TC01604

Customs duty - whether the Appellant had "empowered" a third party to act either as its direct or indirect representative in dealings with the Customs authorities - if so, whether the Appellant could sustain the various limbs of the defence against liability for the duty provided for by Article 220(2)(b) of Council Regulation 2913/92 - Appeal dismissed

FIRST-TIER TRIBUNAL **Reference no: TC/2009/16116**

TAX

QUEENSWOOD NATURAL FOODS LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
ANDREW PERRIN F.C.A.

Sitting in public at Vintry House in Bristol on 27 and 28 October 2011

Florine Weaver of Queenswood Natural Foods Ltd on behalf of the Appellant
David Yates, counsel, on behalf of the Respondents

DECISION

Introduction

1. This case concerned a post-clearance demand by HMRC for unpaid customs duty in the amount of £119,120.89 plus interest. The Appellant is a medium-sized wholesaler, supplying organic produce principally to health food shops and other retailers. In the period from June 2006 to December 2008 the Appellant imported either 22 or 28 consignments (the precise number is not particularly material) of unrefined cane sugar from Havana, Cuba. It is common ground between the parties that the sugar was entered under the wrong commodity code for Customs Duty purposes which is why the duty is now claimed.

2. There were two different codes for the importation of raw sugar in the relevant period. Code 1701 11 10 00 applied to:

> *"Raw sugar not containing added flavouring or colouring matter; Cane sugar; For refining".*

The other code, Code 1701 11 90 00 applied to:

> *"Raw sugar not containing added flavouring or colouring matter; Cane sugar; Other".*

3. In this decision we will refer to those two codes as Codes 10 and 90. The rate of duty for imported sugar that was not necessarily to be refined (Code 90) was higher than the rate of duty where imported sugar was imported in order to be refined (Code 10). There were in fact two different rates of duty even within Code 10, though no claim was ever made that the lower of those two rates would apply. The Appellant's freight forwarder entered the imports under Code 10, paying the higher rate of duty within the two rates within Code 10, albeit that since the sugar was not to be refined, it should have been entered under Code 90, with the yet higher rate of duty then being paid.

4. The Appellant has advanced two different arguments as to why it should not be liable to pay what is now admitted to be the correctly calculated extra duty. First it is contended that when the freight forwarder acted for the Appellant it had not properly been "empowered to act in the name of or on behalf of the Appellant" within the meaning of Article 5, paragraph 4 of Council Regulation (EEC) No 2913/92. As a result it was claimed that within the meaning of Article 5, the freight forwarder was neither the direct nor the indirect representative of the Appellant for Customs Duty purposes. In both those cases of "representation", it was clear that the Appellant itself would have been liable for underpaid duty, but if the Appellant prevailed in its argument that the freight forwarder was representing itself to be acting in the name of or on behalf of the Appellant as either form of representative, **when "not empowered" to do so,** then the freight forwarder would alone have been liable for the underpaid duty. We might add that in that situation the duty might well not have been recoverable, because we were told that Hilcon had ceased business.

5. Our decision is that the freight forwarder was the Appellant's "direct representative" which renders the Appellant liable for the underpaid duty unless the Appellant's second argument is sustained. The second argument is the fairly familiar one under Article 220(2)(b) of the same Council Regulation. Under this

Article, the Appellant can escape liability for the underpaid duty if it can sustain all of the following contentions, namely that:

- the incorrect customs code was entered as a result of an error on the part of the customs authorities;
- the error could not *"reasonably have been detected by the person liable for payment"; and*
- the Appellant had *"acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration."*

6. The Appellant advanced various arguments as to why it was suggested that the error in entering the goods under the wrong Customs code was occasioned, or at least perpetuated, by errors on the part of HMRC. We will consider each of the arguments, one of which has some force. So far as the Appellant is concerned, the regrettable feature is that European case law makes it perfectly clear that the second of the three arguments that the Appellant must sustain represents a very steep test. It is not sufficient that we conclude that there was no negligence on the part of the Appellant, or indeed that we confess to having very considerable sympathy for the Appellant. The test that we must apply is whether, assuming the Appellant to be conversant with the content of the Official Journal, and thus the description of goods properly entered under Codes 10 and 90, the Appellant could reasonably be expected to have detected that the goods had indeed been wrongly entered under Code 10, and that they should have been entered under Code 90. We conclude that it was absolutely plain that the goods were wrongly entered under Code 90; that the error was thus a simple one that could easily have been detected by the Appellant, and that the Appellant's claim to escape liability under Article 220 fails. This point is somewhat reinforced by the fact that once the error was detected, nobody contended that there was anything ambiguous about the two Customs Codes, and indeed the circumstances leading up to the error in the first place did not stem from any such ambiguity. The error stemmed either from a culpable failure of the freight forwarder to enter the right code, or from a lack of communication between the Appellant and its freight forwarder, leading to the issue of refining being completely ignored.

7. We feel somewhat reluctant to have to dismiss this Appeal, because the Appeal was well conducted by the Appellant's representative, the buyer within the Appellant's organisation who had had considerable responsibility for the imports in question. We also accept that that representative had acted honestly and competently, and had good grounds for saying that she had been let down by others. That however is not something that can influence the way in which we must approach the middle test to which we have just referred.

The evidence

8. Evidence was given on behalf of the Appellant by Florine Weaver ("Mrs. Weaver") and Peter Burke, respectively the sugar buyer and the general manager of the Appellant. Evidence was given on behalf of the Respondents by Jo Marshall ("Ms. Marshall") who had been the HMRC Officer responsible for undertaking the review of the original decision to issue the claim for the underpaid duty. We believe that all the evidence given was honest and straightforward, and will record it in giving the facts in more detail.

The facts in more detail in relation to the "empowerment" point, and the related legal points

9. It was clear that in 2004, the Appellant had had little experience of Customs procedures. Whilst arrangements for the importation of unrefined sugar from Havana did not commence until 2005, it did appear that the Appellant had appointed a freight forwarder, Hilcon Agencies Limited ("Hilcon") to act for it in relation to some other products in 2004.

10. In 2005, Mrs. Weaver's predecessor, as the person who would be responsible for all the administration in relation to sugar purchases, obviously contacted Hilcon with a view to Hilcon having some role (to use a neutral phrase at this point) in relation to the proposed sugar imports. Either on, or shortly after, the first importations of sugar, Mrs. Weaver joined the company and her evidence was that both she and her colleagues admitted to being broadly ignorant of everything in relation to Customs duties and formalities. On account of that, Mrs. Weaver said that they expected Hilcon to deal with everything to do with Customs duties and the unloading of cargos of sugar, and indeed to be responsible for everything including even the transport of the sugar to the Appellant's premises. There was no written agreement between the Appellant and Hilcon as to the nature of their relationship and Mrs. Weaver, and seemingly others in the Appellant's organisation, appeared not to have appreciated that if Hilcon acted in particular ways (indeed the fairly common way in which freight forwarders might act for importers), the Appellant might have potential Customs liabilities in the event of Hilcon entering goods under the wrong codes, and therefore an obvious incentive to cross-check how Hilcon were entering the goods. The Appellant claimed, and we accept this claim, that it was unaware that there might be such potential liabilities. The Appellant simply took the view that it was ignorant about Customs matters; they had engaged an expert to look after everything, and that that expert would either get it right, or be responsible if it made some error.

11. When the first consignments of sugar were imported, the points that were clear were that the forms were completed by Hilcon, Hilcon indicated that they were acting as the Direct Representatives of the importer, i.e. the Appellant, by giving the appropriate reference number for the consignee, and the goods were entered under Code 10.

12. We should mention at this point that, because Code 10 was designed only to cover sugar that was imported "for refining", for Code 10 to be a valid code it was not only essential that the intention be that the sugar should be intended to be refined, but in addition an End User authorisation had to be applied for. The purpose of this was of course to ensure that the sugar was indeed refined, and that if it was not then the higher rate of duty applicable to Code 90 would have to be paid. No such End User authorisation was applied for, notwithstanding that this was inevitably required with any sugar imported under Code 10.

13. HMRC obviously contacted Hilcon in October 2009 with a view to trying to establish the basis on which Hilcon had been appointed by the Appellant, and Mr. Hillsden of Hilcon wrote to Ms. Marshall in the following terms:

"Re Queenswood Natural Foods Ltd

Dear sirs, further to today's telecon, we confirm that we have been acting as clearing Agents for Queenswood's for approx five years.

Documents are normally sent to ourselves with a short covering letter (copy attached). Sometimes there was only a compliments slip attached. We have never been given specific instructions as to which Tariff no to use and the words END USE have never been mentioned in any instructions. When arranging payment of any Customs charges, we were authorised to use Queenswood's deferment account. We obtained the Tariff no used on our entries by contacting the Tariff Helpline and reading out the descriptions from the suppliers Invoice. This was not done on a regular basis however as our entries were accepted by the Customs House when processing.

We started to sub contract our entries to another Agent when the Tilbury Customs house closed for general workings and all works were initially passed to Aberdeen, now at Salford. We were not connected to the Customs computerised system and it was to our benefit to work with another agent. We believe this happened around 2005/6. We consider the term used on our entries "direct representation" to be correct as in our opinion we were asked by the Importer to clear goods on their behalf and as such we were Directly representing the importers to the Customs.

Please find attached one copy of Invoice from ourselves to Queenswood covering works carried out on their behalf.

If you require any further information, please contact the undersigned.

Yours faithfully,"

14. We will need to revert to several points mentioned in this letter when we deal with the second topic, namely the possible defence under Article 220. For present purposes, however, the significance of the letter is that it confirms Hilcon's understanding of the way in which they were representing the Appellant, and their assertion that they rightly described themselves, either in words, or by using a particular Code, Code 2, inserted into one of the boxes, as the Direct Representative of the identified Queenswood.

15. Prior to quoting the terms of Article 5, the factual position appears to be that:

- the Appellant had clearly appointed Hilcon in a general sense to "act on its behalf" (whatever this might mean legally) in dealing with Customs, in unloading and transporting the sugar, and in arranging for duty actually to be paid by being authorised to use the Appellant's deferment account;
- the Appellant was unaware that it might have liabilities for wrong declarations of the goods for Customs purposes, and if it thought about matters, it probably thought that having entrusted matters to an expert, the expert would make the appropriate declarations, and be responsible itself if it made errors;
- Hilcon itself, having been instructed to act on behalf of the Appellant to deal with Customs declarations for the Appellant, considered it appropriate to treat itself, as we believe would be the normal and realistic assumption, as being a representative, and indeed the direct representative of the Appellant.

16. We now quote Article 5, to which we have already referred, which distinguishes between direct and indirect representatives, and also deals with the situation where a person purporting to be a representative has not been empowered to do so. The relevant parts of Article 5 are as follows:

> *"1. ……any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.*
>
> *2. Such representation may be:*
>
> - *direct, in which case the representative shall act in the name of and on behalf of another person, or*
> - *indirect, in which case the representative shall act in his own name but on behalf of another person.*
>
> ……
>
> *4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.*
>
> *A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.*
>
> *5. The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative."*

17. We might deal with the undisputed point first, which is that if Hilcon acted either as the direct or indirect representative of the Appellant, then the Appellant is liable for the unpaid duties. There might theoretically have been joint liability in the case of indirect representation, but since Hilcon has ceased business, whether Hilcon would theoretically also have been liable in the case of indirect representation is immaterial.

18. The difficult point is how to determine whether the Appellant "empowered", or in other words authorised, Hilcon to act as its representative in relation to customs matters.

19. It is clear, and indeed somewhat unfortunate, that it is unnecessary for there to be a written authorisation, or indeed for there to be any written contract specifying the relationship between the Appellant and Hilcon. Had there been a requirement for such a written contract, and in particular if there had been some standard form of appointment contract, it would at least have been clear on what basis Hilcon was appointed and, perhaps equally as relevant, it would then have been clear to the Appellant whether it did or did not have potential residual liability should wrong declarations be made on its behalf.

20. As it is, the Appellant's position is clear. Their understanding of the situation was as we summarised in paragraph 10 above, particularly in the last sentence of that paragraph.

21. In the hearing, one of the points advanced by counsel for the Respondents was that the Appellant cannot sensibly have expected Hilcon to assume a potential liability for declaration errors when it was only charging fairly modest amounts for its services. Beyond this, the contention was that the reasons why the Appellant's contention about lack of authority had to be wrong were all advanced in a particular paragraph of Ms. Marshall's second Witness Statement. The relevant paragraphs themselves partly referred to, and declined to repeat, points that Ms. Marshall had included in her review letter.

22. All that the relevant paragraphs actually revealed were that:

- Hilcon itself had declared itself to be the Appellant's direct representative, which is undisputed but not relevant to the question of whether it was properly authorised to do so;
- the Appellant had periodically referred to Hilcon as "our forwarding agent";
- one fax was produced in which the Appellant asked Hilcon to "arrange clearance and book in when the containers are ready for delivery";
- Hilcon had clearly stated that they considered themselves to be properly appointed as direct representatives in the letter that we quoted in paragraph 13 above; and
- finally, there being no written contract between the parties, there was nothing to undermine the reasonable assumption that in the ordinary way the appointed freight forwarding agent would be treated as empowered to act as direct representative.

Our decision on the first issue

23. Whilst we consider it very unfortunate that this matter was not more clearly established, and particularly unfortunate that we consider that there is every likelihood that the Appellant failed to appreciate that it potentially incurred liabilities if any of Hilcon's filings were wrong, we do decide that Hilcon was indeed the Appellant's direct representative. This means that the Appellant has the liability, subject to the Article 220 points, for the claimed duty.

24. The reasons for this decision are as follows.

25. It is clear that, whether or not the Appellant actually appreciated the potential consequences of its action, it did clearly appoint Hilcon to act on its behalf as freight forwarding agent, and it regarded that authority as extending to everything to do with declaring the goods for customs purposes. Referring to the wording of the first paragraph of Article 5 quoted above, it cannot be denied by the Appellant that it appointed Hilton to do precisely what that paragraph envisaged. When it is almost invariably the case that freight forwarders will act as direct representatives of importers when making customs declarations, when the Appellant was clearly appointing Hilcon to act fully on its behalf in all matters relating to customs declarations, and when Hilcon itself inevitably proceeded on this basis, we consider that the Appellant did "empower" Hilcon to act in the requisite way. It is more realistic to conclude that the Appellant made this appointment, but failed itself to appreciate the significance of it, than to conclude that the Appellant appointed Hilcon to act in every way on its behalf in respect of customs declarations, but did not

authorise Hilcon to treat that appointment as having its ordinary consequences and attributes.

26. We were shown a paper summarising the European principles of contract law, which included a sentence to broadly the same effect as the English law principle geared to holding out a person to be one's agent. The sentence said that:

> *"A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it."*

We quite understand that, in the present context, we are not directly considering a contractual question. It is the case, however, that by the very full delegation of authority from the Appellant to Hilcon to enter into all dealings in relation to customs matters on its, the Appellant's, behalf, and by Hilcon assuming very understandably that it was to be acting in the name of, and as the direct representative of, the Appellant, that third parties would be led to accept that situation. The Appellant did not appreciate the potential consequences and risks of this, but that was the result of the appointment that it made.

The Article 220 issues

27. We summarised in paragraph 5 above the three questions that we must address, all of which the Appellant must sustain in order to be able to rely on this defence to its liability for the unpaid duty.

28. We deal first with whether the code was entered incorrectly as a result of an error on the part of the customs authorities. We understand, in this context, that the Hewlett-Packard case, *Societe Hewlett Packard, France v. Directeur General des Douanes* (C-250/19 [1993] ECR I-1819 establishes that omission on the part of the customs authorities can be treated as occasioning the perpetuation of incorrect customs entries.

29. There were essentially five respects in which it was suggested that we might conclude that the acts of the customs authorities had contributed to the wrong declaration. They were:

1. whether, when Hilcon allegedly rang up HMRC's helpline, as mentioned in the letter quoted in paragraph 13 above, and recited the description of the goods in the supplier's invoice, the customs authorities gave the wrong code;
2. whether, when in 2008 a consignment was held up because there was an issue, not as it turned out as regards customs duty, but as regards "safeguard" (a levy designed to stop "dumping", and therefore dependent on the importer showing that it had not sold goods at a loss) HMRC confirmed on that occasion that the correct code was being used;
3. whether the Appellant's answer to the end sale price of goods, in relation to the enquiry mentioned in the previous paragraph, should have drawn HMRC's attention to the use of the wrong code, since the Appellant's answer in relation to the sale of the goods made it clear that the sugar was often being sold directly to retailers, and not therefore refined;

4. whether another challenge, also in 2008, ought also to have drawn HMRC's attention to the use of the wrong code, when the amount of duty paid was questioned, because the duty paid had been included in the wrong box or column on the form. On this occasion, as soon as it was appreciated that the duty then expected to be paid in accordance with Code 10 had been paid, the enquiry was immediately dropped; and finally
5. it was suggested that HMRC's computer should immediately (or at any rate well before 22 or 28 consignments of sugar had been imported under the wrong code) have picked up the point that Code 10 must have been wrongly declared, when no End Use authorisation had been applied for This would either be because this would indicate that the sugar was not being refined or that even if the sugar was destined to be refined, the conditions of Code 10 had still not been satisfied..

30. The first of the points mentioned in paragraph 29 is certainly of no significance. The reference in the letter to the fact that the correct code was checked with HMRC's helpline was firstly a slightly hesitant claim, made years after the event. It is well established that oral indications of information about codes cannot be relied upon. HMRC's checks indicated that no question was raised by Hilcon or the Appellant anyway in relation to sugar, albeit that the checks did reveal other enquiries about different products that Hilcon had made at the relevant time. Even if an enquiry was made, an indication of the correct code would not have extended to the later numbers in the code, including in other words either the 10 or the 90 for the obvious reason that the correct choice of those numbers would entirely depend on what the buyer would do with the sugar.

31. Another relevant point emerges from the letter that we quoted at paragraph 13. On the Appellant's evidence that it knew nothing about customs categories, and left everything up to Hilcon, it appears entirely understandable that the Appellant would have simply described the imported product as cane sugar, and forwarded the Cuban supplier's invoice to Hilcon, and it is improbable that the Appellant would have referred to whether the sugar was to be refined or not. In just the way, for instance, that it would not have indicated the plainly irrelevant issue of whether the sugar was to be sold to customers in the north or south of Britain, it would be unlikely to have indicated whether it was to be refined if it had no idea that that might be significant. This ties in with Hilcon's statement that it was never given any indication about End Use. It is presently completely irrelevant whether Hilcon should have been expected to note the difference between Codes 10 and 90, and asked the Appellant which was the appropriate one. The only point that we make is that this is where the initial error appears to have been made. It was the lack of communication between the Appellant and Hilcon, and the joint failure to appreciate that Code 10 was only applicable where the sugar was to be refined, and an End Use authorisation obtained, that has caused the error in this case.

32. We dismiss the second, third and fourth claims that HMRC contributed to the use of the wrong code. We accept that the Officer looking into the "safeguard" issue was not remotely concerned about the use of a correct code, but about the dumping concerns at which safeguard charges were directed. We accept that the answer that the Appellant provided, referred to at the third point, which indicated that the end sale price was not always known because the sugar was being sold to numerous different buyers, including health food shops, did reveal that the sugar could not inevitably be being refined. However, the officer dealing with the enquiry relevant to the second and third points was concerned only about the different issue of safeguard, and not with whether the correct code had been used.

33. The point raised in the fourth paragraph is clearly irrelevant. It simply related to the fact that an entry had been put in the wrong column. Admittedly the entry was wrong, as indeed were all the entries, because of the Code 10/90 confusion, but the officer raising the point mentioned in the fourth paragraph only raised the issue because a figure was in one column when it should have been in another. Once that was appreciated, the enquiry was dropped.

34. In paragraph 6 above, we mentioned that one of the points advanced in support of the proposition that HMRC officers contributed to the wrong use of code, or allowed the error to be repeated, had some force. This is the fifth point, namely the fact that Code 10 should never have been used without the simultaneous application for an End Use authorisation. Without that authorisation, HMRC should have spotted that Code 10 should not have been used for one or another reason. Either the sugar would not have been imported "for refining", making the absence of the End Use authorisation understandable, but then clearly indicating that Code 90 should have been used, or the entry should have been rejected because the Code 10 condition, namely that the End Use authorisation be obtained, had not been satisfied.

35. HMRC contended that their failure to spot this point was not evident on the face of the declarations, and we accept that the error was not manifest in the way that it would have been had the declarations declared Code 10, and described the goods as "Unrefined cane sugar to be sold directly to end retailers, without being refined". We were led to believe, however, that some computer program ought to have flagged up the feature that Code 10 ought not to have been used without an End Use authorisation, and in some way that program failed to operate. We accept that in this regard, from some date, and probably from a fairly early date in the overall programme during which either 22 or 28 consignments of sugar were landed, the failure of this computer system did prevent HMRC stopping the entirely honest misuse of the wrong code. Had that misuse been revealed at an early point, the Appellant would have been in a far preferable position, in that it could either have increased the sale price to fund the extra payment of duty, or could have ceased making further purchases if they were uneconomic at the higher duty rates. On our finding that the Appellant fails to surmount the second of the tests referred to in paragraph 6, it is not strictly relevant for us to indicate whether we conclude that HMRC did cause the error to be perpetuated. In case, however, our decision on the point to which we will now turn is itself overturned on appeal, we record that we do consider that HMRC's failure to detect the Appellant's, or Hilcon's error, did contribute, from a relatively early date, to the continued use of the wrong code. Unless we are overturned in our conclusion on the following point, that conclusion will regrettably not assist the Appellant.

36. We turn now to the question that seems to us to be the key one, which is whether the Appellant could reasonably have been expected to detect the error, that is the error occasioned by the failure of communication between itself and Hilcon, and the additional fact that HMRC also failed to flag the wrong use of the Code because of the absence of the End Use authorisation.

37. We accept that in approaching this question, we are entitled to consider the issue of whether the Appellant was experienced or fairly ignorant about customs matters. We certainly also accept the proposition that subjectively the Appellant was confirmed in its belief that it was using the right code when the enquiry about safeguard, mentioned in relation to the second and third points dealt with in paragraph 29 above, was satisfactorily resolved. We also confirm that we regarded Mrs. Weaver as a most impressive and honest witness. Notwithstanding that she is French and that English is not her language of birth, she grappled with the Customs

regulations in an impressive way, and led us to conclude that were the issue whether we thought that she had at any time been "at fault", or "negligent", the answer would have been a definite "no". HMRC's attitude seemed somewhat to reflect that view on our part, in that it was periodically suggested that the Appellant had been let down by Hilcon, albeit that if Hilcon had ceased business, it might be rather fruitless to pursue any action against Hilcon. For our part, we do not know where the original fault lay, in that we have already indicated that, in substantial part, it resulted from a regrettable lack of communication at the start between the Appellant and Hilcon.

38. None of this, regrettably, is relevant. It is made absolutely clear by the Court of Appeal's decision in *Invicta Poultry Limited* [1998] 3 CMLR 70 that we must fundamentally ask whether the error could reasonably have been detected by the Appellant, making the critical assumption that the Appellant was conversant with the terms of the Official Journal, and in other words the description of the goods rightly imported under Code 10, and under Code 90. It was absolutely clear that the sugar must have been being imported "for refining", and it was equally clear that the End Use authorisation had to be obtained. The error in this case appears to us to have been an entirely simple error. This is confirmed by the fact that no argument has been advanced in any respect to suggest that there was confusion about the correct code. It is also confirmed by the revelation that the error really resulted from a lack of communication between the Appellant and Hilcon in relation to intended use. It did not result from there being the slightest confusion in the wording of the Codes to someone who actually appreciated what the facts and the proposals were.

39. Our conclusion in paragraph 38 above is based on addressing the situation of the Appellant itself in isolation. In other words, however little knowledge it may have had of customs matters, and however much it may have relied on Hilcon, we must still address the question that we dealt with in paragraph 38 by assuming that the Appellant was aware of the wording of the codes and if, on that assumption, it is reasonable to say that it could and should have detected any error possibly perpetuated by HMRC, then its Appeal fails. We might add that there is a further ground on which the Appeal might fail, which is that when the Appellant appoints someone who cannot claim ignorance in relation to customs matters, then we should almost certainly look to the combined experience of the Appellant and its appointed agent, and not just treat the Appellant as the sole relevant party, whereupon we can pay some regard to its naivety in relation to customs matters. On the required assumption that we must make, that naivety has not saved the Appellant in this case anyway, but we do consider that we could equally have addressed the question by treating the Appellant and its appointed agent as not being at all ignorant. That would simply have produced the same conclusion.

40. We consider it unnecessary to consider the third issue relating to "good faith", and to the case law authority to the effect that in this context good faith has the somewhat modified meaning of requiring the Appellant to demonstrate due diligence. In the case where we anyway conclude that the error was a simple one that could have been detected, it seems to us that this undermines the Appellant's appeal, and probably also results in failure to satisfy the third key point. That third point is obviously more relevant when an appellant has satisfied both of the first tests.

41. We should make one final point. During the hearing, it was implicit that no attention had been given to the end use of the imported sugar, and it was never suggested that there was ever an intention that the sugar be refined. Since the hearing, and having read the papers more carefully, we have noted references to the suggestion that initially the sugar was being imported for refining, and that at some time there was a change of use. We base our decision on the information given at

the hearing, and assume that there was never an initial intention of selling the sugar for refining. We assume that this unclear claim, which was not referred to during the hearing, must have been based on some misunderstanding.

Right of Appeal

42. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HOWARD M. NOWLAN (Tribunal Judge)

Released: 28 November 2011