TC03194

Appeal number: TC/2010/00559

CUSTOMS DUTY – IPR – Tribunal's powers – ancillary or full appeal – preliminary issue.

FIRST-TIER TRIBUNAL
TAX CHAMBER

NUFARM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD BARLOW

Sitting in public at Manchester on 12 December 2013.

Valentina Sloane of counsel instructed by Messrs Deloitte for the Appellant

Simon Charles of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is a decision relating to a preliminary issue raised by the appellant.

2. The appeal in this case relates to the appellant's claim that it is entitled to inward processing relief (IPR) in respect of a quantity of glyphosate from China.

3. The appellant applied for relief from customs duty and anti-dumping duty totalling £896,285.82. That claim was rejected by a letter dated 18 September 2009 and on 12 November 2009 the respondents issued a review letter upholding the decision letter, against which the appellant has appealed.

4. The appellant now seeks a ruling from the Tribunal that the decision made by the respondents and upheld on review should be categorised as a decision falling within section 16(5) of the Finance Act 1994 (the Act) rather than one falling within section 16(4) of the Act.

5. The respondents contend that the decision should be categorised as falling within section 16(4) of the Act with the consequence that the Tribunal's powers are limited to considering whether the decision under appeal is one that the Commissioners could not reasonably have arrived at and, if it was, then to make a direction of the type set out in that section. Those powers include the power to quash a decision but only to direct the Commissioners to review it rather than for the Tribunal to substitute its own decision.

6. If the appellant is right and the Tribunal's powers are those contained in section 16(5) then the Tribunal would have the power to substitute its own decision.

7. The wording of the decision letter is important and I will quote the relevant passages:

> "Firstly, the planned activity is shown in section 9 of the application form as 'storage'. I am sure that you are aware that storage is not accepted as equating to a process being carried out within the EU, as required under Article 114 of Council Regulation 2913/92/EEC. Therefore, it would appear that as no recognisable process is being carried out, an application for approval to operate under IPR, retrospective or otherwise, is not appropriate in this case.
>
> Secondly, as you are aware, retrospective authorisation for IPR, under the provisions of Commission Regulation 2454/93/EEC may only be granted in exceptional circumstances. Exceptional circumstances … are defined by case law … you would need to supply specific evidence to demonstrate that exceptional circumstances apply … .
>
> In light of the foregoing, I am sure that you will appreciate that, as things currently stand, the application must, unfortunately, be rejected".

8. As can be seen, the decision contains three elements of reasoning. First, that as a matter of law, storage is not sufficient to qualify for IPR. That is a statement of the Commissioners' view about what the correct legal position is. Secondly, the Commissioners assert that case law defines exceptional circumstances. That too is an assertion of their view about the correct legal position and even if it is correct that the case law determines what are exceptional circumstances there could still be argument about whether the Commissioners have interpreted the case law correctly and applied it to the situation under consideration. Thirdly the letter can be read as rejecting the appellant's contention that exceptional circumstances applied and therefore refusing the application for retrospective approval.

9. There are two decisions here. There is a decision that IPR cannot apply because the only process was storage and the second is the Commissioners' decision to refuse retrospective authorisation. Clearly if the first decision is correct then the second becomes irrelevant because a retrospective authorisation would have no effect even if granted.

10. There is no reason why the tribunal's jurisdiction and powers should be categorised as the same in respect of both of those decisions just because they are both contained in the same letter and I will consider each separately.

11. The decision that storage is insufficient to amount to a process for IPR purposes is a decision which falls within section 13A(2)(a)(iv) of the Act in that it is a decision "in relation to any customs duty … as to … whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty …". Accordingly, by reason of section 16(8) of the Act, even if that decision would otherwise fall within one or more of the 'ancillary decisions' in Schedule 5 of the Act, it does not do so and is covered by section 16(5) giving the tribunal power to quash or vary that decision and to substitute its own.

12. However, in order to secure the benefit of IPR a person must also be authorised to process the goods and in principle that authorisation must be obtained before the goods are imported.

13. I hold that the authorisation does not fall within section 13A(2)(a)(iv) as such. It is a pre-condition of the granting of the relief that the person must be authorised but that sub-paragraph deals with 'entitlement' which only arises when the relevant processing has occurred. The granting of authorisation does not entitle an importer to relief it only puts him in a position to claim it once the relevant process has been completed.

14. The granting or withholding of authorisation falls within paragraph 1(f) of Schedule 5 to the Act which deals with authorisations. As it does not also fall within section 13A(2) it is an ancillary matter under section 16(4) of the Act and remains so despite section 16(8) because that provision only applies where a decision is also within section 13A(2). I would add that paragraph 1(f) of Schedule 5 would have little, if any, effect if its application could be defeated by an argument that a refusal to authorise was the same as a decision as to entitlement to relief. That sub-paragraph is

intended to have some effect and its very existence strengthens the argument for saying that a decision about authorisation is not to be equated with a decision about entitlement. Authorisation does not confer entitlement, processing does, albeit only when carried out by an authorised person.

15. It follows that as far as the decision about authorisation is concerned the Tribunal's powers are limited to those in section 16(4). If the Commissioners have misunderstood the case law relating to exceptional circumstances that would make their decision one they could not reasonably have reached and so that part of their reasoning in the decision letter is amenable to challenge as well as the actual exercise of their discretion about the merits of the application for retrospection.

16. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

RICHARD BARLOW
TRIBUNAL JUDGE

RELEASE DATE: 9 January 2014