submitted that this showed that, other than the fact that it was the PCC procedure that was being used as a sort of partial discharge mechanism, the decision really had nothing to do with the PCC Regulation. It was instead a case about inward processing about the payment of duties payable on exportation within that process. While there was a restriction on the PCC authorisation, the restriction was there to control the use of that procedure as a means of payment under the inward processing procedure, which was the main procedure under consideration in that case.

287. The Court had noted that the first subparagraph of Article 18(3) of the inward processing Regulation provided that the alternative ways of discharge referred to in points (c) to (f) (which included being placed under the system of processing under customs control) were to be subject to the authorisation of the customs authority, and that this authorisation must be granted where circumstances so warranted. Counsel submitted that this was very clearly a different test to the tests for PCC authorisation under consideration in these appeals, because they were in effect sub- authorisations within the inward processing system.

288. The Court further noted that it was clear from the general scheme of the inward processing Regulation that the Community legislature intended undertakings to be free to choose ways of discharging the inward processing relief arrangements other than re-export, subject to the reservation, however, that their choice does not lead to abuse. The Court therefore held at paragraph 24 that a customs authority

could not refuse authorisation for the alternative ways of discharging the inward processing relief arrangements except where it could show that those ways of discharge were liable to produce actual abuse, for example where the beneficiary would gain an unjustified customs advantage.

289. Counsel submitted that this showed that under the inward processing Regulation, the scope of the power of the customs authority to refuse authorisation for the alternative ways of partially paying the customs duty on the conclusion of the inward processing procedure was limited, and the onus was on the customs authority to show that the alternative way chosen was liable to produce actual abuse. Counsel submitted that accordingly the Opinion of the Advocate General and the decision of the Court that Article 18(3) neither required nor entitled a customs authority to attach any quantitative limit to an authorisation were reached in the context of that authorisation being used as a means of partially paying the customs duty due under the inward processing system.

290. Counsel further submitted that was clear that the legislative regime governing the inward processing system was very different to the PCC legislation under consideration in the instant appeals. In particular, Article 133 of the Customs Code required that the five cumulative conditions listed therein, including the economic conditions, be satisfied before a PCC authorisation could be granted. In contrast, Article 18(3) of the inward processing Regulation considered by the Court in ***Temic*** effectively required the customs authority to grant an authorisation for an alternative method of discharge unless it was satisfied that such a grant was liable to produce actual abuse.

291. Counsel submitted that it was manifest from the foregoing analysis that the decision in ***Temic*** concerned an entirely different question to that under consideration in the instant appeals, and that the Appellant was contending for a

strained interpretation of the decision in arguing that raising a customs debt in relation to an excess over quantity or value limits somehow meant that the Respondent had imposed a quantitative restriction.

292. Counsel submitted that it was permissible for the Respondent under the Customs Code and the Implementing Regulation to provide the Appellant with an authorisation which was valid for use up to the specific quantity and value limits listed therein. The Respondent had further stated that the Appellant had to monitor the quantity and value of goods covered by the Authorisation and, if those amounts were going to be exceeded, the Appellant had to apply in advance to the Respondent for an amendment of the Authorisation. Once the five conditions required by Article 133 continued to be met, an amendment would be granted. Furthermore, it was the Appellant that was required to indicate the quantity and value of the various commodity lines to be covered by the Authorisation, both when the initial application was made and when any application for amendment was made. Once the requirements of Article 133 were satisfied, the quantities and values sought by the Appellant would be approved by the Respondent. In the circumstances, Counsel submitted that it could not be said that a quantitative limitation was being imposed by the Respondent.

293. Counsel further submitted that the Respondent's position was further supported by the Opinion of the Advocate General in ***Temic***. It was clear from paragraph 11 of his Opinion that he was of the view that an authorisation granted under Article 18(3) of the inward processing Regulation constituted "*an unconditional measure.*" Counsel submitted that this was clearly distinguishable from a PCC authorisation, where an applicant making an initial application or an application for an amendment had to meet the economic test criteria.

294. In summary, Counsel submitted that the Advocate General and the Court of Justice in ***Temic*** had found impermissible a quantitative restriction on the use of a PCC authorisation as a means of payment or partial discharge under the inward processing Regulation. They had not found that quantity and value limits within a PCC authorisation constituted impermissible quantitative restrictions.

295. Counsel further submitted that the Appellant's reliance on the decision in ***Dassonville*** was misplaced. That case concerned trading rules which actually or potentially impacted on intra-Community trade and, more fundamentally, concerned their impact on a fundamental Treaty provision. It was therefore not of relevance to the issues in the instant appeals. Counsel further submitted that the decisions in ***International Fruit*** and ***Commission –v- France*** also dealt with different legislative regimes and were similarly distinguishable from the instant appeals.

296. Turning to the decision in ***Firma Söhl & Söhlke***, Counsel accepted that the judgement provided guidance as to the correct interpretation of Article 508(3) in its finding that the circumstances to be considered are those which were liable to put an applicant for an extension in an exceptional situation in relation to other traders carrying on the same activity, and that 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.

297. Counsel submitted that the exceptional circumstances sought to be relied on by the Appellant in relation to the second appeal were those detailed in the final paragraph of Witness 2's email to Witness 5 dated the 13th of June 2014, where he stated:-

> *"Due to the commercial success of our* [redacted] *product range we had to rapidly increase our production output and raw material imports in 2012. This increase was not anticipated at the time of our PPC* [sic] *application. In addition in 2012*

we added the supplier to authorisation which also increased our import levels. Your office was notified of this change in July 2012. We would also like to point out that even though the individual values increased, the overall value did not change. Consequently there is no duty at risk. We note your new requirement regarding the monitoring of quantities and values and can confirm that your Office was notified of such increases in the past and in this instance dating back to July 2012."

298. Counsel submitted that it was clear that the primary fact being relied upon by the Appellant was the introduction of a new product. He submitted that the development of a new product was clearly not something unknown to traders; it could potentially happen to all traders. Equally, the fact that the introduction of a new product could result in the necessity to import new materials not covered by an authorisation, or greater quantities of materials already covered by an authorisation, was clearly not something that could be said to be unforeseen or exceptional.

299. Counsel further referred me to paragraph 52 of the Court's decision where it stated that, since a lack of "obvious negligence" is an essential condition of being able to claim repayment or remission of import or export duties, it followed that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited.

300. At paragraph 58 of the decision, the Court had stated that:-

"as regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make enquiries and seek all possible clarification to ensure that he does not infringe those provisions."

301. The Court had gone on in paragraph 60 to conclude that:-

"… in order to determine whether or not there is "obvious negligence"… account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred and the professional experience of and the care taken by, the trader. It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader."

302. Counsel further submitted that a similar approach was more recently taken by the General Court in the cases of **Case T-26/03** ***Geologistics BV –v- The Commission*** and **Case T-324/10** ***Firma Leon Van Parys NV –v- European Commission***. Counsel submitted that the statements of principle in those three decisions were equally applicable in the instant appeals because the Appellant had received the benefit of a special permission, had failed to comply with the conditions of that permission, and was now seeking to justify that failure on the basis of exceptional circumstances. Accordingly, it was appropriate for me to adopt a strict approach in deciding whether the statutory conditions for a retroactive extension are met.

303. In applying that approach, Counsel submitted that I should have regard to the fact that the letters enclosing both the first and the second Authorisations had made it absolutely clear that the Appellant was required to apply in advance to the Respondent if it was going to be necessary to add further goods to the Authorisations or to increase the authorised quantities and values of the goods to be processed. He submitted that nothing in the letters supported the Appellant's position that only the overall value of the authorisation needed to be monitored. He said that I should also note that the letters made it equally clear that failure to acquire prior approval from the Respondent would result in the Appellant becoming liable to a customs duty, as

would unauthorised operation of the PCC procedure. It was also relevant that the letters had stated in bold type that it was the clear responsibility of the Appellant to ensure that these conditions were met.

304. In addition to the foregoing, Counsel submitted that the Appellant had the benefit of an audit in 2010 arising from the operation of the initial Authorisation. Various breaches had been identified and the Respondent had made recommendations to ensure that those breaches did not re-occur. He submitted that it was important to note that the letter of the 20th of July 2010 had expressly stated that the recommendations were made to "*ensure compliance going forward*"; the Appellant could only have been aware that it was at risk of incurring a customs debt if it did not comply with the recommendations made.

305. Counsel further submitted that it was important to note that notwithstanding that the 2010 audit had established a number of breaches of quantity and value limits, the Respondent had allowed a retrospective amendment of the Authorisation in order to cover those breaches. The Appellant had in return indicated that it would thereafter closely monitor the new quantities and values, and it had furthermore produced a new Standard Operating Procedure which would put in place proper procedures to ensure that quantities and values were not exceeded in future. The new Standard Operating Procedure also acknowledged that an increase in quantities and values might result in a need to increase the level of the bond.

306. The letter of the 20th of July 2010 had further recorded that the new Operating Procedure devised for customs procedures was "*to be implemented and should be closely monitored by management*." Counsel submitted that in circumstances where the Appellant had received recommendations from the Respondent to prevent a recurrence of the breaches identified on the audit of the first Authorisation, and had then failed to comply with those recommendations, it could clearly not be said to be

in exceptional circumstances and it could not be said that there was not obvious negligence on the part of the Appellant.

307. Insofar as Witness 1 had given evidence that there had been no consultation with the Respondent's local control officer following the July 2010 recommendation that the bond be increased €520,000, Counsel submitted that it would have been appropriate for the Appellant to proactively engage with the local control officer with a view to seeking to agree the necessary bond amount in circumstances where the Respondent had clearly indicated its belief that the bond was insufficient and needed to be increased.

I. Analysis and Findings

The First Appeal

308. It is clear from the submissions of the parties outlined above that my determination of the issues in these appeals depends in large part on the interpretation of the Customs Code and the Implementing Regulation. I agree with the Respondent that in my approach to such interpretation, I am not solely confined to a strict reading of the legislative provisions but may also have regard to the underlying purpose and objective of the legislation as well as the overall context. I did not understand the Appellant to take serious issue with this proposition.

309. The first issue which requires to be decided in the first appeal against the finding that the Appellant had incurred a customs duty liability of €357,036.42 is whether quantity and value limits, which the Respondent submits are conditions

attached to the Appellant's PCC Authorisation, are valid conditions under European Community law.

310. As is clear from its submissions in this regard, the Appellant places considerable emphasis on the Opinion of the Advocate General and the decision of the Court of Justice in the ***Temic*** case. It is understandable why this approach was taken; on first examination, both the decision of the Court and, more particularly, the Opinion of the Advocate General appear to support the Appellant's submission that quantitative restrictions on authorisations to operate the Processing under Customs Control system are impermissible.

311. I agree with the Appellant that the fact that the Advocate General and the Court were considering the legislation in force prior to that applicable in the instant appeals does not mean that their conclusions are not of relevance; as the Appellant correctly points out, the Customs Code effectively consolidated the pre-existing legislation. The conditions to be met for a grant of PCC authorisation under Article 4 of Regulation No 2763/83 are substantially the same as those contained in Article 133 of the Customs Code.

312. However, I agree with the Respondent that the Opinion of the Advocate General and the decision of the Court were reached in a very different factual and legislative context to that which pertains in the instant appeals. Neither the Advocate General nor the Court was considering an application for authorisation to operate the PCC system *simpliciter*; they were instead considering whether a quantitative limitation could be placed on the quantity and value of goods imported from outside the Community under inward processing operations that could benefit from a specific PCC authorisation as a means equivalent to export for discharging the inward processing relief arrangements with regard to those imports.

313. Having carefully considered both the Opinion and the judgment, it seems to me that both the Advocate General and the Court premised their conclusions on the particular wording of Article 18(3) of the inward processing Regulation then in force, which required a customs authority to "*grant this authorisation where circumstances so warrant*". It is, in my view, important to bear in mind that an authorisation granted under Article 18(3) was not a general authorisation to operate the PCC system; it was instead an authorisation to operate the PCC system as an alternative way of discharging the inward processing arrangements.

314. I accept that paragraph 12 of the Advocate General's Opinion records his view that the conditions which a customs authority had to find fulfilled before granting the specific authorisation under Article 18(3) were the same as those which had to exist for goods to qualify in general for the system of processing under customs control. Nonetheless, both the Opinion and the decision of the Court were reached having regard to what the Advocate General described as the "*all too broad formulation of the last sentence of paragraph 3*" of Article 18, which neither required nor expressly allowed an authorisation granted thereunder to be limited quantitatively by reference to any particular criterion.

315. The Advocate General concluded in paragraph 11 of his Opinion that an authorisation granted under Article 18(3) "*appears, at least where the relevant conditions* [for the grant of the authorisation] *are fulfilled, to constitute an unconditional measure.*" This can, in my view, be contrasted with an authorisation to operate the PCC system granted pursuant to the Customs Code. Article 87(1) of the Customs Code provides that the conditions under which the suspensive procedure in question is used shall be set out in the authorisation. This clearly envisages that use of the authorisation may be made conditional on ongoing compliance with conditions stipulated in the authorisation. The position is reinforced by the provisions of Article

87(2), which requires the holder of an authorisation to notify the customs authorities of all factors arising after the authorisation is granted which may influence its continuation or content.

316. It was submitted on behalf of the Appellant that the conditions which must attach to a PCC authorisation are those listed in Article 133. I do not believe this submission to be correct. On my reading of the legislation, Article 133 lists the conditions which must be met before a PCC authorisation can issue to an applicant; they are, in my view, separate and distinct from conditions under which the PCC system is to be operated.

317. I therefore accept as correct the Respondent's submission that the Opinion and decision in ***Temic*** are not good authority for a general prohibition on quantitative restrictions being contained in PCC authorisations. That prohibition is, in my view, limited to PCC authorisations granted for the purpose of discharging inward processing arrangements.

318. Even if I am incorrect in this regard, and the Opinion and decision of the Court are of the more general application contended for by the Appellant, ***Temic*** would only prohibit the imposition of quantitative restrictions by a customs authority.

319. Having carefully considered all of the evidence and the submissions made, I find that the Respondent did not place any quantitative restrictions on the Appellant. Instead, the Appellant was required as part of its application for a PCC authorisation to furnish estimates of the quantity and value of the various goods which it intended to import over the authorisation period. The obligation to give those estimates was not imposed by the Respondent but was instead mandated by Article 497 of the Implementing Regulation, which requires applications for authorisations to be made using the model contained in Annex 67 to that Regulation.

320. I agree with the Respondent's submission that the use of the phrases "*estimated quantity*" and "*estimated value*" in the explanatory notes to the application form contained in Annex 67 do not mean that the quantities and values entered by an applicant on the form were not intended to impose any restriction on a successful applicant's operation of the authorisation if granted. The use of those phrases was instead reflective of the fact that changes in circumstances during the currency of an authorisation might require the trader to apply to revise quantities and values either upwards or downwards.

321. The need for an applicant for PCC authorisation to give details of the various commodities which it intends to import under the authorisation and to give approximate figures for the anticipated quantity and value of those commodities is obvious. That information is clearly necessary to enable the economic condition test required under Article 133(e) of the Customs Code and Articles 502 and 552 of the Implementing Regulation to be considered. Equally, the information is necessary to establish the level of security that a customs authority may require to be provided in accordance with Article 189 of the Customs Code.

322. It is clear from the decision of the Court of Justice in ***Friesland Coberco*** that an assessment of the economic condition test requires a consideration of the possible impact of the authorisation on Community producers of raw materials as well as Community producers of finished products. This cannot be properly considered unless an applicant gives details of the quantities and values of the raw materials which it intends to import under the authorisation.

323. It was submitted on behalf of the Appellant that an estimate of the quantity and value of the goods to be imported under an authorisation was not critical to ensure compliance with the economic conditions test because it was only one of the

criteria to be considered; it submitted that other factors, such as the nature of the goods to be imported, the number of jobs created by the processing activities envisaged, the value of the investment made and the permanence of the activity envisaged were also relevant considerations. While I accept that these are relevant considerations in any consideration of the economic conditions test, they do not, in my view, obviate the necessity to have regard to the quantity and value of the goods to be imported when deciding whether or not that test has been satisfied.

324. It is clear both from the documentation and the oral evidence given that the Respondent did make it a condition of the grant and use of the PCC Authorisation that the Appellant monitor on an ongoing basis the type, quantity and value of the goods which it was importing under the Authorisation, and it was an express condition of the Authorisation that the Appellant advise the Respondent in advance if these goods or the amounts and values thereof were to change. I accept as correct the Respondent's submission that these conditions were necessary both to enable a fresh consideration of the economic conditions test whenever a substantive change was made to the type, amount or value of the goods being imported, as well as to ensure that the customs duties potentially applicable to the goods were secured by a sufficient bond.

325. Overall, I agree with the Respondent that these conditions on the use of the Authorisations and the Respondent's insistence on the Appellant complying with same did not amount to the imposition of quantitative restrictions. They were instead legitimate controls on the operation and use made by the Appellant of the Authorisations for the purpose of ensuring that the Appellant complied with the necessary conditions under which it was granted those Authorisations.

326. I believe that my findings in this regard are consistent with the fact that an authorisation to operate the PCC system is a derogation from the general rule that goods imported from third countries into the Community should be subject to customs duties, and the conditions for operating that system must therefore be strictly observed. They are further consistent with the recital to the Customs Code which records that customs authorities must be granted extensive powers of control.

327. I further believe that this interpretation of the legislation does not give rise to the risk of differences in treatment of taxpayers cautioned against by the Advocate General and the Court of Justice in ***Temic***.

328. I therefore find that the Appellant has not succeeded on the first ground of appeal in its appeal against the finding that a customs duty had been incurred.

329. The second ground of appeal advanced by the Appellant in the first appeal was in relation to the amendment application made by the Appellant in respect of the [redacted] goods in July 2012. The first argument made in this regard was that, as the Respondent had not refused that application prior to its 2013 decision to renew the Appellant's PCC Authorisation, the Appellant had a legitimate expectation that the renewal of the PCC Authorisation determined its earlier application for amendment with retroactive effect to the date of the application.

330. I accept the Respondent's submission that this forum does not have the jurisdiction to consider this argument. As Murray J, giving the decision of the Court of Appeal, stated in ***Kenny Lee –v- Revenue Commissioners*** **[2021] IECA 18**, the jurisdiction of the Appeal Commissioners is confined by statute to the assessment of and statutory charge to tax alone. Arguments as to contract, legitimate expectation, estoppel or other theories which might, through one or more aspects of the general

law, operate to prevent Revenue from issuing, acting on or (as the case may be) enforcing an assessment do not come within the jurisdiction so defined.

331. The second argument advanced by the Appellant in relation to the second ground of appeal was that if the July 2012 application for amendment had been refused, the decision to do so was invalid, because the sole ground advanced by the Respondent, namely insufficiency of bond security, was contrary to the guidance contained in the Respondent's Instruction Manual in relation to the manner of calculation of same.

332. However, the evidence given during the hearing of the appeal and the submissions made by Counsel for the Respondent made it clear that, contrary to what had been asserted by officials of the Respondent in correspondence, the Respondent never made any formal decision in relation to the July 2012 amendment application, and in particular did not make any decision to refuse same.

333. By reason of the foregoing, I cannot consider either of the arguments advanced by the Appellant in relation to the second ground in its appeal against the finding that a customs duty liability had been incurred. Accordingly, the Appellant has not succeeded in this ground of appeal.

334. I therefore find that the Appellant has not succeeded in its first appeal.

The second appeal

335. As the Appellant has not succeeded in its first appeal, I must therefore proceed to consider and determine its second appeal against the decision made by the Respondent's Designated Appeal Officer on the 1st of December 2014 which rejected the Appellant's application for retrospective amendment of its second PCC Authorisation.

336. It was common case between the parties that the provisions of Article 508 of the Implementing Regulation mean that even if the Appellant succeeds in this appeal, retroactive authorisation can only be granted for the period from the 19th of September 2012 (being one year prior to the date on which the application for retroactive amendment was made) to the [redacted]st of [redacted] 2012 (being the date on which the Appellant's second PCC Authorisation expired).

337. Paragraphs (2) and (3) of Article 508 provide as follows:-

"(2) If an application concerns renewal of an authorisation for the same kind of operation and goods, an authorisation may be granted with retroactive effect from the date the original authorisation expired.

(3) In exceptional circumstances, the retroactive effect of an authorisation may be extended further, but not more than one year before the date the application was submitted, provided a proven economic need exists and:

(a) the application is not related to attempted deception or to obvious negligence…"

338. Accordingly, in order for the Appellant to succeed in this appeal, I must be satisfied that:-

(i) exceptional circumstances exist;

(ii) there is a proven economic need for the authorisation; and,

(iii) there is not obvious negligence on the part of the Appellant.

339. As the Appellant correctly submits, it is a mixed question of fact and law as to whether or not the Appellant satisfies the legal test for retroaction pursuant to Article 508(3) of the Implementing Regulation.

340. In deciding whether or not exceptional circumstances exist, the decision in ***Firma Söhl & Sölke***, and the subsequent decisions in ***Geologistics*** and ***Firma Leon Van Parys***, provide that the circumstances which I am to consider are those which were liable to put the Appellant in an exceptional situation in relation to other traders carrying on the same activity, and that exceptional circumstances which, although not unknown to the Appellant, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances.

341. Further in accordance with those decisions, as an extension of the retroactive amendment beyond the date on which the amendment application was made is an exceptional measure, I must give the phrase "*obvious negligence*" an interpretation which ensures that the number of such extensions remains limited. I must also take into account the complexity of the provisions which have been breached by the Appellant, as well as its professional experience in the care it took. I must also have regard to the fact that in cases of doubt as to the exact application of legislative provisions, the onus is on the Appellant to make enquiries to seek all possible clarification to ensure that it did not infringe those provisions. In assessing whether or not an error was detectable by the Appellant, the decision in ***Kingdom of the Netherlands*** provides that the key considerations are the complexity of the applicable rules and the Appellant's experience and diligence.

342. I also accept that the decision of the Court of Justice in ***Spedition Wilhelm Rotermund*** provides that in determining whether the facts in question constitute a special situation, I must, in the context of the broad margin of assessment, assess all the facts and balance the Community interest in ensuring that the customs provisions are respected against the interest of the economic operator acting in good faith not to suffer harm beyond normal commercial risk.

343. It was submitted on behalf of the Respondent that the exceptional circumstances sought to be relied on by the Appellant were those detailed in the final paragraph of the email sent by Witness 2 on the 13th of June 2014. That email referred to the commercial success of the Appellant's new [redacted] product range which had necessitated a rapid increase in raw material imports and production output. These increases had not been anticipated at the time of the application for renewal of the PCC Authorisation. In addition, the addition of a new supplier to the Authorisation had increased import levels. The email further stated that even though individual values had increased, the overall value did not change and consequently there was no duty at risk. The email further pointed out that the Respondent had been notified of the increases as far back as July 2012.

344. It was submitted on behalf of the Respondent that the primary fact being advanced by the Appellant as constituting exceptional circumstances was the introduction of a new product and the consequences that flowed therefrom. Counsel for the Respondent submitted that this was clearly not something unknown to traders, and the necessity to import new or greater quantities and values of materials in order to manufacture a successful new product was clearly not something that could constitute unforeseen or exceptional circumstances.

345. In relation to the issue of obvious negligence, Counsel for the Respondent submitted that I should have regard to the fact that the Appellant was informed when both the first and the second Authorisations were granted that it was required to apply in advance to the Respondent if it was going to be necessary to add further goods to the Authorisations or to increase the authorised quantities and values of the goods to be processed. There was nothing in the letters which could have suggested that only the overall value of the Authorisations needed to be monitored. The letters

equally made it clear that failure to acquire prior approval from the Respondent would result in the Appellant becoming liable to a customs duty.

346. Counsel further submitted that it was relevant that the Appellant's operation of the initial Authorisation had been the subject of an audit in 2010 and that this had identified various breaches of the Authorisation. The Respondent had granted a retroactive amendment of the Authorisation to cover those breaches and had further made specific recommendations to ensure that those breaches did not re-occur and to ensure that the Appellant was compliant with its Authorisation going forward. It was also relevant that the Appellant had introduced a new Standard Operating Procedure to ensure that quantity and value limits were not exceeded in future, and had undertaken that the new procedures would be closely monitored by management. Notwithstanding this, the 2013 audit revealed that the Appellant had once again breached its Authorisation, had failed to follow its own operating procedures and had not applied to amend the Authorisation to allow for increased quantities and values other than in the case of the [redacted] goods.

347. The Respondent further submitted that I should have regard to the fact that the Appellant did not engage with the Respondent's local control officer after July 2010 to seek to agree the appropriate level of bond security, notwithstanding that the Respondent's auditors had recommended that the bond be increased in consultation with the local control officer.

348. Having carefully considered all of the documentation submitted and the oral evidence given at the hearing of the appeal, I am satisfied of the following on the balance of probabilities and I find as material facts:-

(i) the Appellant's employees had a genuine belief that the Respondent had made an error when recommending that a revised bond in the amount of €520,000 be put in place following the 2010 audit;

(ii) there was no engagement on the part of the Respondent's local control officer with the Appellant in relation to agreeing the amount of a revised bond following the recommendations made at the conclusion of the 2010 audit;

(iii) during the second half of 2010, new products were added to the second Authorisation and the quantity and value limits contained therein were increased on the application of the Appellant without an increased bond having been put in place;

(iv) the Appellant's employees thereafter believed that the Respondent had accepted that the level of bond security was sufficient;

(v) the introduction of the Appellant's new [redacted] range of products in 2012 resulted in an increase in demand greater than anything the Appellant had previously experienced;

(vi) the goods imported by the Appellant in excess of the quantity and value limits contained in its second Authorisation were notified to the Respondent as required;

(vii) the Appellant when monitoring its compliance with the conditions of its Authorisation focused on the overall values of the goods authorised for importation rather than on individual commodity lines;

(viii) the Appellant had applied in July 2012 for an amendment of its Authorisation to allow for the increased importation of [redacted] goods;

(ix) no decision to grant or refuse the July 2012 amendment application was made by the Respondent;

(x) the Appellant's employees believed in July of 2012 that it was not necessary to apply for an amendment of the Authorisation to allow for

the increased importation of non-[redacted] goods because the increased [redacted] value was sufficient to cover the overall value limit;

(xi) the Appellant's employees and its agent had a genuine belief that the bond in place during the currency of the second Authorisation was at all times sufficient to cover any risk to the Respondent of unpaid customs duty;

(xii) this belief was founded upon the Appellant's reading and understanding of the Respondent's Instruction Manual as well as on the Appellant's agent's experience of other PCC authorisations;

(xiii) when the Respondent had queried the level of the bond security following the July 2012 amendment application, the Appellant's agent had indicated willingness on the part of the Appellant to increase the bond if the bond amount could be agreed;

(xiv) there was thereafter little if any engagement by the Respondent with the Appellant between July 2012 and January 2013 in relation to agreeing a revised bond amount;

(xv) the Appellant was informed for the first time on the 23rd of January 2013 that the July 2012 amendment application had not been granted, and that the reason for this was the Respondent's belief that the existing bond was insufficient to cover the authorisation as it stood;

(xvi) on learning this, the Appellant by its agent immediately indicated a willingness to increase the level of the bond, suggested a basis on which a new level could be established, and indicated that the process of securing an increased bond would be put in train immediately once the new bond figure was communicated to the agent;

(xvii) once the new bond amount had been communicated to the Appellant's agent by the Respondent's local control officer, the Appellant acted in a timely manner to put the new, increased bond in place; and,

(xviii) the Appellant's employees had a genuine belief that the renewal of its PCC Authorisation in March 2013 meant that increases sought by the July 2012 amendment application had been granted with retroactive effect.

349. I agree with the Respondent that the commercial success of the Appellant's new [redacted] product range and the consequent increase in production activity and need to increase the quantity and values of products imported under the PCC Authorisation cannot of themselves constitute exceptional circumstances. They did not put the Appellant in an exceptional situation in relation to other traders carrying on the same activity. In addition, they cannot be said to be events which would not normally confront any trader in the exercise of its occupation. Even if the level of increased demand was greater than anything previously experienced by the Appellant, it does not follow that the increased demand could not have been foreseen or anticipated.

350. Accordingly, in relation to the non-[redacted] goods which were imported in excess of the quantity and value limits contained in the second Authorisation, I find that no exceptional circumstances existed and accordingly the Appellant fails to meet the first requirement of the test for retraction contained in Article 508(3).

351. Even if I was persuaded that special circumstances existed in relation to the non-[redacted] goods, I believe that the failure to apply for an amendment to the Authorisation to allow for an increase in the quantity and value of those goods constituted obvious negligence on the part of the Appellant. The fact that there was no evidence of bad faith on the part of the Appellant, as evidenced by the fact that the importation of the excess goods was made known to the Respondent through the PCC system, the fact that the Appellant believed that the overall value limit under the

Authorisation was key and monitored compliance with the Authorisation on that basis, and the fact that the Appellant believed that the amendment application it made in relation to the [redacted] goods made it unnecessary to make a similar application in respect of the other goods, do not in my view excuse the Appellant in this regard. I find it relevant to this issue that the Appellant had previously made amendment applications to increase the quantity and value of imports permitted under Authorisation. More importantly, I agree with the Respondent that the fact that the Appellant had acknowledged following the 2010 audit the necessity to comply with quantity and value limits, and had agreed to put measures in place to ensure those limits were adhered to, means that I can only find that there was obvious negligence on the part of the Appellant.

352. I therefore find that the Respondent was correct in refusing the Appellant's application for retroactive amendment of its second Authorisation in relation to non-[redacted] goods.

353. I believe the position is different, however, in relation to the application for retroactive amendment in relation to the [redacted] goods. In that case, the Appellant did apply in advance of the importation of the increased quantities of those goods for an amendment of its Authorisation. Although the sufficiency of the bond level had initially been queried by the Respondent, the Respondent did not thereafter engage in a meaningful manner with the suggestion by the Appellant's agent that a revised bond limit be agreed. The Respondent never made a decision to grant or refuse the amendment application in respect of the [redacted] goods and its failure to do so was in breach of its obligations under Article 506 of the Implementing Regulation. It was only in January of 2013 that the Appellant was informed that the amendment application had not been granted.

354. These factors did, in my view, put the Appellant in an exceptional situation in relation to other traders carrying on the same activity, and they were not events which normally confront any trader in the exercise of his occupation. I am therefore satisfied that they constitute exceptional circumstances within the meaning of Article 508(3). In reaching this conclusion, I have had due regard to the need to balance the Community interest in ensuring that the customs provisions are respected against the interests of the Appellant acting in good faith not to suffer harm beyond normal commercial risk.

355. I am also satisfied that there is an economic need for the retroactive authorisation. I believe this finding is justified by the fact that the Respondent was satisfied that the economic need test had been met when it granted a renewal of the Appellant's Authorisation, which included the increased quantity and value limits in relation to the [redacted] goods, in March of 2013.

356. In relation to the third leg of the test, namely whether there was obvious negligence on the part of the Appellant, I have had careful regard to the submissions made in this respect by the Respondent. However, I believe it is of key importance that the Appellant did make an application for amendment of its Authorisation in advance of importing the [redacted] goods. It did so at a time when it believed that the bond security which was in place was sufficient to protect the Respondent against the risk of unpaid customs duty.

357. Its belief in this regard was premised in large part on the wording of the Respondent's Instruction Manual. While I accept the explanation given by Witness 5 for the reference in the Instruction Manual to average stock turnover period rather than period for discharge, I believe it was an unfortunate choice of words and it gave rise to a genuine confusion as to how the appropriate level of bond security was to be calculated. Accordingly, I accept that the Appellant's view that the bond in place was

sufficient was bona fide and reasonable in all the circumstances. I believe this finding is also relevant when considering the complexity of the applicable rules in accordance with the decision in ***Kingdom of the Netherlands***.

358. I believe it is also relevant to have regard to the fact that there was a failure on the part of the Respondent's local control officer to engage with the Appellant in relation to agreeing a revised bond level in accordance with the recommendations made by the Respondent's auditors in July 2010. There was a similar failure on the part of the Respondent following the expression by the Appellant's agent on the 18th of July 2012 of a willingness to put an increased bond in place if the level could be agreed.

359. Not only did the Respondent fail to engage in a meaningful manner in relation to the bond following the said email of the 18th of July 2012, it also failed to make a decision in relation to the amendment application. This was, as Witness 6 accepted, a surprising omission.

360. Finally, I believe it is relevant to have regard to the fact that when the Appellant was (incorrectly) informed in January 2013 that the amendment application had been refused on the grounds of the bond being insufficient, albeit in the context of its application for renewal of the Authorisation, it immediately and proactively sought to agree a revised level of bond and, once the Respondent's local control officer had communicated the increased level of bond sought, the Appellant acted expeditiously to put the new bond in place.

361. Having regard to the foregoing factors, I am satisfied that there was not obvious negligence on the part of the Appellant in relation to the [redacted] goods imported in excess of the quantity and value limits contained in its second Authorisation.

362. I therefore find that the Appellant meets the criteria for retroactive amendment of an authorisation contained in Article 508(3) and it is therefore entitled to retroactive amendment of its second Authorisation in respect of the [redacted] goods for the period from the 19th of September 2012 to the [redacted]st of [redacted] 2012.

J. Conclusion

363. My findings above can be summarised as follows:-

(a) The Opinion of the Advocate General and the decision of the Court of Justice in **Case C-437/93** ***Hauptzhollamt Heilbronn –v- Temic Telefunken*** do not mean that there is a general prohibition on quantitative restrictions being contained in authorisations to operate the processing under customs control suspensive procedure. The prohibition is limited to authorisations granted pursuant to Article 18(3) of E.C. Regulation 1999/85.

(b) Even if that Opinion and decision did impose such a general prohibition, only quantitative restrictions imposed by customs authorities would be prohibited. The requirement that a trader adhere to the quantity and value limits contained in an authorisation, and apply to the Respondent in advance of importation if those quantity and value limits will be exceeded, does not amount to the imposition by the Respondent of quantitative restrictions.

(c) The Tax Appeals Commission does not have jurisdiction to consider an argument grounded in legitimate expectation.

(d) No decision was made by the Respondent to refuse the application made by the Appellant in July 2012 to amend its PCC Authorisation. Accordingly, I cannot consider whether a refusal to grant that Authorisation would have

been correct in law having regard to the Respondent's Instruction Manual on Processing under Customs Control.

(e) Accordingly, the Appellant has not succeeded in its first appeal against the decision of the Respondent's Designated Appeal Officer on the 9th of December 2014 that the Appellant had incurred a liability to customs duty pursuant to the provisions of Article 204(1)(b) of the Customs Code.

(f) The Appellant's September 2013 application for retroactive amendment of its PCC Authorisation to cover the excess importation of non-[redacted] goods cannot succeed because the Appellant has not established exceptional circumstances and further because there exists obvious negligence on the part of the Appellant in the importation of those goods.

(g) The Appellant is entitled to succeed in its September 2013 application for retroactive amendment of its PCC Authorisation to cover the excess importation of [redacted] goods because, having regard to all of the circumstances, there existed exceptional circumstances, there was a proven economic need and there was not obvious negligence on the part of the Appellant in the excess importation of those goods.

(h) The Appellant has therefore succeeded in part in its second appeal against the decision of the Respondent's Designated Appeal Officer on the 1st of December 2014 that the Appellant was not entitled to retroactive amendment of its second PCC Authorisation.

364. By reason of the foregoing findings, I determine pursuant to section 949AL(1) of the Taxes Consolidation Act 1997 as amended that the decision of the Respondent's Designated Appeal Officer on the 1st of December 2014 ought to be varied and that the Appellant's Authorisation to Process Goods under Customs Control bearing Number IE[redacted] should be amended to allow the processing of the goods the

subject of the amendment application made by the Appellant on the 17th of July 2012, with effect from the 19th of September 2012 to the [redacted]st of [redacted] 2012.

Dated the 18th of July 2022

MARK O'MAHONY
APPEAL COMMISSIONER