Neutral Citation: [2023] UKFTT 274 (TC)

Case Number: TC08751

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2019/04702

CUSTOMS CLASSIFICATION – pappadum made of shelled urid bean flour – classification as preparation shelled bean – yes – appeal allowed

Heard on: 16 January 2023
Judgment date: 08 March 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
DUNCAN McBRIDE

Between

NATCO FOODS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr L Pagarani managing director of tunche Appellant

For the Respondents: Mr M Simpson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties the appeal was heard remotely using the Tribunal's Video Platform. A face-to-face hearing was not held because an earlier listing of the matter was thereby facilitated. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

2. In substance the appeal concerned the identification of the correct customs classification code for pappadum imported by Natco Foods Limited (**Appellant**) in the period 15 February 2016 to 24 January 2019 and in respect of which, on 25 March 2019, HM Revenue and Customs (**HMRC**) had issued a post clearance demand notice (**C18**) in the sum of £280,047.41. That sum was reduced on statutory review (HMRC accepting that period to which the C18 related fell outside the period in which the duty was assessable) and further reduced (for the same reason) during the course of the hearing. The total sum in dispute was therefore limited to £265,891.47.

3. The Appellant accepted that they had used the wrong customs classification code at the time of importation (having imported them under commodity code 2005 9980 99 – preparation of vegetables … other … other … other) but contended that the correct code was 2005 5100 00 (preparation of vegetables … bean … beans, shelled) and not, as HMRC contend 2005 5900 00 (preparation of vegetables … beans … other).

4. For the brief reasons explained at the end of the hearing and as set out below we agree with the Appellant that the pappadum are preparations of shelled beans and correctly classified as 2005 5100 00. The consequence of our conclusion is that the C18 is overstated having notified a customs debt on the basis that duty was owed at the rate of 15.7% rather than at 14.10% as we have found. The C18 should therefore be recalculated at the lower rate.

FACTUAL BACKGROUND

5. There was no dispute between the parties as to the facts in this appeal and accordingly we find the following facts.

6. In 2008 the Appellant applied for and received a Binding Tariff Information (**BTI**) valid from 16 July 2008 to 15 July 2014 classifying the pappadum under commodity code 2005 9980 99. At the time of application 2005 5100 00 and 2005 5900 00 provided for classification as set out in paragraph [3.] above but neither were determined as the correct classification code. Code 2005 9980 99 ceased to exist on 31 December 2011 due to a change in the structure of the commodity code. Despite this the Appellant continued to make its import declarations on the basis of that code.

7. On 28 October 2018 HMRC initiated a Customs and International Trade desk audit into the Appellant and, in particular, to the importation of pappadum. The Appellant complied fully with the audit and provided all the requested documentation.

8. That documentation and information confirmed that the two varieties of pappadum were comprised of between 83 and 90% urid flour, 7 - 1% rice flour, 8% salt, 0.25 – 1.5% calcium bi carbonate, and 0.05% coconut oil. They are brittle discs of dried dough approximately 18cm across, pale in colour. The "raw" pappadum are fried such that the puff up ready for consumption.

9. The process by which they are produced is that mature urid beans are removed from their pods (or shells). The pods are black and fibrous and unsuitable for human consumption.

The beans are then deskinned and ground to form urid bean flour. The flour is mixed with water and the other ingredients identified in paragraph [8.] above (save for the rice flour) to form a dough which is then rolled into discs. The discs are dusted with the rice flour to prevent them sticking to the drying area or each other before being dried in the sun. The majority of the rice flour will blow away in the drying process. Then 20 dried discs are packed in plastic.

10. HMRC sought a ruling from the Tariff Classification Service which determined that commodity code 2005 5900 00 should be applied. It is right to note that the explanations given by HMRC for such classification have been somewhat difficult to discern. We set out below where Mr Simpson landed for the purposes of the hearing, a position which had a somewhat tenuous relationship with the position articulated in the original decision, review, statement of case and skeleton argument.

11. The Appellant challenged the classification contending that as the products were substantively made of shelled urid beans the correct classification was 2005 5100 00.

12. The C18 was also challenged on the basis that the Appellant had a legitimate expectation that additional customs duty should not be payable for any importation prior to notification that 2005 9980 99 was no longer applicable. This argument was "weakly" maintained at the hearing. Mr Pagarani explained that he so firmly believed that the classification he sought was the correct one that the legitimate expectation argument would not need to be considered.

RELEVANT LEGISLATION

13. The Combined Nomenclature Regulation (Reg EEC) No 2658/87 provides the legal basis for the Community's Tariff. An annual amendment to this Regulation is contained the Combined Nomenclature (**CN**) reproduced as the UK Tariff. It provided a systematic classification of all goods in international trade and is designed to ensure, with the aid of the General Interpretive Rules (**GIRs**), that any product falls to be classified in one place and only one place.

14. The legal procedure for tariff classification is contained in Volume 2 Part 1 Section 3 of the UK Tariff. The first paragraph explains that the appropriate 4-digit heading must first be established. The GIRs have legal force and are intended to be applied to determine the appropriate commodity code.

15. The GIRs require in rule 1 that "classification shall be determined according to the terms of the headings and any relative section or chapter notes" and, "provided such headings or notes do not otherwise require, according to" the remaining provisions of the GIRs.

16. Rule 2 is not relevant to this appeal.

17. Rule 3 is for goods which are on the face of it classifiable under two or more headings. So far as relevant in this appeal it provides:

> (1) The heading which provides the most specific description is to take precedence over one which provides only a general description (i.e. "other").
>
> (2) In respect of mixtures, composite goods consisting of different materials or components which cannot be classified by reference to (1) above, classification is by reference to the material or component which gives them their essential character.
>
> (3) Where goods cannot be classified under (1) or (2) above they are to be classified in the heading which occurs last in numerical order among those which equally merti consideration.

18. Rule 4 provides that where classification has not been possible under rules 1 – 3 they are to be classified by reference to the goods to which they are most akin.

19. Rule 5 allows for packaging to be classified by reference to the goods they contain.

20. Rule 6 provides that for legal purposes the classification of goods in the subheadings of heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.

21. There are also explanatory notes to the Harmonised System (**HSENs**) and to the CN (**CNENs**). Whilst these are not legally binding but are considered persuasive and represent an aid to interpretation.

22. The CN provides, under Chapter 20 for the following classification:

> "2005 Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006.
>
> …
>
> Beans (vigna spp. Phaseolus spp):
>
> 2005 51 00 beans shelled
>
> 2005 59 00 other

23. The Chapter notes provide:

> "Heading … 2005[s] cover, as the case may be, only those products of Chapter 7 … which have been prepared or processes other than those [specified in Chapters 7 … or 11].

24. The CNENs provide that the classification of pappadums falls within the four-digit heading 2005.

25. The HSENs for 2005 note that the vegetables falling within the heading are classified in the heading when they have been prepared or preserved by processes not provided for in Chapters 7 [chilled, frozen, dried, provisionally preserved but not ready for immediate consumption] and 11 [hulled, rolled, flaked, pearlised, sliced, kibbled, ground, pellets].

26. BTIs, as their name indicates, are binding as between the applicant and the tax authorities but they are not otherwise binding. They are available publicly and one tax authority may determine the classification of a product having taken account of a BTI given by another authority for the same or a similar product but is not obliged to do so. As such other BTIs for the same or similar products are of interest but no direct relevance to us in determining the correct classification of the products in this case.

SUBMISSION

Appellant

27. The Appellant notes that the urid bean is one of the beans within the botanical genra of vigna and phaseolus. All beans within that genus may be harvested in a mature or immature state. Green, runner and French beans are frequently harvested in their immature (green) state when both the pod and the bean are suitable for human consumption. However, when the bean is harvested in its mature state the bean pod is not suitable for human consumption and must be removed before the bean. Immature and mature beans serve different culinary functions. This, the Appellant contends, provides the intuitively sensible and meaningful distinction adopted in the classification regime between shelled an unshelled beans.

28. The Appellant contends that there is no relevant distinction drawn in the code between preparations of mature (shelled) beans by reference to the number of levels of processing i.e. it does not matter whether, having been shelled, the beans are skinned or unskinned, cooked or uncooked, chopped or "unchopped", crushed or uncrushed and ground or unground. The fact that the pappadum are made from shelled, skinned and ground urid beans does not denude them of their nature as "beans – shelled" and thus the appropriate classification of the pappadums is 2005 51 00.

29. In the Appellant's submission there was no justified basis for concluding that because urid flour itself was classified separately under chapter 11 that a preparation from urid bean flour should be classified under 2005 59 00. In response to HMRC's position that in order to be classified under 2005 51 00 the "character of shelled beans" must be preserved, the Appellant submitted required "shelling" to be construed as a process which merely altered the form of the bean (similar to chopping, slicing, etc) whereas shelling fundamentally referenced the substance of the bean (immature v mature).

30. This position was also supported, by reference to the terms of GIR 3(a) and classified the pappadum by reference to which it was contended that "beans – shelled" provides the heading which provides the most specific description" and should therefore be preferred to "beans – other". The Appellant also noted that if the pappadum were not preparations of shelled beans it was difficult to conceive how they could be relevantly described as preparations of beans at all and thus outside classification under 2005, and yet the CNEN specifically provide for pappadum to be classified within that heading.

31. Most simply put the Appellant's case was "if it is accepted that a product is a 'preparation of beans' then the question of whether it is 'a preparation of shelled beans' is determined by whether the bean pod is present or absent" no more and no less.

32. In the event that classification was not as contended for by the Appellant they claimed that they had a legitimate expectation that additional duty would only be assessed from the point at which they had been notified that the classification code used and provided for in the BTI had ceased to be applicable.

HMRC

33. As indicated above HMRC's case was somewhat difficult to discern. The correspondence and statement of case placed considerable reliance on the contention that in order to be classified under heading 2005 51 00 the shelled beans needed to retain their form as beans or be identifiable as a bean and that because the pappadum were preparations made from urid flour the form of the bean was lost.

34. When pushed to explain why the form of the bean was relevant Mr Simpson shifted the focus of HMRC's case to the fact that the starting point for the pappadum was urid flour and not a shelled bean. Evidentially it was accepted by the Appellant that the manufacturer of the pappadum did not buy in either shelled or unshelled beans which were subsequently deskinned and ground. The manufacturer purchased flour from which the pappadum were then made. HMRC contended that as the pappadum were preparations of urid bean flour and not urid beans the correct classification was under 2005 59 00 "beans – other". Support for this analysis was drawn from correspondence with the German authorities (available in the hearing bundle) which too had classified pappadum as 2005 59 00.

35. Although accepting that other BTIs were not in any way binding HMRC references a number of BTIs granted by other tax authorities across Europe which had classified pappadum under heading 2005 59 00.

36. HMRC also relied on the FTT decision in *Sarra Foods UK Ltd v HMRC* (unpublished) in which the FTT determined that pappadum were to be classified under heading 2005 59 00.

37. On legitimate expectation, HMRC contended that we had no jurisdiction and, in any event, the Appellant could have no legitimate expectation of continuing to import the pappadum by reference to a BTI which ceased to be valid from 31 December 2011.

DISCUSSION

Classification

38. There is no dispute that the pappadums are products derived from the urid bean which is a bean within the genus of vigna. There is also no dispute that the beans are shelled. The critical question is whether the fact that the beans were ground into flour before being made into the pappadums takes them out of a classification as "beans shelled" and requires them to be "beans other".

39. It is plain that the pappadum are not classified under Chapter 11 under which the flour itself is classified. The parties are agreed, and by reference to the CNENs which are persuasive, it is clear that the pappadum are to be classified within subheading 2005.

40. We must consider the objective characteristics of the pappadum and determine whether they are preparations of shelled beans or simply preparations of beans. The objective characteristics include the ingredient list, which in this case, references urid flour.

41. As we communicated at the end of the hearing we can see no justified reason for concluding that because the shelled beans were subject to the grinding process prior to the preparation which resulted in the pappadum themselves that the pappadum are not preparations of shelled beans. The terms of the subheadings simply refer to preparations not the form of those preparations save to the extent that preparation must not be of a type identified in chapters 7 or 11. The fact that urid bean flour has been classified under chapter 11 may have indicated that a preparation made from the bean flour was excluded from chapter 2005 altogether. However, the chapter note referred to in paragraph [23] above provides that heading 2005 includes preparations not falling within chapters 7 and 11 and yet expressly includes pappadum (see the CNEN referred to in paragraph [24]). The fact that pappadum are made from flour does not therefore appear to be relevant when considering the terms of the subheadings within 2005.

42. The only relevant question would therefore seem to be whether the pappadum are preparations of shelled or unshelled beans and it is accepted that they are of shelled beans. On the basis that conclusion is correct the terms of GIR 3 do not appear to be relevant as there are not two headings which appear to be relevant. However, if there were beans shelled is clearly more specific than beans other.

43. We note that *Sarra* was a matter in which the Appellant contended that the correct classification heading was 1905 90 90 00 (bread, pastry, cakes, biscuits and other bakers' wears whether …). HMRC contended, as here, that the proper classification was 2005 59 00. The Appellant did not attend the hearing and the Tribunal determined, that the pappadum were classifiable under Chapter 20 and not 19. There was no argument before it as to whether the appropriate subheading was 2005 51 or 59 and the case is therefore of no assistance in the present appeal.

44. Finally, the correspondence with the German authorities reflects the submission made by HMRC and which we reject.

45. In our view the pappadum in question are preparations of shelled beans and classified under 2005 51 00.

Legitimate expectation

46. In view of our findings on the correct classification of the pappadum it is not necessary to consider the Appellants case on legitimate expectation.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 08th MARCH 2023