TC04165

Appeal number: TC/2013/04163

CUSTOMS DUTY– ***failure to accurately complete import documentation- duty assessed on subsequent review after a delay of over three years- form EUR1 said to be invalid as submitted after 10 months from importation- whether duty on HMRC to check the accuracy of import documentation- no; whether liability to duty arises despite the submission of EUR1 at the date of importation- no; review decision flawed as failed to take account of the fact of submission of EUR1.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

TBA SUNTRA UK LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR RICHARD CROSLAND

Sitting in Hull on 9 October 2014

Darren Southwell of Relay Port Agency (Customs Agent/Broker) and David Ackroyd of Alpha Associates (Freight Forwarders) on behalf of the Appellant

Richard Adkinson of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Overview

1. This appeal concerns a charge to duty levied on the Appellant on the importation into the UK of a quantity of broken rice from Guyana. The duty was said to be payable as the Appellant had failed to complete accurately the importation document, C88 single administrative document (referred to as the SAD) in relation to the claim so as to show the relevant quota for duty free importation of the product.

2. The duty assessed by the Respondents was in the sum of £42,780.64. This assessment was made by way of a post-clearance demand notice issued on 21 March 2013.

3. The decision to confirm the assessment was made in a review letter dated 17 May 2013.

4. The importation into the UK of the broken rice took place on 4 May 2010.

5. It is the Revenue's case that the responsibility for the correct completion of the SAD lies with the Appellant, generally, as is the case here, through its Customs Agent or Broker. In this respect, says counsel for the Revenue the law is quite clear.

6. The Appellant contends that whilst it accepts the primary responsibility for correct designation of any relevant import quota or other basis for claiming freedom from duty lies with it, that cannot absolve the Revenue from exercising care in its approval of the documentation submitted to it.

7. More generally the Appellant says it is quite unfair that some 3 years after the importation of a product which was entitled to be imported free of duty whether under any quota or EU rules, the Revenue is entitled to raise a Post Clearance Demand note by reason of a clerical error in the claim to quota.

8. The Appellant further contends that it made clear in the documents submitted that quite separately from any claim of an applicable quota relief from duty it was also importing the broken rice under a European exemption from duty indicated in a form EUR1 submitted at the time of importation.

9. The Revenue contends that the Appellant's EUR1 was submitted after 10 months from the date of importation and is by reason of the relevant legislation invalid for this purpose.

The facts

10. There does not appear to be any dispute between the parties that 766,815 Kg of broken rice was shipped from Georgetown, Guyana on or about 23 March 2010 and was landed in the UK on 4 May 2010

11. It is also not disputed that, absent a correct claim for quota or other applicable relief from duty, the assessed duty of £42,780.64 would have been payable in respect of the importation of the product.

12. The Appellant, through its agents, purported to claim eligibility to benefit from tariff quota Order Number 09.4168 by inserting these details in Box 39 of the SAD. The quota claimed was subject to the presentation of a valid import licence issued in accordance with the conditions laid down in Commission Regulation (EC) No 327/1998.The licences submitted were prefixed with the letters GBCPI1RG.

13. Subsequently during what was described as "assurance audits" conducted at the end of 2012 or early 2013, over two and a half years later, it was found by the Revenue that the Appellant's licences were invalid. It appears that the wrong licences had been issued to the Appellant by the Rural Payments Agency.

14. On behalf of the Appellant and as its agent, Darren Southwell had been in touch with Officer Barry Jordan of HMRC about the matter at the end of January 2013 when it was suggested that he, Mr Southwell, should contact the Rural Payments Agency about the matter of the licences if he believed that he had been issued with the incorrect licences. For this purpose an extension of time to 1 March 2013, presumably in order to correct the position, was granted to the Appellant.

15. On 31 January 2013 Mr Southwell e-mailed a copy of an EUR1 certificate for the consignment to Officer Jordan as indicating that the goods were in any event duty free under a preference. This was however rejected by HMRC because it was said that the Appellant had not shown the intention to claim the preference at the time of importation and had not submitted the certificate within the 10 months validity period prescribed by Article 21, Annex ll, Council Regulation (EC) No 1528/2007 being the regulations relevant to the arrangements for (amongst other things) the importation into the UK of products from certain states being part of the African and Pacific (ACP) group of states. Guyana is designated for this purpose as an ACP state.

16. Further correspondence between Officer Jordan and Mr Southwell failed to resolve the matter so far as the Appellant was concerned. It was made clear to Mr Southwell that HMRC relied on the declarations made by importers and that the "right to be heard" period during which representations about the matter would be entertained would not be extended.

17. In a letter dated 25 March 2013 Mr Traens on behalf of TBA Suntra UK Ltd wrote to the Respondents' Customs and International Review and Appeals team as follows:

" Your Ref. 150-000516T – C18126593

Dear Sir/Madam

I'm writing in connection with the above mentioned import entry on which we declared a consignment of 755,185kg of broken rice (commodity code 1006 4000 90).

On 29/04/2010 our forwarding agent Alpha Associates gave instructions (see enclosed) to Relay Port Agency for the clearance into home us of 755,815 of broken rice – origin Guyana at zero duty levy according to EU regulation 1528/2007 art.6 lid 1, using import licence GBCP1RG20274. A valid EUR1 document and a copy of the purchase invoice were presented to customs officer.

Relay Port Agency inadvertently put an order number in Box 39 of the original entry, which was incorrect and should have been left blank but according to our forwarding agent, this clearance went Route 1 (additional document check) and was approved and cleared (EPU150ENO0005167)

On 09/01/2013 we received a first letter stating the entry was not issued in accordance with EU regulation 327/1998 and a C18 post clearance demand note was going to be raised.

However we feel like we have presented all necessary information and instructions in order to permit clearance with zero duty (according to EU regulation 1528/2007 art 6 lid 1).

Therefore we would like to have our case reviewed.

Many thanks for keeping us further informed on how to proceed.

Best regards

Jacques Traens
TBA Suntra UK Ltd"

18. The formal departmental review letter dated 17 May 2013 upheld the original decision to charge import duty. The Appellant appealed to the tribunal.

19. In its Notice of Appeal dated17 June 2013, the Appellant states as follows:

"1. The importer was entitled to zero rate of duty albeit via a different route through EUR1 preference.
2. The entry was selected Route 1 and checked by HMRC accordingly. HMRC cleared the shipment and while we appreciate the entry originally claimed quota free instead of EUR1 preference free, we feel to come back 3 years later when the preference certificate is out of date is not only harsh but also disturbing.
3. We feel the importer is being punished unfairly, at no time has the importer attempted to defraud HMRC.
4. While we appreciate the importance of entering the correct details when lodging a customs entry, the routing the entry took (Route 1) does also put an onus on HMRC to correctly check and clear the consignment. We feel HMRC are looking to benefit out of a situation which there *(sic)* error has created or at least helped to create"

20. The above was further elucidated in a reply (entitled "Statement of Case") subsequently served by the Appellant in which the following points were made:

1. A reduced rate of duty was claimed under quota order umber 094168 with a licence prefixed with GBCPl1RG.
2. The import entry into the HMRC CHIEF system accepted the entry showing a free rate of duty.
3. The entry went via a Route 1 routing which meant that there was an additional documentation check by a customs officer who when satisfied that the customs entry was correct would clear the goods for use in the UK.
4. Whilst accepting that the quota claimed was incorrect the Appellant contended that the fact that the Route 1 procedure for verification of the entry was used meant that the entry would not be cleared without an examination of the paperwork. The CHIEF system is criticised for accepting incorrect entered details. It is also said that the customs officer who checked the details made a serious mistake which has allowed HMRC at this later date to claim duty to which it would not have been entitled had its system and staff picked the matter up when it ought to have done.
5. The actual EUR1 was lodged with the initial entry in 2010 and not produced retrospectively in 2013 as claimed. Under Annex ll Article 21 proof of origin of the goods was valid at the time of entry.
6. A request for amendment to the customs entry was made within the 3 year period following the initial entry but this was refused by HMRC.
7. The Appellant drew attention to the following Commission Regulations:
   Commission Regulation 2454/93/EEC – Article 204
   Commission Regulation 2454/93/EEC – Article 218

The tribunal's consideration of the appeal

21. The Revenue's Statement of Case sets out in some detail the relevant legislation concerning the subject matter of this appeal and, more particularly, the effect that an error in the completion in the SAD concerning a claim to a tariff quota has with respect to the matter of liability to duty.

22. It is clear from the materials helpfully provided by Mr Adkinson that in fact import duties on products of tariff heading 1006 (which includes broken rice) were eliminated as from 1 January 2010. It seems surprising to the tribunal that this very basic fact was not itself picked up by HMRC on submission of the Appellant's entry either by the CHIEF system or by its examining customs officer.

23. It is not understood to be any part of the Respondents' case that the payment of duty by the Appellant has been avoided. To the contrary, it appears that duty has only become payable by reason of the Appellant's error in completing Box 39 of the SAD. Mr Adkinson accepted that there was an understandable sympathy with the position in which the Appellant has found itself – effectively paying duty on a non-dutiable importation of products by reason only of what appears to have been an error on the part of the agents dealing with the matter of customs clearance.

24. It is not intended here to rehearse at length the law relating to the requirements placed on importers of goods from overseas to correctly identify any relevant tariff quota or other claim to relief from duty because the position has

been fully explained in the Respondents' Statement of Case and is not disputed by the Appellant. In short the requirement to correctly specify any tariff quota claimed is a strict one and any error will often have the effect of giving rise to a liability to pay import duty.

25. Were there no more to this appeal than that matter the tribunal could do no other than to confirm the decision on review made by the Respondents.

26. The Appellant has however raised a number of other matters with which the tribunal is bound to deal. These matters can conveniently be dealt with under the headings of:

1. The suggestion that HMRC are jointly responsible for the error
2. The Appellant's right to have its original entry amended
3. The question of the Appellant's claim to EU preference.

The "joint responsibility" point

27. The law in relation to this aspect of the Appellant's appeal is, unhappily for the Appellant, clearly against it.

Commission Regulation 2454/93/EEC – Article 199 states:

> Without prejudice to the possible application of penal provisions, the lodging with a customs officer 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 obligations relating to the entry of the goods in question under the procedure

The Respondents rely on this provision and they are, in the finding of this tribunal, entitled to do so. It is disappointing that the error was not picked up but it was the Appellant's error and as to this matter the tribunal must reject the suggestion that HMRC has a legal duty to discover and correct any such errors.

The amendment and preference points

28. It is convenient to deal with these points together because they have become conflated. The reason for this is that in the Respondents' Statement of Case the matter of possible amendment is directed to the relevant time limits concerning the submission of the EUR1 claim to preference whilst the Appellant addresses the issue of possible amendment to its entry declaration more generally by reference to Article 204 of the Implementing Regulations and the corrections referred to in Article 65 of the Community Customs Code established by Council Regulation 2913/92 (EEC). These are two quite separate matters.

29. The Appellant in its reply refers to Article 204 as conferring on customs authorities a discretion to allow certain corrections to be made. Article 204 provides as follows:

> Article 204
>
> The customs authorities may allow or require the corrections referred to in Article 65 of the Code to be made by the lodging of a new declaration intended to replace the original declaration. In that event, the relevant date for determination of any duties payable and for the application of any other provisions governing the customs procedure in question shall be the date of the acceptance of the original declaration.

Article 65 of the Code states:

> The declarant shall, at his request, be authorized to amend one or more of the particulars of the declaration after it has been accepted by customs. The amendment shall not have the effect of rendering the declaration applicable to goods other than those it originally covered.
>
> However, no amendment shall be permitted where authorization is requested after the customs authorities:
>
> (a) have informed the declarant that they intend to examine the goods; or,
>
> (b) have established that the particulars in question are incorrect; or,
>
> (c) have released the goods.

30. The Appellant might equally have referred to Article 78 of the Code which provides for revision of the declaration or post-clearance examination and includes the following:

> Where revision of the declaration or post clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information the customs authorities shall, in accordance with any provisions laid down, take measures necessary to regularize the situation, taking account of the new information available to them.

31. The tribunal finds it difficult to understand why in the circumstances of this appeal HMRC has, apparently, decided not to correct the mistake admitted by the Appellant. No doubt HMRC would claim to be taking those steps necessary to "regularize" the position by determining that a customs debt had arisen.

32. If that is so it is difficult to reconcile this approach with Article 201 which states:

> 1. A customs debt on importation shall be incurred through:
>
> (a) The release for free circulation of goods liable to import duties or
>
> (b) …….(not applicable)
>
> 2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

33. In this appeal the goods concerned were not in fact ever "liable to import duties" save by the somewhat torturous route of penalising the Appellant for the error made by it. In substance the goods were at all material times free of duty and whilst it may be possible for HMRC to argue, as it does, that it has no obligation to correct the error and can happily rely on that error to produce a customs debt this has, in the view of the tribunal, very little merit, however correct the legal analysis may be.

34. The Appellant has in further dealing with the question of amendment and preference referred to Article 218. This provides as follows:

> 1. The following documents shall accompany the customs declaration for release for free circulation:
> (a) the invoice on the basis of which the customs value of the goods is declared, as required under Article 181;
> (b) where it is required under Article 178, the declaration of particulars for the assessment of the customs value of the goods declared, drawn up in accordance with the conditions laid down in the said Article;
> **(c) the documents required for the application of preferential tariff arrangements or other measures derogating from the legal rules applicable to the goods declared;** *(emphasis added)*
> (d) all other documents required for the application of the provisions governing the release for free circulation of the goods declared.
>
> 2. The customs authorities may require transport documents or documents relating to the previous customs procedure, as appropriate, to be produced when the declaration is lodged.
> Where a single item is presented in two or more packages, they may also require the production of a packing list or equivalent document indicating the contents of each package.
>
> 3. Where goods qualify for the flat rate of duty referred to in Section II (D) of the preliminary provisions of the combined nomenclature or where goods qualify for relief from import duties, the documents referred to in paragraph 1 (a), (b) and (c) need not be required unless the customs authorities consider it necessary for the purposes of applying the provisions governing the release of the goods in question for free circulation.

35. It was made clear by the Appellant in its reply that contrary to the suggestion advanced by HMRC it had submitted its EUR1 at the time of importation. Further in

the course of the tribunal hearing both Mr Southwell and Mr Ackroyd confirmed that the EUR1 had been electronically lodged with and as part of, the application for clearance through the CHIEF system.

36. The tribunal heard that, in accordance with what was common procedure for the clearance of goods arriving in port, an application for clearance was submitted by the customs agent on behalf of the importer in advance of the intended arrival date of the ship. In this case the documents submitted by the Appellant did, according to Mr Southwell's evidence, include the EUR1 declared by the exporter on 23/03/2010 and bearing No A 112736. This was included in the papers submitted electronically to the Respondents "CHIEF" system used for the approval of customs clearances. The tribunal accepted Mr Southwell as a reliable witness of truth.

37. It must have been clear to those charged with the responsibility of inspecting the Route1 submission that quite apart from any claim to tariff quota the goods concerned were not dutiable by reason of the EUR1 preference.

38. This may well have accounted for the rather cursory review of the submission to CHIEF made by the Appellant. As soon as it was seen that an EUR1 had been submitted a careful consideration of the tariff quota had become otiose. Had there been such a consideration it would have become apparent that the duty on the broken rice had in any event been removed altogether on 1 January 2010.

39. It was clear to the tribunal that the evidence that the EUR1 had in fact been submitted with the original application for entry clearance had not been appreciated by counsel or those instructing him. It also seems clear from the terms of the review letter that this material fact was not understood by the original decision maker or the officer dealing with the review.

40. Mr Southwell, although aware that an EUR1 had been submitted to HMRC's CHIEF system in support of the request for clearance, was told by HMRC (which was not aware it had been submitted) that it was out of date in January 2013 and could not be revived for the purposes of making a fresh application because the 10 month limitation period for this had expired.

41. The tribunal notes that Mr Adkinson in his skeleton argument states:

> "It seems correct (without conceding the point) that had the EUR1 been presented at the time, TBA would have been able to import the broken rice quota and duty free."

42. Whilst the point was not formally conceded Mr Adkinson did not however seek to adjourn the hearing to take further instructions in light of this new evidence or to develop any argument that notwithstanding the submission of the EUR1 at the time it might not have met any other of the conditions of the Rules of Origin in Annex ll to Council Regulation (EC) No 1528/2007.

43. What Mr Adkinson did do is to draw to the attention of the tribunal the fact that there was a possible argument that the EUR1 had not been "submitted" as that word is

properly to be construed in the context of this appeal in connection with the Appellant's application for entry clearance.

44. The tribunal was not directed however to any case law or statutory provisions concerning the meaning of the word "submitted". In this appeal the Appellant states that the EUR1 was submitted as part of its CHIEF application to HMRC. It is difficult to see how, on any view, this was other than a submission of the document properly so called.

45. Even if the tribunal (and it seems counsel for HMRC also) is wrong about the significance of the submission of the EUR1 at the time of importation the fact that this appears not to have been known to either the original decision maker or the Review Officer means that the decision is flawed in public law terms as it does not take account of a material fact which ought to have been considered.

46. For that reason alone the decision is one which should be set aside.

47. Further, the tribunal finds that the importation of the broken rice was the subject of a European preference the Appellant having submitted its EUR1 at the time of importation. Consequently no duty point arose then or arises now.

Decision

47. The tribunal allows this appeal. The Post Clearance Demand Note is discharged.

CHRISTOPHER HACKING
TRIBUNAL JUDGE

RELEASE DATE: 3 December 2014