TC01526

Appeal number: TC/2010/08964

"Anti Dumping Duty" charged on importation of a bicycle – alleged misleading/incomplete advice received from HMRC – whether an error was made by customs authorities – whether the Appellant could have reasonably detected any such error – whether HMRC "unjustly enriched" by receipt of the duty – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

ALAN ZACKRISSON **Appellant**

- and -

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

TRIBUNAL: J. Blewitt (Judge)
D. Robertson (Member)

Sitting in public at Manchester on 6 October 2011

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

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DECISION

1. By Notice of Appeal dated 24 November 2010, the Appellant appealed against HMRC's rejection of a claim for repayment of customs duty paid on a bicycle imported into the UK by the Appellant for his own use on 2 September 2010.

2. The Appellant did not attend the hearing, having contacted the Tribunals Service by email on 22 September 2011 in which he indicated that he would be unavailable due to work commitments. The Appellant requested that written submissions contained within the email be taken into account in his absence. In addition to the information contained within the email from the Appellant dated 22 September 2011, we also took into account correspondence from the Appellant to HMRC dated 27 September 2010 and 20 April 2011, and a letter from the Appellant to the Tribunals Service dated23 March 2011, all of which was contained within a bundle of documents provided to us by HMRC.

Undisputed Background Facts

3. The Appellant purchased a shop soiled 2009 GT Force 1.0 mountain bike in the sum of $2,000 from a retailer called Samuel Mishkin of Giant Nerd, 2897 Mapleton Avenue, Suite 100, Boulder, Colorado, USA. FedEx were engaged by the Appellant to courier the bicycle into the UK on 2 September 2010 under import entry number 760029383J. The Country of Origin was entered under code "CN" (China) and the value of the item recorded as $2,000 (£1,282.54).

4. Having received the commercial invoice from the retailer, issued on 30 August 2010, FedEx issued invoice number 5-422-38327 on 7 September 2010 in the sum of £1,195.45 comprised of £29.16 advancement fee, £364.72 import VAT and £801.57 duty. The Appellant queried with FedEx and HMRC the amount of charges applied and was informed that the "duty" amount was made up of Third Country Duty at 14% (£179.55) and Anti Dumping Duty ("ADD") at 48.5% (£622.03).

5. The Appellant applied for the repayment of the import duty, import VAT and agency fees by Form C285 dated 24 September 2010. By letter dated 27 September attached to the Form C285 the Appellant set out his reasons for the application which can be summarised as follows; the clam was based on the fact that once charges have been levied they now far exceed the bicycle's true value and that prior to making the purchase, the Appellant had checked the duty cost with HMRC to calculate the financial viability of the purchase. The Appellant stated that he was advised that duty would be calculated at 14% and that VAT of 17.5% would be added to the final customs invoice.

6. Following receipt of the duty/taxes invoice from FedEx, the Appellant contacted HMRC as FedEx were unable to advise how the costs had been calculated. The Appellant explained that he was informed that *"the amount of duty charged was incorrect where it was reconfirmed it is set at 14%"* and that he was passed to another department to obtain the C285 "Application". The Appellant stated that he since learned from FedEx that the duty was set at 48.5% due to the "Country of Origin",

however he had no prior knowledge of this fact until the invoice was received and clarification obtained.

7. The Appellant stated that he is left in a position whereby he has paid more for a bicycle than he would have, had he chosen to buy either of the two replacement models in the UK and that returning the bicycle is not an option given the very high financial penalties which would be incurred, such as re-stocking fees and postage.

8. In a decision notice dated 2 November 2010, HMRC rejected the Appellant's application for a refund of Import Duties under Article 236 of the Community Customs Code on the basis that the amount of duty and VAT charges was correct and therefore there was no valid basis for the claim.

9. No formal departmental review of the decision was requested by the Appellant, who subsequently lodged an appeal with the Tribunals Service.

The Appeal

10. The Appellant's grounds of appeal set out that the basis of the claim is that:

"I was ill-advised on several occasions by HMRC's hotline...my grievance is with the advice given by HMRC, I had taken the trouble to contact them on a number of occasions prior to and after the receipt of the aforementioned goods. On all occasions the sole two questions I was ever asked was

1. What is the commodity code of the goods being imported (8712 00 3000) and;

2. From which country (USA) was I importing it from?

This I duly supplied but at no time was I ever asked to provide "Country of Origin" (place of manufacture)...In fact it was more the opposite even when it was I who advised HMRC what charges had been applied...the advisors considered the charge was incorrect and I was advised to seek repayment."

11. The Appellant stated that the purpose of ADD is to protect against the dumping of goods in the EC which are substantially lower than the normal price and that the additional 48.5% tax incurred has increased the value of the bicycle imported to a level far beyond locally obtained goods. The Appellant notes HMRC's stance that a claim for excise duty overpaid will not be repaid if that would result in unjust enrichment and considers that "the same ruling should apply vice-versa."

12. In the email to the Tribunals Service dated 22 September 2011, the Appellant further clarified his grounds of appeal. The Appellant stated that he only seeks to appeal the duty costs imposed in the sum of 48.5% and does not seek reimbursement of any other charges imposed for the importation of the bicycle.

13. The Appellant refers to evidence he had previously supplied to HMRC including a telephone call reference number and a letter in which HMRC refer to 48.5% duty

being chargeable on the commodity code as opposed to the item's country of origin, which, it is submitted by the Appellant, *"clearly shows how easily HMRC can mislead."*

14. The Appellant reiterated that as a result of the charges incurred, the value of the bicycle now exceeds the value of full UK 2009 MRRP of £1,899, that a fair comparison must be applied between the export price and normal value and that the costs incurred prior to the imposition of 48.5% ADD was of sufficient level so as not to cause "injury" to the Community industry.

Law

15. There was no dispute between the parties as to the fact that ADD was due or that the rate has been charged correctly.

16. Article 2 of Commission Regulation 1095/2005 states (published in the Official Journal):

"Article 1(1) and (2) of Council Regulation (EC) No 1524/2000 shall be replaced by the following:

'Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of bicycles and other cycles (including delivery tricycles, but excluding unicycles), not motorised, falling within CN codes ex 8712 00 10 (TARIC code 8712 00 10 90), 8712 00 30 and ex 8712 00 80 (TARIC code 8712 00 80 90), originating in the People's Republic of China.

2. The rate of the definitive duty applicable to the net, free-at-Community-frontier price, before duty, shall be 48,5 %'"

17. The application for repayment was made under Article 236 (1) of the Community Customs Code (Council Regulation EEC 2913/92) which provides that repayment be made:

"in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220 (2)"

18. It is not disputed that the duties were legally owed; consequently the issue raised by the Appellant is whether the case falls within Article 220 (2) (b) of the Community Customs Code (Council Regulation EEC 2913/92):

Except in the cases referred to in the second and third subparagraphs of Article 217 (1), subsequent entry in the accounts shall not occur where:

... (b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in

good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;.

Submissions and Decision

19. We carefully considered all of the issues raised by the Appellant in the correspondence before us. The Appellant, correctly in our view, did not seek to argue that ADD was chargeable on the importation of the bicycle or that the rate at which ADD was charged, that being 48.5%, was incorrect. There was also no appeal against the imposition of import duty at 14% or VAT at 17.5%.

20. We therefore went on to consider the points raised by the Appellant; the first of which is his reliance on incomplete/misleading advice given by HMRC.

21. The Appellant did not attend the hearing, as is his right, and consequently the evidence in relation to telephone calls made by the Appellant to HMRC and the advice received was contained within his written submissions. Whilst we did not doubt that the Appellant had sought advice from HMRC, we found that the evidence was insufficient for us to be satisfied on the balance of probabilities as to how many telephone calls were made, when and the precise details of any advice received. There was no corroborative evidence from HMRC's records due to the fact that no times, dates or details were provided by the Appellant beyond a reference code ("BEQ50832") which HMRC submitted did not relate to a recorded telephone call. Given the vague nature of the evidence before us, we were unable to accept that the Appellant was misled by HMRC.

22. However, even had we been so satisfied, we are bound by law to consider whether such advice amounted to an "error" which "could not reasonable have been detected by him."

23. In considering this issue we were referred to Public Notice 600 and a number of case authorities.

24. HMRC relied on the fact that the correct amount of ADD had been charged and that, even if the Appellant had received inaccurate advice from HMRC, guidance is available to the public through HMRC's notices, including Public Notice 376 "Anti-Dumping and Countervailing Duties" and Public Notice 600, "Classifying your imports and exports" which states at paragraph 2.2:

"However, you should be aware that whilst every care is taken to provide accurate advice, verbal advice is not legally binding. If there remains any element of doubt we recommend that you apply for a BTI. The contact details are..."

HMRC submitted that the Appellant should be treated as having knowledge of the contents of the Public Notices and that the case law applicable in this case supports their contention.

25. We were referred to ***Viva Mexico v Commissioners of Customs and Excise*** *[2001] UKVAT C001030* which stated at paragraph 41:

"As to Mr Jordan's first point, that the incorrect entry resulted from an error by Customs, while I am satisfied that Mr Jordan is wholly honest in believing that he was misled, I am quite unable to accept that he gave sufficiently detailed information to the lady on the telephone for it to be possible properly to categorise her action in circling codes as an error, even assuming that the conversation lasted longer than the 5 minutes which he stated. If her attempt to assist him was to be described as "official error", it would be a major disincentive to Customs to give guidance without receiving very detailed information in writing."

26. We also considered the case of ***James Halifax v HMRC***, *C000209*, which confirmed at paragraph 15 that "any trader is deemed to be aware of the contents of the Official Journal."

27. It was further submitted by HMRC that even if an error falling within Article 220 (2) was made, then the error was reasonably detectable by the Appellant on the basis that the information required by the Appellant was publicly available and easily accessible by consulting the Official Journal and Public Notice 376. A number of cases were cited by HMRC in support of their contention, including ***Binder v Hauptzollamt Bad Reichenhall*** *[1989] ECR 2415* at paragraphs 19 – 22, ***Covita AVE v Greece*** *[1989] ECR 1 – 771* at paragraph 26, ***RecoveryPak Ltd v HMRC*** *[2010] UKFTT 226 (TC)* at paragraph 13 and ***Commissioners for Customs and Excise v Invicta Poultry*** *[1998] 3 CMLR 70*, the latter stating:

"Where, as in the present case, the question cannot be shown to be one of complexity, and can therefore be answered simply from the Journal, it seems clear to me, as it seemed to the judge, that the issue of whether the error could reasonably have been detected is determined by that very fact: that the error is revealed by the Journal. The trader therefore in every case ignores the Journal at his peril."

28. We carefully considered the oral submissions made by Mr Charles on behalf of HMRC and the written representations made by the Appellant. Whilst we had great sympathy for the situation in which the Appellant now finds himself, and did not doubt that he was a genuine individual who believed he had been mislead by HMRC, we found that we were bound by the confines of the legislation applicable and the case authorities to which we were referred. Consequently we were satisfied that there was no "error" such as would make the case fall within the scope of Article 220 (2) (b) as the amount of duty legally owed had been entered into the account. We found that any advice given to the Appellant, such as it might have been, did not amount to an error within Article 220 (2). In addition, we concluded that even if there had been such an error by customs authorities, then the said error was reasonably detectable by the Appellant by having regard to the Public Notices and Official Journal.

29. Having made the findings as set out above, we did not go on to consider the remaining conditions which must be satisfied in order for Article 220 (2) (b) to be applicable, namely that all legislative provisions have been complied with and that the Appellant acted in good faith. That said, there was no dispute by HMRC that the Appellant had acted in good faith at all times.

30. The second issue raised by the Appellant in support of his appeal is based on the costs incurred (by payment of ADD) resulting in the total price of the bicycle exceeding its value. The Appellant also points to the fact that a newer model could have been purchased in the UK at less cost than that ultimately paid by him as a result of the VAT and ADD incurred.

31. It was submitted by the Appellant that the principle of "unjust enrichment" should apply to HMRC and that there was no injury caused to Community industry by his import.

32. It is regrettable that the Appellant finds himself in such a position, and we accepted that the Appellant's import was not designed to harm industry within the EC. However, whether injury is caused or not is not a matter which falls within our jurisdiction; we are bound to make findings in accordance with the law. We found that the payment of duties legally owed and imposed in the correct sums could not accurately be described as "unjust enrichment" and for that reason we did not accept the Appellant's submission.

33. We found that the conditions of Article 236, under which the Appellant's claim for repayment was made, had not been met.

34. The appeal is dismissed.

35. 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.

TRIBUNAL JUDGE
RELEASE DATE: 27 October 2011