TC02755

Appeal number: TC/2012/06578

Customs duty – relief for samples – conditions required – objective test – relevance of Public Notice 367 – Regulations 2913/93, 2454/93 & 1186/09 – VAT (Imported Goods) Relief Order 1984 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANNA SCHOLZ LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
PHILP GILLETT FCA

Sitting in public at 45 Bedford Square, London on 14 June 2013

The Appellant was not present or represented

Ms Hui Ling McCarthy instructed by HMRC Solicitor's Office for the Commissioners

© CROWN COPYRIGHT 2013

DECISION

Introduction

1 The appellant was not present or represented when the appeal was called on for hearing, but an email and letter dated 13 June 2013 from Wilson Stevens LLP, who had been advising the company, had been sent to the tribunal indicating that neither they nor the company would be present and stating the appellant's submissions in the appeal. We were therefore satisfied that the appellant had received notice of the hearing and, pursuant to Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, we considered it in the interests of justice to proceed with the hearing in the appellant's absence.

2 This is an appeal against a C18 Post Clearance Demand Note in relation to imports of clothing which entered the United Kingdom between 7 May 2009 and 19 January 2012. The customs debt owed under the C18 initially consisted of VAT and customs duties totalling £2,457.85. A departmental review of the C18 on 21 May 2012 upheld the Demand Note, but subsequently the debt was revised to £2,278.86 consisting of £614.39 customs duty and £1,664.47 of VAT to take account of assessment errors which do not concern this appeal. Before us was a substantial file of papers and correspondence, but we received heard no oral evidence; the issue is solely whether the goods charged are entitled to relief from duty and tax as samples.

Legislation

3 The Customs Code, Regulation 2913/92 as amended, provides in Article 204:-

> (1) A customs debt on importation shall be incurred through:
>
> (a) non-fulfilment of 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 are placed, or

(b) non-compliance with a condition governing the placing of the goods under that 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 a 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.

4 Regulation 2454/93 – the Customs Code's Implementing Regulation – provides at Article 199:

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

5 Council Regulation (EEC) No 1186/2009, Article 86, provides:-

(1) Without prejudice to Article 90(1)(a), samples of goods which are of negligible value and can be used only to solicit orders for goods of the type they represent with a view to their being imported into the customs territory of the Community shall be admitted free of import duties.

(2) The competent authorities may require that certain articles, to qualify for relief, be rendered permanently unusable by being torn, perforated, or clearly and indelibly marked, or by any other process, provided such operation does not destroy their character as samples.

> (3) For the purposes of paragraph (1), 'samples of goods' means any article representing a type of goods whose manner of presentation and quantity, for goods of the same type or quality, rule out its use for any purpose other than that of seeking orders.

6 Relief from VAT for samples is given by the VAT (Imported Goods) Relief Order 1984, Article 5 of which states:

> 5(1) Subject to the provisions of this Order, no tax shall be payable on the importation of goods of a description specified in any item in Schedule 2 to this Order.

7 Item 2 of Group 3 of Schedule 2 of the 1984 Order includes:

> Samples of negligible value of a kind and in quantities capable of being used solely for soliciting orders for goods of the same kind.

8 Note (1) to Group 3 of Schedule 2 to the 1984 Order provides:

> Where the commissioners so require, item 2 applies only to goods which are rendered permanently unusable, except as samples, by being torn, perforated, clearly and indelibly marked, or by any other process.

Facts

9 We find the following facts.

10 The appellant is a clothing company specialising in ladies' clothing from sizes 12 to 28. The goods were imported into the United Kingdom from China using Customs Procedure Code 4000C30 on the basis that they were within the description: "*Samples of goods of negligible value, e.g. swatches, mutilated articles, single gloves etc., sent to gain orders for similar goods and on which relief from import duty and VAT is claimed.*" The goods comprised over the period under appeal several hundred items of size 18 clothing made in 100% polyester. Two of the importations were of particularly large quantities: on 27 January 2011, 176 items, and on 14 July 2011, 273 items.

11 To each item, had been affixed a detachable label bearing the word "SAMPLE", of which a photograph was produced. The items were produced from design drawings and were to be modified for what the appellant described as "technical correctness". Following that, the appellant's practice was either to destroy the samples or to archive them. In relation to the two large importations the appellant explained:

> Re the larger sample imports, they are partly further prototype samples and the majority are the final correct sample collection pieces that once approved and used for wholesale selling appointments here are then sent to our overseas sales agents for their selling appointments so that wholesale customers can place their forward orders on the basis of the samples that they see. The collections (we design two different collections) have two selling seasons every year.

12 Following the issue of the Post Clearance Demand Note to which we have referred, Wilson Stevens LLP requested a review of HMRC's decision and explained the position in more detail. They said that the appellant designed two collections ("White" and "Black" label) twice a year for the Spring/Summer and the Autumn/Winter seasons and sent the designs to China where the samples were produced. Each collection consisted of 60-70 styles including different colour options, all the 80 or so samples being produced only in UK size 18; these prototype samples for each collection were made from remnant fabric and used to check for faults, errors, or required changes, and sent back to China; the samples were subsequently destroyed or archived. There is no mention of their being used to solicit orders.

13 The first samples for each collection were then made and used to check again for faults, errors or required changes, and later destroyed; final samples were then made and used to sell the collections. There were generally 240 "final" samples per season which followed, now in three different colours for each collection. The "final" samples were used extensively during the pre- and post-launch periods and for photoshoots, and worn many times for promotion purposes; they were subsequently distributed in a number of ways: some returned to the factories; some kept as press samples; some sent to the appellant's overseas agent for their press purposes; and some for archiving.

It was stated that the samples were never sold to the public and that their value was either nil or less than £5.

14 On 21 May 2012, the departmental review upheld the issue of the Demand Notice and on 27 November 2012 the amount of the debt was, as we have seen, reduced to £614.39 customs duty and £1,664.47 VAT for reasons which are not material to this appeal.

15 It remains to add that Public Notice 367 issued in August 2004 sought to explain the legislation which has been cited regarding relief from customs duty on samples. Paragraph 2 of the Notice states, so far as relevant:

> **2. Relief conditions**
> **2.1 What are the conditions for relief?**
> You can get relief on samples of goods of any kind if, when imported, they:
> • can only be used as samples
> • are of negligible value and
> • are intended to obtain orders for the type of goods they represent.
> **2.2 How do I ensure the goods can only be used as samples?**
> There are many ways for you and your supplier to do this, for example by:
> • tearing, perforating, slashing or defacing
> • indelible marking
> • limiting quantities or size or
> • method of presentation.
> *We may ask for one or more of these methods to be used before we will allow relief on the goods you are importing.*
> **2.3 What is negligible value?**
> Although the law requires the samples to be of negligible value, it does not define the meaning. In practice, once we are satisfied the goods can only be used as samples, we regard them as being of negligible value.
> **2.4 Are there any goods excluded from relief?**
> Yes, we will not allow this relief on goods:
> • imported without the intention of obtaining further orders
> • not presented as samples at import, but intended for subsequently making into samples (for example, unaltered rolls of fabric you import to cut up and make into swatch books)
> • which can be used other than as samples or intended for consumption, destruction or distribution free of charge to the public at a trade fair or exhibition. Such goods may qualify for the alternative relief explained in the Tariff, Volume 3 under Customs Procedure Code 40 00 44 or 49 00 44, as appropriate.

16 The italicised words at 2.2 evidently signal the possibility of an exercise of the power conferred in Article 86(2) of Regulation 1186/2009, but otherwise the Notice states that it "explains [HMRC's] view of the law".

Submissions

17 For the importer, the case was put by Wilson Stevens in their letter of 13 June 2013 as follows:

> We disagree with the Customs decision that our client has not fulfilled the relief conditions as set out in HMRC public notice 367: *importing commercial samples of negligible value free of duty and VAT*.
>
> As stated by the leaflet, the conditions for relief are the samples of goods imported. When imported the following applies:
>
> - they can only be used as samples;
> - they are of negligible value; and
> - they are intended to obtain orders for the type of goods they represent.
>
> The notice does state that there are several ways of ensuring that the goods can only be used as samples. The notice also gives example methods. Amongst the four examples listed are the following methods:
>
> - limiting quantities or size; or
> - method of presentation.
>
> Our client ensures that all samples are always imported in UK size 18 and used exclusively for promotional purposes. The presentation methods adopted are:
>
> - distribution to sales agents in UK and overseas;
> - press samples used for pre-launch and post-launch of new product lines; and
> - worn for photo-shoots for promotional material for the company's website and brochures.
>
> Samples are also sent back to the factories as examples.

> Council regulation (ec) no. 1186/2009, Article 86 states that "the competent authorities may require that certain articles, to qualify for relief, be permanently rendered unusable by being torn, defaced or marked, **provided such operation does not destroy their character as samples**. Due to the nature of the products, the suggested methods of *tearing, perforating, slashing or defacing* is not a practical option for our client. The operation of this method would destroy the character of garments.
>
> The samples are of negligible value and are stored away. It can be demonstrated that these are of UK size 18 and not in a saleable condition. It can be further demonstrated that these samples have only been used to obtain orders for the types of garments that they represent.

18 For the commissioners, the case was summarised thus: firstly, that the imports do not meet the conditions for relief at Article 86 of the 2009 Regulations and of Article 5(1) and Schedule 2 of the 1984 Order, so that relief is not due to the appellant as a matter of law; secondly, that the appellant has also failed to comply with the terms of the Notice and, thirdly, that HMRC has not failed to follow its own guidance and has not opted to apply conditions to the appellant's case different from those set out in its Notice - though even if HMRC had so failed, the First-tier Tribunal does not have jurisdiction to determine whether HMRC acted outside the scope of its own guidance so as to grant the appellant relief in circumstances where the legislative conditions for relief have not been met.

19 Ms McCarthy's principal submission was that sample relief is not due as a matter of law. Article 86 of the 2009 Regulations makes it clear that samples (i) must be of negligible value and (ii) can be used only to solicit orders for goods of the type they represent. "Samples of goods" means any article whose manner of presentation and quantity (for goods of the same type) or quality rule out its use for any purpose other than that of seeking orders. In essence, the focus of article 86 is on the physical characteristics of the goods, which must be such as to avoid goods allegedly given as samples unduly passing into final consumption.

20 Article 86(2) gives examples of the sorts of physical characteristics that may render goods qualifying as samples permanently unusable, namely: "*being torn, perforated, or clearly and indelibly marked*". For VAT purposes, Article 5(1) and Sch.2 of the 1984 Order are materially identical. Thus, rendering a garment unfit for sale but still fit for purpose as a sample would require subjecting the garment itself to some sort of permanent alteration prior to importation.

21 For example, the back of a garment could be slashed such that it could still be displayed on a mannequin or photographed, but it would be commercially valueless, or an area could be cut from a garment and replaced with a label the same size, stating that the garment is a sample. Provided that these alterations were performed in such a way that the garment could not be restored to a condition suitable for retail sale, the garment would qualify as a sample and be free from import duty and VAT. None of these characteristics is present in the goods in question: all that has happened is that a detachable tag marked "SAMPLE" has been attached to goods, which are not otherwise commercially unfit for sale. That the goods are not *in fact* sold (or intended for sale) is immaterial to their classification because the test focuses on their physical characteristics, not on the appellant's intention or the actual use of the goods.

22 The Notice is entirely consistent with the 2009 Regulations and the 1984 Order. Paragraph 2.1 makes it clear that relief on samples is only available if, *inter alia*¸ the goods in question can only be used as samples *and* are of negligible value. The focus is plainly on the physical characteristics of the goods; merely fixing detachable labels to goods which are not *themselves* rendered unsuitable for sale does not meet the relevant criteria. In paragraph 2.2, the subheading and introductory words make it clear that the principal requirement is that the goods "can only be used as samples" and the suggested methods for achieving this are clearly marked as "examples". The Notice goes on to state that "*[HMRC] may ask for one of more of these methods to be used before we will allow relief on the goods you are importing*".

23 It is therefore clear that HMRC are making no representation to importers that goods will automatically qualify as samples if one of the methods is chosen. On any view, it is questionable whether the appellant has indeed "*limited quantities or size*" in the relevant sense. Limiting quantity or size might be suitable as a method where, for example, the goods in question consisted of small packets of two or three sweets, or 5ml samples of cosmetic products; here, the appellant imported several hundred garments of a size which falls squarely within its size range for commercial sale (sizes 12-28).

24 For the reasons set out above, there has been no failure on HMRC's part to follow the terms of the Notice. But even if there had been such a failure, where (as a matter of law) relief is not due as a matter of law, it is now settled that the First-tier Tribunal has no jurisdiction to grant relief because of some procedural failure on HMRC's part.

Conclusions

25 As we have indicated, the letter containing the appellant's submissions was emailed to the tribunal on 13 June and it was drawn to our attention by the clerk of the tribunal at the start of the hearing; it had not been seen by Ms McCarthy or those instructing her, so that the commissioners had not had an opportunity of responding to the submissions. In the absence of the appellant or its representative and in view of the substantial quantity of documentary evidence available, we had intended to give a short form decision, bearing in mind the appellant's right to apply for a further hearing.

26 The commissioners, however, after the hearing had concluded, made a request to the tribunal office that we should issue a reasoned decision on the matter. Although in these circumstances it is less than ideal to do so, we have nevertheless acceded to that request in the hope that it will avoid further litigation.

27 The eve of hearing notification by Wilson Stevens that neither they nor their client would attend the hearing is less than satisfactory, having regard to the work undertaken by the commissioners in preparation for it, not to mention the time of the tribunal itself. Wilson Stevens' submission includes the unproved assertion that the imported articles are "not in a saleable condition"; in addition to there being no evidence offered in support of that, the statement is difficult to reconcile with the claim made for the departmental review that the final samples are used extensively during the pre- and post-launch periods, for photoshoots and the press, and will be worn many times for promotion purposes.

28 The burden of proof that the goods were not capable of use other than as samples rests on the appellant, and it has not been discharged on the evidence before us. This is a matter of fact which an importer must establish before eligibility for the relief in question can be shown; such evidence as there is points to a contrary conclusion, namely that the articles imported could very easily have had their 'sample' labels removed and be used otherwise than as samples. That some of them may have been of less quality or fineness of finish or design than the appellant desired, or that they may have been goods which the appellant would not have wished to sell in view of its reputation in the market, is not the issue.

29 The legislation both in Article 86(1) and (3) of Regulation 1186/2009 and the 1984 Order is categorical: to be eligible for the relief, goods must both be of negligible value and ones which "can only be used to solicit orders", and a sample is one "whose manner of presentation and quantity, for goods of the same type or quality, rule out its use for any purpose other than that of seeking orders". Strictly speaking, these provisions make the issue of the potential for commercialisation of the goods irrelevant. The requirements are to be assessed objectively at the point of importation, and the appellant has not demonstrated that they were satisfied.

30 We add that paragraph 2.3 of Public Notice 367 appears to contain a concession by the commissioners in regarding goods which pass the sample-only test as being in practice of negligible value. While it is no doubt true that in many cases genuine samples would be of negligible value, it is possible to envisage instances in which the samples themselves would be of some value – perhaps a significant value. But that is for the commissioners: Ms McCarthy states the law correctly that the tribunal has in these circumstances no jurisdiction in regard to the application of the Public Notice - see the recent decisions of this tribunal and the upper tribunal in *Prince v CRC* [2012] UKFTT 157, *CRC v Noor* [2013] UKUT 071 and *CRC v Hok Limited* [2012] UKUT 363. Accordingly, we express no further view on the application of the Notice to the facts of this case.

30 The evidence does not show that the clear requirements of the legislation regarding relief from duty and VAT for samples have been met and the appeal does not therefore succeed.

Appeal rights

31 This document contains the full findings of fact and reasons for the decision. The appellant, not having been present or represented at the hearing of this appeal, may under Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 apply in writing to the tribunal for the decision to be set aside; the application must be received by the tribunal no later than 28 days after the decision is sent to the appellant.

32 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 the tribunal no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 19 June 2013