[2015] UKFTT 0688 (TC)

TC04806

Appeal number: TC/2015/02701

CUSTOMS DUTY – VALUE ADDED TAX - Appellant purchasing motorhome in USA in connection with intended long-term travel - Returning to UK prematurely due to illness - Vehicle imported to UK from Canada - Charged Customs Duty and VAT - Claim for Repayment - Article 239 of Council Regulation (EEC) 2913/92 - Community Customs Code - Whether a 'special situation'? - Yes - Whether any 'obvious negligence' by the appellant? - No - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR BRIAN HUGHES **Appellant**

- and -

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

TRIBUNAL: JUDGE DR CHRISTOPHER MCNALL
MR PETER WHITEHEAD

Sitting in public at The Civil and Family Court, 35 Vernon Street, Liverpool L2 2BX on 4 December 2015

The Appellant in person

Miss Joanna Vicary of Counsel, instructed by the General Counsel to HMRC, for the Respondents

DECISION

1. This appeal was made by way of a Notice of Appeal dated 11 April 2015.

2. The disputed decision ('the Decision') was dated 16 December 2014. It refused the appellant's claim, advanced under Article 239 of Council Regulation (EEC) No 2913/92, for repayment of import charges and VAT levied against him in relation to the importation of a motorhome into the UK from Canada in December 2012.

3. That Decision was subsequently upheld by a formal departmental review, with the reasons being set out in a letter dated 16 March 2015 ('the Review'). The Review considers the same law and applies the same reasoning as the Decision.

The Law

4. Council Regulation (EEC) No 2913/92 of 12 October 1992 established the Community Customs Code: 'the Customs Code'.

5. Useful guidance as to the intended scope of the Customs Code can be gleaned from its preamble which (amongst other matters) recites that it was considered *'advisable, in the interests both of Community traders and the customs authorities, to assemble in a code the provisions of customs legislation that are at present contained in a large number of Community regulations and directives'*. It sought to *'secure a balance between the needs of the customs authorities in regard to ensuring the correct application of customs legislation, on the one hand, and the right of traders to be treated fairly, on the other'*. Reflecting *'the paramount importance of external trade for the Community, customs formalities and controls should be abolished or at least kept to a minimum'*.

6. Article 239(1) of the Customs Code reads:

> Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:
>
> - to be determined in accordance with the procedure of the committee;
>
> - resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

7. Articles 236, 237 and 238 deal with the following situations: duties not legally owed or erroneously entered in the accounts by the customs authorities (A 236); invalidation of a customs declaration (A 237); goods rejected by the importer because they are defective or do not comply with the terms of the contract under which basis they were imported (A 238). Whilst these Articles are not directly relevant to this

appeal, they enable Article 239 to be set in its proper legislative context, so as to assist in interpretation.

8. The legislation is discussed in a so-called *'Information paper on the Application of Articles 220(2)(b) and 239 of the Community Customs Code'*: 'the Guidance'. That Guidance is neither signed or dated, but was published by the European Commission on 4 June 2004. It is available online at the European Customs and Taxation website.

9. Part 2 of the Guidance states that Article 239 '*constitutes a general equity clause'*. It goes on to say that '*[a]ccording to Community case law, if the person liable for payment can demonstrate both the existence of the special situation in the absence of deception and obvious negligence on his part, he is entitled to the repayment or remission of the amount of duty legally owed*.'

10. This succinct analysis makes clear that there are two conditions - in this decision, and for shorthand, 'special situation' and 'obvious negligence' - which are cumulative. Repayment or remission must be refused if one of those conditions is not met.

11. 'Special situation' is not defined in Article 239, but the Guidance describes the expression as follows:

> 'According to Community case-law, the existence of the special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties. In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be born by the operator [...] A prudent trader aware of the rules must assess the risks inherent in the market which is prospecting and accept them as normal trade risks'.

12. This reflects the decided case-law to which we were referred. In *Eyckeler & Malt AG v Commission of the European Communities* (T42/96 - 19 February 1998) [1998] ECR II-401, the Court of First Instance considered Article 13 of Council Regulation 1430/79, which was the immediate precursor of (and is in almost identical terms to) Article 239.

13. The Court remarked (at [3]) that Article 13:

> 'constitutes an equitable provision designed to cover situations other than those which arose most often in practice [...] It is intended to apply, *inter alia*, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred. The Commission must assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision. Although it enjoys a margin of assessment in that respect, it is required to exercise that power by actually balancing, on the one hand, the Community interest in

> ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk'.

14. The same reasoning applies to Article 239.

15. Article 239 was subsequently considered, at more length, by the Court of First Instance in *Kaufring AG and others v Commission* (T/186-97 - 10 May 2001) [2001] ECR II-1346. That case concerned the remission of customs duties exacted in relation to the importation into various Member States of colour television sets from Turkey. The factual issue was whether the applicant importers (being large industrial combines in several Member States) were entitled to remissions having relied on certificates from the Turkish exporters which falsely stated that the television sets only contained components which had been released for free circulation in Turkey.

16. The Court remarked (at [218] and [219]):

> "the case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business ... And that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts *a posteriori* of customs duties. As regards the condition concerning the absence of obvious negligence or deception on the part of the interested party ... The aim is to limit the post-clearance payment of import.'

17. The Court went on to say (at [279]):

> '[...] account has to be taken inter-alia of the precise nature of the error and the professional experience of and the care taken by the trader. That assessment must be made in the light of the particular circumstances of the case.'

18. This is reflected in the Guidance, which states that:

> 'The criteria to be used to determine whether an operator acted with obvious negligence or not are the same as those used to determine whether an error on the part of the customs authorities within the meaning of Article 220(2)(b) of the Code could reasonably have been detected by the operator. Particular account should therefore be taken of the precise nature of the error, the trader's professional experience and the care exercised'.

The Appellant's case

19. We heard from the appellant and also considered the document described as a 'Report' which accompanied his Notice of Appeal. We found him to be a forthright and honest witness. His evidence was not challenged by way of cross-examination. We find the following facts.

20. On 31 March 2012, the appellant retired from the police force. He and his wife (who had taken voluntary redundancy) had dreamt of travelling the world. They decided that there were be no better opportunity to make such a trip. They intended to travel initially to the US, but then on to Canada, and eventually to Australia and New Zealand. They had already booked one-way air tickets to New York and they flew out on 23 May 2012. In the meanwhile, and in anticipation of a lengthy time abroad, they had taken steps to let out their family home in Liverpool, and had taken other steps appropriate for people intending to stay abroad, including setting-up a postal re-direct and buying landlord's insurance.

21. The appellant and his wife enjoyed travel insurance under the Merseyside Police Federation Group Insurance Scheme. That was limited to cover for 30 days at a time. The appellant contacted his insurer and told them of his intention to stay away for longer than 30 days. He also arranged Annual Travel Insurance with First Direct. Hence, there was cover with two insurers of repute.

22. He had made his insurers aware of some pre-existing medical conditions, but had not told them that he had, in 2007, suffered a head injury, nor that he had had a grommet fitted in his ear. This was because the former had happened some years previously (with a prognosis that he would continue to improve and would eventually be able to resume full normal duties as a police officer) and the grommet was not something which he was asked about.

23. Shortly after their arrival in the United States, the appellant and his wife purchased a pre-owned 2006 'Fourwinds Majestic' Recreational Vehicle ('the Motorhome') for USD19,301, equating to approximately £12,000. At the same time, the appellant bought 12 months' vehicle insurance.

24. Between May and October 2012, the appellant and his wife were travelling in the Motorhome. They travelled some 26,000 miles, making their way from Arizona to California (where they registered the Motorhome for 9 months) and then on to Canada.

25. In October 2012 the appellant fell ill, suffering with eyesight and balance difficulties, nausea and blackouts. He attended a public clinic, and was advised to attend hospital and contact his insurers.

26. Paragraph 12 of the appellant's statement sets out what happened when he contacted his insurers:

> "I was told that I would probably not be covered under the insurance, for two reasons. 1. I had suffered a serious head trauma in 2007 and 2. I had been previously treated in the UK for some of the symptoms as a result of a burst eardrum, after which a grommet was fitted. As the insurer said they were not made aware of these issues, they could not guarantee cover. This obviously gave us grave financial concerns as to being admitted to hospital, as we simply could not have afforded it".

27. Before us, the appellant described the potential consequences - as he had seen it at the time - if he were admitted to hospital in Canada:

> "At that stage, my wife could have been in the Motorhome and I would have been in hospital. She could have been sat in the RV in the car park at the hospital. Insurance companies are not great at paying out. Having just retired, I did not want to see 30 years' of effort drizzling into a Canadian hospital. I was not willing to jeopardise my house if I had to pay. The insurers would not make any guarantees as to whether I was covered or not. I was as properly insured as I needed to be, but the insurers had immediately set my alarm bells ringing."

28. As he put it, the appellant had been looking for comfort from his insurers, but had found none. Although it had not been their intention to return home so soon, the appellant and his wife decided to return to the UK so that the appellant could seek treatment on the NHS. The appellant explained this decision as follows: he could stay in Canada, and risk all the above, or he and his wife could simply return to the UK on an ordinary commercial flight for £300 each.

29. But the Motorhome was proving a problem for the appellant and his wife. Instead of liberating them to explore Canada, it had now become *'a bit of a millstone'* around their necks. The heart of the problem was that it was registered in the US. The appellant stated that it was virtually impossible to store the vehicle in Canada, as the Canadian authorities required local state insurance, which he had been told, having made inquiries, was impossible for a UK driver of a US registered vehicle to obtain. The Motorhome could not be returned to the US without a new visa; and it could not be sold, scrapped or abandoned in Canada because it was US registered. As the appellant saw it, he was left with no alternative but to ship the Motorhome back to the UK.

30. On or about 6 November 2012, the appellant made arrangements to ship the Motorhome back to the UK from Halifax, Nova Scotia, for a price of USD 2950.

31. On 9 November 2012, the appellant and his wife booked air tickets from Toronto back to the UK, and flew back on 11 November 2012. The appellant was emphatic that it was never his true desire either to return to the UK at that time, or to return the Motorhome to the UK. These choices had been made reluctantly.

32. On 3 December 2012 the appellant's agent, Warrant Group Ltd, entered the Motorhome into the Port of Liverpool on his behalf. The Motorhome was subject to a tariff of 10% customs duty rate. Since the customs value of the Motorhome was declared as £12,000, £1200 customs duty became due together with £2640 import VAT (being 20% on £13,200), amounting to import duty in the sum of £3,840. That sum was paid and the Motorhome was released.

33. Unfortunately, this was not the end of the appellant's problems with the Motorhome. It was still a millstone. It was not 'road legal' in the UK. It needed 'Individual Vehicle Approval' from VOSA which was initially refused. Its electrical system was US voltage and not UK voltage, and the appellant was quoted a large sum to put this right. The Motorhome has other characteristics of a US-made vehicle: principally, it is left-hand drive. He still has the Motorhome, but it is sitting on his driveway under a SORN.

34. More happily, the appellant's health was not as bad as he had initially feared. Shortly after his return, he was seen by an ENT specialist and neurologist, and the tests were clear. He and his wife resumed their travels, flying to Auckland on 27 February 2013. They left the Motorhome in the UK.

35. On 17 January 2014, the appellant applied for relief from duty and VAT on the Motorhome on a transfer of residence from outside the EC (Transfer of Residence Relief). There then followed a procedural detour insofar as the appellant appealed, by way of a Notice of Appeal dated 24 April 2014, against the decision to levy import duties. That appeal was eventually withdrawn, on the basis that the import declaration was not an appealable decision within the meaning of the Finance Act. The Notice of Appeal is substantially consistent with the Notice of Appeal in this case.

36. On 20 July 2014, the appellant applied for repayment or remission of the duty and VAT under Articles 236 and 239 of the Customs Code.

37. The claim under Article 236 was refused on 9 October 2014 although no formal decision has yet been issued.

38. On 11 November 2014, HMRC notified the appellant (by way of a 'Right to be Heard' letter) that it intended to refuse his Article 239 application, on the basis that he had not experienced *'circumstances which put an operator in an exceptional situation outside his normal commercial and professional risk, when compared to other operators in the same industry*', and that his situation resulted from circumstances which could be attributed to his 'obvious negligence': namely, that the decision of whether to take out valid travel insurance to mitigate against the risk is a matter of choice for every individual traveller. It was not considered that the appellant's situation was different from that experienced by any other traveller, and accordingly no 'exceptional situation' arose.

39. Following a further letter from the appellant, that initial decision was confirmed by letter dated 16 December 2014. The officer wrote:

> "I can see nothing in your letter to make me alter my opinion that all travellers face the risk of falling ill while abroad, especially during an extended trip, and are able to take out travel insurance to protect against the consequences of this happening depending on the risk they feel they face. Consequently I do not consider that you were in a special situation compared to anyone else in your position"

40. On 16 March 2015 an officer of the Customs Directorate completed a formal departmental review, and concluded that the decision should be upheld. That letter accurately summarised the Decision ('*[the officer] did not consider your situation was different to any other traveller*'). Its key conclusion was as follows:

> "Article 239 of the Community Customs Code allows import duties to be remitted in situations other than those referred to in Articles 236, 237 and 238. These are special situations as explained in EC guidance and established case law. Having considered the legislation, case law, and EC guidance, I am of the view that your return home early from

> your trip to Canada and the US through health grounds resulting in the importation of your motorhome before you had been outside the UK for twelve months or more does not constitute a special situation. Therefore, I uphold the decision to refuse your repayment application under Article 239 of the Community Customs Code'.

HMRC's Case

41. HMRC argued that a declarant's 'Personal problems, illness, leave etc' are specifically excluded from amounting to a 'special situation' by virtue of Paragraph 2.1.1 of the Guidance.

42. HMRC also argued that the appellant had behaved in a manner which was 'obviously negligent'. It was his responsibility to obtain valid insurance cover, and insofar as his insurance cover was invalid, this was as a result of his own non-disclosure to his insurers.

Discussion and conclusions

Article 239

43. In our view, it is clear that the Customs Code is designed principally to address traders - that is, those engaged in a species of trade. Support for this proposition can readily be found in the passages cited from the preamble. Moreover, given that Article 239 is expressed as dealing with a residual category of situations, outwith those dealt with in Articles 236 to 238, those must form part of the context for Article 239. Articles 236 to 238 and the situations which they address are read most intelligibly as applicable to traders.

44. Of course, there is no doubt that all persons, including private individuals such as Mr Hughes, are prima facie subject to the Customs Code. But Article 239, as a general equitable provision, exists to deal with situations which are 'special'.

'Special situation'

45. The Guidance makes pervasive references to 'other operators engaged in the same business', 'a prudent trader aware of the risks', 'traders', and 'trade risks'. In our view, this gives a clear indication that the legislation should be read as meaning that 'special situation' is targeted with reference to those who are engaged in the business of importation. Those persons are expected to know the ordinary commercial risks of importation, and are expected to factor those risks into their costs.

46. Section 2.1.2(B) sets out situations which are '*part of the trader's normal professional and commercial risk and not therefore considered special situations*', including *'the declarant's personal problems (illness, leave etc)*'.

47. The Guidance makes reference to 'REM 9/01' in support of this proposition. REM 9/01 is a Commission Decision dated 22 August 2002 in relation to an

application for remission ('REM') of import duties. It is reported in full on the Community Customs and Taxation website:

http://ec.europa.eu/taxation_customs/resources/documents/remrecs/2001/rem_09_2001_en.pdf

48. This Commission decision repays attention. It underpins the Guidance. There is no evidence that this decision itself (as opposed to the description of it in the Guidance) was ever considered by HMRC. It serves to emphasise the necessarily commercial context in which Article 239 is intended to operate. A German firm had been overloaded with work and short-staffed. Many of its staff were on sick-leave. This, together with other factors, prevented it meeting deadlines for customs declarations. It claimed that this was a special situation. The Commission decided that it was not a special situation since the requirement to file declarations *'did not affect this firm alone, but impacted on all operators working in similar conditions at the time ... It follows that this was an objective situation, affecting an undefined number of economic operators'*: at [33].

49. The reasoning is wholly consistent with both Eyckeler AG and Kaufring AG. It is noteworthy that both those leading cases involve companies. Our attention was not drawn to any decision in which Article 239 was considered in the context of a non-commercial entity.

50. In our view, the exception relied upon by HMRC drawn from section 2.1.2(B) of the Guidance is intended to deal with those traders who fail to make appropriate arrangements, and who, if allowed to plead special circumstances, would otherwise enjoy (by virtue of their own negligence) a competitive advantage in the market place. It would be obviously unfair if a trader could (on the one hand) cut her costs by failing to guard against certain industry-wide risks but could (on the other hand) claim, when those risks eventuated, that her situation was a 'special' one so as to bring her within Article 239.

51. The emphasis which was placed on the scope of the appellant's travel insurance was misconceived. Despite Miss Vicary's able and ingenious argument, we do not accept that it is appropriate to read down the legislation and case-law, as HMRC consistently did, so as to compare the appellant with other *travellers* (a broad class) or other travellers *intending to be abroad for a long period of time* (a narrower class).

52. We cannot find any support for such an approach in the legislation, the Guidance, or the case-law. It seems to be a spontaneous re-working of Article 239 by HMRC. If this were the correct approach, it would create artificial (and inevitably arbitrary) distinctions. Moreover, it would be unworkable, since (in this case) HMRC would have been required to assess the appellant against (for example) all other persons intending to travel abroad for up to 2 years. HMRC could not possibly do so. Even if an appropriately comparable class could be identified (and we doubt that it could be), the circumstances of that class (for instance, the terms of their insurance arrangements) could not be interrogated so as to permit assessment of whether an appellant was being treated preferentially in relation to that class or not. Or, in other

words, it would not be possible to assess whether an individual's situation were 'special' or not, or whether they had acted with 'obvious negligence' or not.

53. HMRC wrongly glossed Article 239 to the effect that 'operators' and 'traders' should mean 'travellers'. This was both seeking to confine Article 239 to too narrow a compass and it was going against both the letter and spirit of the Guidance.

54. HMRC wrongly treated the appellant as if he were a trader. He is not a trader. He was not engaged in any business. He had not imported a motorhome previously (and he is unlikely to want to do so again). He was not doing so for the purposes of trade: the Motorhome is still on his driveway. The risk of his falling ill and then finding himself potentially uninsured was not part of his *'normal professional and commercial risk'*. It was wrong to regard it in this way.

55. In short, we do consider that the appellant's situation was a 'special' one, within the meaning and intent of Article 239.

'Obvious negligence'

56. In REM 09/01 the Commission remarked (at [45]):

> "As regards the professional experience of the operator, it must be asked whether or not an economic operator whose main economic activity is import-export operations is concerned, and whether it had acquired a certain amount of experience of such operations"

57. So, and by way of illustration, in Kaufring AG all the applicants were companies with a certain amount of experience of importing electronic equipment. The nature of the error had persisted for more than three years. The manner in which the applicants had entered into purchase contracts and carried out their checks were in conformity with standard trade practice.

58. No such considerations are present here. But even if the terms of the appellant's insurance cover were indeed relevant (and we do not think they are, for the reasons already explained) we still do not consider that the appellant had done anything which could be characterised as 'obviously negligent'. He told us, and we accept, that he did not consider it appropriate to declare his head injury (which had happened in 2007) and he was not asked about his grommet. He had taken out insurance. He genuinely believed that he was unwell and reluctantly took the decision to return to the UK.

59. His decision to return to the UK was entirely reasonable in the circumstances in which he found himself. He was understandably, and reasonably, concerned at his insurers' hesitation. Whilst they did not refuse outright to indemnify him, he faced an uncertain situation, with financial consequences which, if his insurers did eventually refuse to indemnify, could have been ruinous.

60. Similarly, his decision not to leave the Motorhome in Canada, and to bring it back to the UK was a reasonable one to take in the circumstances.

61. Article 239 is a general equitable provision, and, in our view, should have been applied in the appellant's favour. HMRC fell into error in not doing so. Its refusal was not correct under Community legislation. This was a special situation. Section 2.1.2(B) of the Guidance should not have been read as to prevent the appellant's situation from being treated as 'special'. Moreover, nothing that the appellant had done, or failed to do, could be characterised as 'obvious negligence'.

62. It does not seem to us to make any difference, for the purposes of this appeal, whether our jurisdiction is of a broad kind which permits us to remake the decision afresh, or whether it is a narrower review-type jurisdiction. This is because, even on the narrower view, HMRC, in reading-down Article 239 in the way that it has, has made a material error of law or has materially misdirected itself as to the law in a way which fundamentally invalidates its decision. Both the Decision and the Review made the same error.

63. The Appeal is allowed. In consequence, the sum of £3,840 must be repaid.

Other matters

64. Other matters were advanced by the appellant, and we consider it appropriate to deal with them at this point, if only in case any of these matters should fall for determination in the future.

65. Firstly, the appellant ostensibly argued that duty and VAT should have been remitted since he had been outside the UK for 'well over 185 days in a 12 month period'. But this present appeal is not made against HMRC's decision in relation to Article 236 (its letter of 9 October 2014) nor its interpretation or application of *The Customs and Excise Duties (Personal Reliefs for Goods Permanently Imported) Order 1992*: SI 1992/3193.

66. The Grounds of Appeal also stated the appellant's belief *'that the valuation by HMRC of the Motorhome was incorrect, and I did not receive any information as to how they arrived at the valuation figure, nor was I asked for any input'*.

67. This argument is completely unsustainable. The valuation was not 'arrived at', in any sense of the expression, by HMRC. The value of £12,000 was declared to customs at Liverpool by the appellant's agent. That can only have been done on the basis of information supplied by the appellant. If there was or is any dispute as to the value of the Motorhome, it is a matter which lies entirely between the appellant and his agents, and in no way ever concerned HMRC.

68. A further criticism advanced by the appellant was that he had not been treated professionally, efficiently or fairly by staff from the Border Agency at the port. We cannot see any basis upon which such an assertion can properly be made. On the contrary, it seems to us that the appellant was advised, helpfully and responsibly, that he should engage the services of a customs agent, and one was suggested to him. It is difficult to see how the officers at the port can have been any more helpful to the appellant. It was his responsibility, and not theirs, to deal with the documents

importing the Motorhome. Moreover, HMRC was not guaranteeing the agent's performance of its duties. It could not do so.

69. This 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 CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 18 DECEMBER 2015