TC03943

Appeal number: TC2011/04296

TYPE OF TAX – Customs duty. Customs Code Article 221 – meaning of "communicated to". Must communication be received by the alleged debtor – yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

A G VILLODRE S L **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q C
J L COLES ESQ

Sitting in public at Bedford Square, London on 22 July 2014.

Mr. Yates, counsel, for the Appellant.

Mr. Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION on PRELIMINARY ISSUES

1. By Consent of the parties the Tribunal ordered that three preliminary issues should be determined. They are :

(1) The Respondents' application for the Tribunal to determine as a preliminary issue, whether the Tribunal has jurisdiction to entertain the appeal,

(2) The Appellant's application for a determination as to whether the respondents gave proper notice of the alleged customs duty liability, and

(3) The Appellant's application for a determination as to whether W S Logistics was empowered to act as its "direct representative".

2. There is also an issue as to whether the appellant's appeal was lodged within time. If we find that it was not lodged within the time permitted, the appellant seeks permission to appeal out of time and for an extension of its time for appealing.

3. The substantive appeal involves garlic. The rate of customs duty for garlic imported into the United Kingdom depends upon its country of origin. The rate for garlic originating from China is substantially higher than that for garlic originating from India. Contrary to what might generally be thought, something in excess of 75% of the world's garlic supply comes from China.

The Undisputed Facts.

4. The respondents wrote a letter dated 7 August 2007 and addressed it to "A G Vilodore, Av Juan Garcia Y, Gonzalez 50 La Roda, 02630, Spain. It stated that it enclosed a C18 Post Clearance Demand Note on the basis that the respondents had been provided with evidence, from the European Commission, that the consignments of garlic imported by the appellants (on a schedule attached to the letter) were not of Indian origin." The bundle made available to us does not contain a copy of that C18. It is possible, but certainly has not been established as a fact, that the letter might have enclosed a copy of the C18 to which we have referred above, notwithstanding that that document is date stamped as issued on 9 August 2007.

5. On 9 August 2007 the respondents sent a letter to W S Logistics at its address in Felixstowe, which was accompanied by a document, commonly known as a C18. The C18 was a demand for £283,726.31p said to be due by way of customs duty on consignments of garlic imported into the United Kingdom by the appellant, which had been declared as originating from India (thus attracting the lower rate of import duty), whereas the respondents asserted that it had originated from China and so should have been duty paid at the higher rate applicable to Chinese garlic.

6. The letter dated 9 August 2007 was addressed to W S Logistics at its address in Felixstowe and the C18 identified the appellant as the "Consignee" with W S Logistics being shown as the "Declarant/Representative".

7. Matters seem to have arrested there until 19 February 2008 when the respondents wrote again to the appellant at the same address as it had written to in 2007. The letter said *"I have enclosed a copy of the original paperwork"* and, it is said, it enclosed a copy of the C18 bearing a date stamp 9 August 2007.

8. It might be significant to note that the two documents bearing the date stamp 9 August 2007 are not the same. The one that was said to be included with the letter dated 9 August 2007 says in its left-hand margin "Agent's Copy". The one attached to the letter dated 19 February 2008 states in its left-hand margin "Reminder". Other than that, they are the same.

9. On 16 May 2008 the respondents wrote to the Spanish tax authorities asking for "mutual assistance in the recovery of debt" pursuant to Directive 76/308. The amount in respect of which such assistance was sought, was put at £296,164.56p. We were not told why the amount had increased, but it may well be that it included a sum for interest.

10. Well over two years later, on 11 October 2010 the Spanish tax authorities issued a "Certificate" presumably as a preliminary to the collection of the debt on behalf of the respondents. Plainly there was no urgency in the request of 16 May 2008 being dealt with. There is no evidence that the respondents replied to the Spanish tax authorities in any way whatsoever.

11. On 18 March 2011 the Khan Partnership (solicitors) wrote to the respondents stating that it was instructed to act on behalf of the appellant "*in relation to its customs matters*". It then asked the respondents to deal with that firm "*in relation to the above referenced C18 and the alleged customs debt.*"

12. The respondents replied by letter dated 06 May 2011 which stated that further to the letter from the Khan Partnership a Review had been undertaken in respect of the C18, C1803/1199/07 and a decision had been made to uphold the original decision. It is plain beyond doubt that the letter dated 18 March 2011 was construed as a request for a Review by the respondents and treated as such. At page 5 of the Review Decision the respondents stated in terms that if the appellant was dissatisfied with the outcome of the review, it could appeal to the Tribunal.

13. An appeal was received by the Tribunal on 6 June 2011. If the time for appealing ran from the date of the Review Decision, the appeal was in time because the 30 days expired on a weekend and so an appeal received on the next working day is in time.

Disputed Facts.

14. The appellant has put in witness evidence, supported by a Statement of Truth, from Mr Garcia which says that no communications were received by the appellant

company from HMRC enclosing any C18 or any reference thereto. The position taken by Mr Prichard, on the half of the respondents, is that the respondents *"do not concede that the company did not receive the C18 but do not challenge Mr Garcia's witness statement."* Thus we proceed on the basis that there is no challenge to Mr Garcia's witness evidence and that certainly for the purpose of dealing with preliminary issues, we must proceed on the basis that it is true and correct.

The Preliminary Issues.

15. The first preliminary issue is whether the Tribunal has jurisdiction to entertain the appeal.

16. Mr Prichard argues that, prior to the Finance Act 1994 being amended in April 2009, a right of appeal existed against a customs duty demand only in respect of a review decision or deemed review decision, but not in respect of an original decision. Thus a request for a Review had to precede an appeal, with a right of appeal being exercised within 30 days of the Review Decision. That did not happen in this case.

17. Then, argues Mr Prichard, the Finance Act 1994 was amended in April 2009, which does not give the respondents power to review a decision once the time for requesting a review has expired, except where section 15E applies.

18. Mr Prichard's position is that notwithstanding that the respondents issued a Review Decision on 06 May 2011, that was not a review decision that triggered a right of appeal. He argues that the appellant had an opportunity to appeal at the time of the original decision, but chose not to do so. It will be immediately apparent that the force of that submission turns upon other issues that we consider later, as to whether the C18 has ever been validly communicated to the appellant.

19. The argument relied upon by Mr Prichard is that since April 2009 when the amendments to the Finance Act 1994, came into effect, the respondents have had no power to review a decision once the time for requesting a review has elapsed, unless the circumstances in section 15E of the 1994 Act apply.

20. We do not understand quite why the respondents construed the letter dated 18 March 2011 from the Khan Partnership as a request for a review. However, it is plain beyond doubt that the respondent did so construe it. It therefore strikes us as difficult for the respondents to maintain the argument that if a Review Decision is a trigger for an appeal, no appeal lies because the respondents should not have undertaken a review. It seems to us that there is a strong inference that the respondents treated the letter of 18 March 2011, as a request for a review and treated the appellant as having a reasonable excuse for not having requested an earlier review within the usual time allowed, thus bringing the matter within section 15E(2)(b) of the Finance Act 1994 (as amended).

21. As set out above, we are satisfied that the appeal was in time if the Review Decision was the trigger for the running of time, as we find it was.

22. Mr Prichard's position was that the appellant requires leave to appeal out of time. That is only the case if our foregoing conclusion is wrong.

23. If our foregoing conclusion is wrong we grant permission to appeal out of time. We do so because it will be clear from what we have said above that the evidence of Mr Garcia to the effect that the appellant did not receive any notification of the C18, is not challenged. Our decision is also influenced by what we say hereafter about the position of W S Logistics and the scope of the authority of that representative to act on the half of the appellant. We are also influenced by the fact that given that the respondents construed the letter of 18 March 2011, as a request for a review and did undertake a review and thereafter communicate a Review Decision to the appellant (expressly stating that it had a right of appeal), it would be unjust to shut out the appellant given the chronology involved in this case (set out above) and the rather relaxed manner in which various steps have been taken, especially by the respondents and the Spanish tax authorities.

24. The next issue is whether the respondents gave proper notice of or "communicated" the additional demand for customs duty to the appellant.

25. We were exhorted by both counsel not to import into our considerations concepts of agency taken from domestic law, but, instead, to focus upon Council Regulation 2913/1991 ("the Customs Code"). We agree that that is appropriate.

26. At this point. It is worth observing that Article 5(1) of the Customs Code provides that "*any person may appoint a representative in his dealings with the customs authorities to perform the act and formalities laid down by customs rules.*" Such a representative can be "direct" or "indirect".

27. Article 221 of the Customs Code provides as follows :

> *"As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures."*

28. This provision gave rise to considerable debate and argument during the hearing. That is because Mr Prichard argues that it is sufficient for the respondents to establish as a fact that they dispatched the C18 demand to the appellant and it is irrelevant whether it was actually received by the appellant. In other words, Mr Prichard argues for a rule akin to the common law rule for the acceptance of a contractual offer where the letter containing written acceptance is put into a post box. Mr Yates argues that the expression "communicated to" has a wider meaning and requires the communication to have come to have been delivered to and to have come to the notice of the intended recipient, subject only to the qualification that if a recipient deliberately closes his eyes to the content of a letter or communication, communication will nonetheless have taken place.

29. The argument advanced by the respondents is that the C18 demand was communicated to the appellant, by being posted to it in Spain. Alternatively, it is argued that given that W S Logistics was the appellant's direct representative, it is sufficient that the C18 was sent to it. That immediately sends us into a consideration

of the scope of the authority of a direct representative. In our judgement that takes us back to Article 5(1) of the Customs Code, which is in the following terms :

> *"Under the conditions set out in article 64(2) and subject to the provisions adopted within the framework of article 243(2)(b), any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules."*

30. A natural reading of Article 5(1) suggests to us that where a representative has been appointed by a taxpayer, the Customs Code plainly envisages that that will be so that the representative can perform acts and formalities required by customs rules. The question that arises is whether the receipt by the alleged debtor taxpayer of a C18 can properly be described as an act or formality required by customs rules which falls to be performed by the representative. Mr Prichard argues that the "act" is the act of receiving a notice or communication but it is not enough that there should be an "act" because Article 5(1) requires it to be an act and/or formality "*laid down by customs rules"*. We have not been directed to any customs rule that lays down how any communication required under Article 221 is to be made to an alleged debtor with its registered office in Spain or any other country outside the United Kingdom. We take support for our view from the very fact that the respondents plainly considered it necessary to send the C18 demand to the appellant in Spain. There is an obvious distinction between informing a customs representative at the time entry is made that duty is payable and that payment needs to be made before the goods are released (the usual role of a customs agent) and very much later informing a customs representative that his principal has a further alleged customs liability. That might occur a long time after the goods have been released and substantially after the time when the customs agent has fulfilled his usual role. Indeed, by that time the business relationship of principal and customs representative may have terminated. The respondents cannot assume an ongoing commercial relationship between the principal and his agent.

31. We have arrived at the conclusion that upon its true and proper construction Article 221 does not provide that communication of a C18 demand to a direct representative is and/or amounts to communication of that demand to the alleged debtor taxpayer.

32. Given the conclusion that we set out in paragraph 31 above, we must of necessity address head-on the issue of whether posting a C18 demand to a company in Spain is sufficient for it to be *"communicated to"* that party within the meaning of Article 221, or whether, upon its true and proper construction that Article requires the demand to reach the intended recipient, so that the demand can then be said to have been communicated to that recipient (with a saving in respect of the recipient who knows what is within the envelope but deliberately decides to destroy it or ignore it, thus wilfully shutting his eyes to its content).

33. We have in mind that this is a European Directive and so only limited assistance can or should be gleaned from domestic legal principles and analogies. The Customs Code contains no deeming provisions similar to provisions in the Civil Procedure

Rules that deem service of originating process to have taken place if posted to the intended recipient by first class post at his last known address.

34. The importance of the communication of an alleged customs debt is that the time period allowed for requesting a Review or making an appeal is short. We have to bear in mind that the communication of the demand is the trigger for the running of time for making a review request or lodging an appeal. Mr Prichard seeks to meet this point by saying that if a demand is sent to an alleged debtor taxpayer which, on his analysis, is sufficient communication of the demand, that taxpayer can be protected against his inability to launch an appeal (because he does not know of the demand if it has not been delivered) because the Tribunal has a discretion to extend the time for an appeal to be lodged. In our judgement that is not a sufficient answer. That is because the alleged debtor taxpayer then has to rely upon a judicial body exercising its discretion in his favour, whereas, if the communication had come to his notice, he can appeal as of right and without having to seek any exercise of discretion in his favour. A right of appeal to a judicial body is an important safeguard for the individual and so the trigger for the running of time for making such an appeal must be certain. Equally the period of time for making an appeal (which is a mere 30 days) would be foreshortened (perhaps substantially) if the demand was communicated to the alleged taxpayer debtor upon being posted. That is especially so if posted to a country with an unreliable or slow postal service.

35. We have given serious consideration to referring the issue of the true and proper construction of the meaning of the phrase "communicated to" to the European Court of Justice. That is because, as we understand the position, if we find that the C18 has not been "*communicated to"* the alleged debtor taxpayer, it is common ground that the respondents are out of time to communicate such a demand to the appellant and so the alleged debt could not be pursued.

36. However, upon considering the true and proper construction of Article 221. We have arrived at the conclusion that we should determine that a C18 demand is only "*communicated to*" the alleged debtor taxpayer if it comes to his actual or constructive notice. We say "constructive notice" to cover a situation where the letter is received, but wilfully ignored or destroyed. We observe that the necessary communication does not have to be in writing; it might be oral. Thus, in circumstances where, for example, a customs officer knows that a person is deaf, we do not consider that it could sensibly be said that a demand for payment has been communicated to that person if only made orally. A similar situation would arise if such a demand was sent to a company in a foreign country where it was known that the postal delivery system was unreliable. Thus in our judgment it is not sufficient for the respondents simply to establish that they put a written demand into the post in this country addressed to the appellant in Spain in circumstances where the respondents do not challenge Mr Garcia's evidence that no such written demand has been received by the appellant company.

37. So as to do justice to the argument advanced before us, we should state that we reject Mr Yates' argument that for the C18 demand to be communicated to a company in Spain, the Spanish domestic rules for service of Administrative Documents must be

complied with. We take that view because those rules do not apply to communications from other countries; they are particular to Spanish Administrative Documents; and do not apply to the Customs Code when relied upon by the respondents in the United Kingdom.

38. We should also mention that Mr Prichard placed reliance upon an undated letter written by Hassan Khan & Co to the respondents which can be dated at or around 22 August 2007 because that is the data recorded on the fax header. He places considerable reliance upon it, because the heading of the letter mentions several bodies corporate, including the appellant. It says that reference is made to the respondents' letter dated 7 August 2007 enclosing various C18's (one being referable to the appellant).

39. The argument that was then developed was that this letter demonstrates that somebody received the C18 intended for the appellant and that was probably W S logistics who acted as representative for the appellant and the four other companies referred to in that letter. It was not argued that there is an available inference that those solicitors received the C18, referable to the appellant, from the appellant itself. On the basis of Mr Garcia's unchallenged evidence that would be improbable.

40. However, it was argued that it is sufficient for the purposes of the respondents that those solicitors, who have changed name to become known as The Khan Partnership, came into possession of a C18 addressed to the appellant. This squarely raises an issue about the scope of the authority of a solicitor if instructed to act on behalf of a party. However, before we turn to that point, we must address the unchallenged witness evidence in respect of that letter. In its letter dated 8 June 2011 The Khan Partnership states that after reviewing its historic files it can state that under its former name of Hassan Khan and Co., it was not instructed by and did not act for the appellant. Until March 2011it says that it received various C18's from W S Logistics amongst them being the C18 intended for the appellant.

41. Mr Prichard argued that the mere fact that a firm of solicitors purported to act on behalf of the appellant was sufficient to establish that it did, and, moreover, that it was within the scope of its then authority to accept service or to accept a communication of a C18 demand.

42. A solicitor does not ordinarily have it within the scope of his ostensible authority to accept service of proceedings or originating process even if holding a "general retainer". We can see no proper basis for concluding that those solicitors had ostensible authority to accept any communication of any alleged tax debt owed by the appellant. It has not been suggested that those solicitors had actual authority to accept any such communication.

43. Even if those solicitors had had it within their ostensible authority to receive a communication of the type relied upon by the respondents, we cannot ignore the unchallenged assertions set out in the letter dated 8 June 2011, coming, as they do, from solicitors of the Supreme Court. It is said that Hassan Khan & Co was not retained by and/or acting on behalf of the appellant in 2007 and that all reference to

the appellant in its 2007 letter was in error. Whilst Mr Prichard treated that assertion as of questionable merit, he did not go so far as to attack its underlying truthfulness.

44. The third preliminary issue is whether W S Logistics was empowered to act as the appellant's direct representative. We think that this may have been a slight misrepresentation of the true issue which was, it seemed to us, whether in that capacity W S Logistics could have the C18 demand communicated to it, with the result that communication to it was sufficient to meet the requirement of Article 221 (the issue that we have addressed above).

45. We were also asked to deal with an application dated 8 July 2014 made by the respondents to amend its Statement of Case dated 28 February 2013. However, it is acknowledged within that application that it can only be relevant if the Preliminary Issues are resolved in favour of the respondents and the appellant is granted permission to appeal out of time. Thus, strictly speaking, it is accepted that it does not now have relevance.

46. Nonetheless, we should decide the application given that we are seized of it and have heard substantial argument in this case. We refuse the application. The first reason is that it is made very late. It could have been made much earlier and/or the point that it wishes to raise could have been addressed in the Statement of Case. The second and more powerful reason is that the application is to amend the Statement of Case to plead that the respondents can rely upon Article 221(4) of the Customs Code , which provides for communication of an alleged customs debt after the period specified in Article 221(3) (three years) in circumstances where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal proceedings in a criminal court.

47. Thus the respondents seek to raise a serious allegation at a very late juncture bearing in mind that the C18 goes back to 2007 in respect of importations of garlic in 2005. The serious allegation is said to rest upon an assertion by the European Commission that the garlic may have come from China, rather than India, thus allowing the respondents to argue that a false customs declaration was made and so a summary offence under section 167(4) Customs and Excise Management Act 1979 has been committed. The respondents have adduced no persuasive evidence to that effect sufficient to show that the appellant has a case to answer.

48. In the foregoing circumstances we do not consider it appropriate to exercise our broad discretion in favour of allowing the proposed late amendment.

49. 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.

GERAINT JONES Q. C.

TRIBUNAL JUDGE

RELEASE DATE: 20 August 2014