TC02029

Appeal number: TC/2011/2974

Customs Duty – Post clearance demand notice – Whether waiver of notice – No – Whether correct customs information provided – No – Whether importer liable to pay import duty and for accuracy of presented documents – Yes – Burden of proof not discharged – Appeal Dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GB SEED LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE KAMEEL KHAN
CAROLINE de ALBUQUERQUE

Sitting in public at Bedford Square, London WC1 on 29 March 2012

Russell Haughan, General Manager for the Appellant

Trevor Bewell, Senior Manager and Simon Pritchard, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of HM Revenue & Customs ("the Respondents") to issue a port clearance demand notice ("C18") for customs duty totalling £44,647.55. This was for 15 consignments of millet imported on dates between 19 November 2008 and 24 September 2009. The consignments were entered to commodity code 1008 2000 00.

2. The Respondents carried out a post clearance check of imports made by the Appellant between November 2008 and September 2009. These were found to have not met the conditions to allow a zero rate of customs duty to be applied to the importation into the European Community (EC).

3. On 22 January 2011, the Appellant requested a formal Departmental Review. On 17 March 2011, the decision to issue the C18 was upheld on view.

Relevant Background Facts

4. The Appellant who are grain importers imported goods (cereal products) ("the Goods") into the EC and expected to obtain a duty reduction or exemption.

5. The Goods fell within Combined Nomenclature Code 1008200 00 00 ("Millet"). At the time the goods were imported the normal customs duty rate was 56 Euros per tonne (1,000kgs). The duty had been reintroduced (after a period of exemption) and the Goods did not qualify for transitional relief at the nil rate of duty. It was not possible to claim a reduced rate of duty of 7 Euros per tonne since the relief, which expired on 25 November 2008, had not been claimed.

6. In order to qualify for duty suspension, which meant no duty, the Goods had to qualify under transitional relief provisions. This was a temporary window which allowed relief from duty for goods which were en route before the reintroduction of duties on cereals came into force. A trader whose goods had started their journey to the EC not later than the date customs duty regulations were reintroduced, 23 October 2008 would qualify for transitional relief of nil duty.

7. The import entry and documentation relevant to the import of the Goods showed that they had started their journey from the exporting country after 23 October 2008 and therefore after the relevant regulations re-introducing customs duty on cereals was officially published. Only goods which had commenced their journey from the exporting country before 23 October 2008, would qualify for relief.

8. The HMRC Customs Handling of Import and Export Freight ("CHIEF") is the Commissioners computer system which manages both the customs declaration and movement of goods into and out of the UK. Declarants use CHIEF to calculate duties when importing goods. The Appellant (or their agent) are required to make certain declarations under the CHIEF computer system. The Appellant's agents (Global Container Services, ("Global")) submitted their import entries by declaring the code

"FB" in box 47C. This box is used to enter a tax rate identifier onto the CHIEF system to calculate appropriate custom duty rates. By entering this code the Appellant told the CHIEF system that the goods being entered were not liable to customs duty. The code "F" represents goods liable to duty at the full rate and code "B" represents a tariff suspension or nil rate duty. Both these codes were entered and the CHIEF system applied a nil duty rate to the Goods.

9. The result of entering code "FB" was that the goods were cleared at a nil rate of duty. Code "F" would only have given the options of a full rate of duty or a reduced rate. Code B represents a tariff suspension or nil duty rate. Because both codes were used, the CHIEF system applied a nil duty rate and it recognised a tariff suspension may exist. Code B therefore triggered the system to provide the option of a nil rate and that caused problems in this case.

10. A post clearance check found that the nil customs duty rate was incorrectly claimed on the entries and the Commissioners therefore raised a C18 demanding the customs duty of £44,647.55. A Notice of Appeal was filed on 19 January 2011.

11. The facts in this case are undisputed.

12. **The Law**

RELEVANT LEGISLATION

European Council Regulation 2913/92, Article 220 states:

> Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.

European Commission Regulation 2454/93. Article 199 states:

> Without prejudice to the possible application of penal provisions, the lodging of a declaration signed by the declarant or his representative with a customs office or a transit declaration lodged using electronic data-processing techniques shall render the declarant or his representative responsible under the provisions in force for:
>
> - the accuracy of the information given in the declaration,
> - the authenticity of the documents presented, and
> - compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.

Commission Regulation (EC) No 1039/2008 of 22 October 2008 reintroducing customs duties on imports of certain cereals for the 2008/09 marketing year

Article 1

The application of customs duties on imports of products falling within CN codes 1001 90 99, 1001 10, 1002 00 00, 1003 00, 1005 90 00, 1007 00 90, 1008 10 00 and 1008 20 00 is hereby introduced for all imports at the normal rate carried out in accordance with Article 130 of Regulation (EC) No. 1234/2007 and for all imports carried out under the tariff quotas at reduced duty opened in accordance with Article 144 of that Regulation.

In accordance with Articles 135 and 136 of Regulation (EC) No 1234/2007, the customs duties are reintroduced at the levels as last laid down by Commission Regulation (EC) No 1026/2008.

Where the cereals referred to in paragraph 1 of this Article undergo direct transport to the Community and such transport began at the latest by the date of the publication of this Regulation, the suspension of customs duties under Regulation (EC) No 608/2008 shall continue to apply for the purposes of the release into free circulation of the products concerned.

Proof of direct transport to the Community and of the date on which the transport commenced shall be provided, to the satisfaction of the relevant authorities, on the basis of the original transport document.

The duration of that transport to carry the products to their destination shall be that strictly necessary depending on the distance and method of transport.

Appellant's Submissions

13. The Appellant makes the following submissions.

(1) Global were employed in good faith to act as an agent and the declarations solicited in C18 were submitted by them on the Appellant's behalf. They relied on the expertise of the declaring agents.

(2) The Commissioners have caused confusion by issuing two demands (C18), one each to Global and to the Appellants for the same value and consignments. They say that the recovery of the duties must be from their agents not themselves.

(3) The non-collection of duty must have been the result of an error made by the Commissioners. The Appellants say that the CHIEF system was faulty in leaving the tariff suspension open for longer than necessary. Their submission is contained in a letter of 19 January 2011, which states:

> "it is standard customs response to advise the importer is responsible to ensure the correct duty is paid but you may have grounds to appeal based

> on … the tariff suspension appears to be left open much longer than necessary, it continued to be claimed as there was no reason at a time to believe this was invalid and the EC regulation does not appear to be common knowledge to the agents and those in the trade, if customs was aware of this before those entries were made why was the suspension not removed from CHIEF … earlier?"

(4) They say they were compliant with the law and relied on competent advisors. Their letter of 19 January 2011 states:

> "… at this time we were an SME and as such we employed and relied upon expertise of clearing agents. All of our paperwork from the clearing agents off the CHIEF system states nil duty…"

13(5) The Appellants say that they relied on the information provided by the CHIEF system to verify whether duty was payable, CHIEF advised that nil duty was payable. If CHIEF has indicated there was a duty liability then the reduced 7 Euro/1000kg rate would have been applicable.

14. The Appellant provided no witnesses, expert evidence, documentary evidence or case law to support their position.

The Respondents' Argument

15. The Respondents make the following submissions:

(1) The Appellant is responsible for ensuring that the information provided on the relevant customs declarations is correct and that all obligations have been complied with as required by Article 199 Commission Regulation (EC) 2454/93. The Goods were wrongly declared because they did not qualify under the transitional provisions.

(2) It is the duty of the Appellant to input the correct code. It is accepted that the CHIEF system was left open, which allowed a suspension code "B" to be entered. However, this would not provide a defence in the circumstances. The goods did not qualify for transitional relief if they started their journey after the 23 October 2008.

(3) All persons are deemed to be aware of changes in the law and the rate of duty where these are published in the official EC Journal. A person is not able to sustain the defence of error where they are aware (or taken to be aware) of changes to customs duties.

(4) The importer is responsible for paying the duties and for providing the correct documentation. This primary obligation rests with the importer and not the agent. This position should be reflected in the contractual relationship between the importer and the agents and should ensure that any negligence by the agents would be covered by a contract indemnity.

Tribunal Powers

16. Section 14(2) of the Finance Act 1994 provides an appeal for reviewing a decision to impose customs duty or the amount of duty. This allows a taxpayer to challenge a Commissioner's decision. A person affected by a decision of the Commissioners may require a review in accordance with Section 14 and 20. Once the review has taken place, the decision of the Commissioners may either be confirmed, withdrawn or varied and appropriate consequential steps taken. The Tribunal's jurisdiction is conferred by Section 16 Act 1994. Section 16(1) requires any appeal to be brought within a period of 30 days from the date of the decision. That has been done. The powers of the Tribunal are contained in Section 15(5). The relevant parts of that section provide as follows:

> "In relation to other decisions, the powers of an appeal Tribunal on an appeal under this section shall also include power to squash or vary any decision and power to substitute their own decision for any decision squashed on appeal".

17. The burden of proof is addressed in Section 16(6) Finance Act 1994, which provides as follows:-

> "On an appeal under this section the burden of proof as to –
>
> shall lie upon the Commissioners; but it shall otherwise be for the Appellant to show that the grounds on which any such an appeal is brought have been established".

18. Accordingly, the burden is on the Appellant to satisfy the Tribunal to exercise its powers under Section 16(5) to squash, vary or substitute the commissioners' decision.

Discussion

19. The first question which must be asked is who is responsible for making the payment of the customs duties? Are the Appellants responsible? The Appellant had no formal contract to engage the services of Global, who acted for the Appellants over several years. The relationship between the parties was based on trust, understanding and an informal business relationship. The Appellants employed Global in good faith to act as their agent and the declarations listed in the C18 form were submitted by them on the Appellant's behalf.

20. Article 5 Counsel Regulation, (EC) 2913/92 state that a representative may be appointed to act on behalf of a party. The representation may be a direct or indirect representative. If direct, the representative shall act "in the name or on behalf of and on behalf of another person". If a person is appointed to act as a direct representative then the importer of the goods will be liable for the customs duties. If appointed to act in an indirect capacity, the agent can be jointly and separately liable with the importer. In the TARIC (EU's online customs tariff database) information provided, Global identified themselves as the direct representative of the Appellant and gave the relevant coded reference number which identified them as a direct representative. The document was signed by a representative of Global on 8 January 2009. The tribunal therefore finds as a primary fact that Global were the direct agents of the

Appellant. In such a situation, the importer must ensure that the correct customs classification and declarations for the importation of the Goods, is made. They must ensure that payment of the import duties is made since the primary obligation to do so rest with the importer and not with their agents. An importer may enter into contractual arrangements which would safeguard against any negligence by their agents especially where post-clearance payments become due as a result of any incorrect customs classification entries. This was suggested in the case of *Faroe Seafood & Others* (1996) ECR 1-2465, at Para 114), a case referred to by the Respondent. The Appellants have been wrongly advised by their customs clearing agent, Global. That is a matter between the Appellant and their agent but it is not a matter that affects the Appellant's liability to the Commissioners in respect of the outstanding customs duties.

21. The second issue is whether there can be a waiver of a post-clearance recovery by the national authorities where three cumulative conditions under Article 220(2)6) of the Council Regulation (EEC) No.2913/92 are met. The conditions all have to be met before waiver of a customs debt will be permitted. The case of *Covita* (C-370/96; (1998) ECR 1-7711) sets out the conditions to be fulfilled in relation to the legislative predecessor to Article 220(2)(b). The conditions are as follows:-

(1) The non-collection of the duties must be the result of an error made by the competent authorities themselves;

(2 The error must not have reasonably been detected by the person liable, the latter having acted in good faith; and, finally,

(3) The person liable must have observed all the provisions laid down by the rules in force as far as their customs declaration is concerned.

22. The first point is that all applicable Community provisions relating to customs tariff must be published in the Official Journal of the European Community. From the date of that publication, everyone is deemed to be aware of the law and changes which have been made to the law and regulations.

23. Commission Regulation 606/2008 of 26 June 2008 ("Suspension Regulations") suspended customs duties on import of certain cereals both for tariff quotas at reduced duty and for imports at normal rates. Article 1(2) of the Suspension Regulations provides that customs duties may be introduced at a later date. Customs Regulations (EC) No. 1039/2008 of 22 October 2008 (the "Re-Introduction Regulation") introduced customs duties on import of certain cereals for the 2008/09 marketing year. This provided transitional relief for traders where cereals were en route for importation into the Community at the time of the re-introduction of the duty. The Regulations provided:

> "However, traders should not be penalised in cases were cereal are en-route for importation into the Community. The time required for transport therefore should be taken into account and traders therefore allowed to release cereal for free circulation under the customs-duty suspension regime provided for in Regulation (EC) No.608/2008 for all products whose direct transport for the Community has started at the latest on the

day on which this Regulation is published. The evidence to be provided proving direct transport to the Community and the date on which the transport commenced should also be established".

24. The key requirement is that the transport of goods should have been en-route on 23 October 2008. Evidence was provided showing import entries where the Goods in question did not qualify for the transitional release since they started their journey from the exporting country after 23 October 2008, which was after the Re-Introduction Regulations were published. The transitional provisions are therefore not applicable. From the date of publication in the Official Journal, no person is deemed to be unaware of the nature and extent of charges to customs duty. Therefore it cannot be said that, if there was an error, it could not reasonably have been detected within the meaning of Article 220(2). (*Binder v Hauptzollamt Bad Reichenhall* (1998) ECR 2415, at (19)). There is therefore no waiver of the post clearance demand notice.

25. The Appellants submit that the CHIEF system was at fault in leaving the suspension of duty period open. It is correct to say that the CHIEF system left the suspension of duty period open in their computer facilities. However, the computer system provides accurate duty assessment once correct information is submitted. In this case, the Appellant's agents submitted the import entries by declaring the goods "FB" in box 47C. These were inaccurate. It is the responsibility of the Appellant or importer to make the appropriate declarations on the CHIEF system. The Appellant's agents submitted the import entry "FB" in box 47C. The guidance notes on customs tariff explains that box 47C is used to enter a tax rate into the CHIEF system in order to calculate appropriate customs duty rates. A person operating the CHIEF system must enter a duty code or a suspension code. The Appellant's agents entered the wrong code and the CHIEF system automatically assumed that the goods were not liable to customs duty. The code "F" represents goods liable to duty at the full rate and the code "B" represents a tariff suspension or nil duty rate. Because both codes were entered, the CHIEF system applied a nil duty rate as it recognised that a tariff suspension may exist. The result of entering code "FB" was that the goods were cleared at a nil rate of duty. If, however, code "B" had not been entered; code "F" would have given the option of full rate of duty or a reduced rate under a tariff quota. This means that entering the code "B" the system misread the duty on the Goods. It is the duty of the Appellant to input the correct information to obtain the correct code and whilst it is correct to say that the CHIEF system did not immediately remove the suspended code, it is no defence for the Appellant to say that this is the reason of an incorrect entry was made. It is the responsibility of the Appellant (and the representative) to check the proper UK tariff. The Europa website and the Official Journal of the European Community must be consulted in order to establish the duties that are applicable at the time the entries made. These are update sites which contain recent changes to the law and regulations. There is no indication this was done.

26. In any event, the Appellant's Goods did not qualify for transitional relief or duty suspension since the Gods had started to be transported after 23 October 2008. The Tribunal finds that the importer must ensure they enter the correct customs

clarification of customs declaration at the time of importing goods. All parties are deemed to be aware of the law and any changes to customs duties once published in the appropriate official journal.

27. Lastly, the Appellant makes a general point about being out of pocket and being treated fairly. It is understandable in the circumstances that the Appellant would feel that they have been treated unfairly since they have done all in their power to make full and honest declarations. However, the mistake was made by their agents. They must look at their agents to be compensated if they are out of pocket. The relationship with their agent existed over a 13 year period on the basis of an informal agreement. It is reasonable for the Appellant to rely on the advice of their shipping agents, who must be taken to be up to date on the customs law and regulations. They must use that knowledge to complete declarations required for claiming relief from customs duties and being compliant with the legal requirements for so doing and for the importation of goods. Traders must make the necessary contractual arrangements to be compensated where there is any negligence on the part of agents which results in post clearance payments which should not have been made.

Conclusion

28. The Tribunal therefore finds as follows:

(1) The Appellant has not met the conditions which would allow a waiver for customs duties. They have not discharged the burden of proof to allow such waiver in the circumstances. The customs duty claimed by the Commissioners in the Post-Clearance Demand Notice C18 is correctly calculated and the party who must pay that Demand is the Appellant.

(2) The Tribunal does not believe the decision should be varied or withdrawn. The decision of the Commissioners to impose customs duty and the amount of duty is therefore confirmed.

29. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 17 May 2012