TC01735

Appeal number LON/08/7110

Customs duty - inward processing relief – failure to respect time limits for re-export – whether 'obvious negligence' or 'special situation' – whether representative 'direct' or 'indirect' – import entry format – Customs Code - Articles 4, 5, 59, 64, 118, 204 & 239 of Regulation 2913/92 and Articles 199, 200, 205, 222-224, 859, 860, 899 & 905 of Regulation 2454/93 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOUDWATER TRADE AND FINANCE LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*customs duty*) **Respondents**

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mrs Elizabeth Bridge

Sitting in public at 45 Bedford Square, London, on 29 September 2011

The Appellant was not present or represented

Ms Hui Ling McCarthy instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1 The appellant was not present or represented when the appeal was called on for hearing, but we had a letter from a Mr Paul Gower dated 26 September 2011 indicating that he was not able to attend for health reasons but indicating clearly the grounds on which the appeal was made; Mr Gower's letter was written from a company called UK Freight Masters Limited, but he was evidently the person in charge of matters at the shipping agent called Belgrave Shipping Co Limited which acted for the appellant, and to which we refer again below. We were therefore satisfied that the appellant had received notice of the hearing and, pursuant to Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, we considered it in the interests of justice to proceed with the hearing in the appellant's absence.

2 The appeal is against the decision of the respondents dated 28 May 2008 upholding a post clearance demand note dated 8 April 2008 for £16,659.68 customs duty and value added tax in respect of import entry 025872N made on 28 August 2007; following subsequent reviews and correspondence, only £3,461.87 of duty and interest remains at issue. The appellant at all times acted through Belgrave Shipping Co Limited ('Belgrave'), who lodged the appeal in the appellant's name. Our jurisdiction is under s16 of the Finance Act 1994.

3 It is common ground that the goods which remain in question - a consignment of coffee - were entered for inward processing relief (IPR) and were in fact processed and re-exported within the required period, but that bills of discharge vouching re-export of the goods were not submitted within the time limits applicable. The issue in the appeal was thus whether the appellant could benefit from the provisions in the Community Customs Code and its Implementing Regulation – Regulations 2913/92 and 2454/93 respectively – allowing remission of the duty otherwise due where there has either been no 'obvious negligence' on the part of the importer, or where the latter has found itself in a 'special situation'.

Evidence

4 We received oral evidence from Mr Perry Young, a Revenue Officer, but who was not the officer who had issued the post clearance demand note or who had issued the review decision appealed against. We also had a bundle of documents and correspondence submitted by the respondents. The evidence was as follows.

5 The goods in question in this appeal were imported from Rotterdam on 28 August 2007 and declared to customs by Belgrave, which entered them for IPR, naming the appellant as the consignee; as such it is said by the respondents that the appellant, already admitted to the IPR scheme, would be responsible for the discharge of the scheme obligations.

6 The standard time for the processing allowed under IPR to take place is six months, and the bill of discharge on re-export of the goods had to be submitted within 30 days after that. The six months was up on 28 February 2008 and the respondents wrote to the appellant that day pointing out that the six month period had expired and requesting the submission of a bill of discharge within 30 days. By 28 March no bill of discharge had been received and no application for extension of time had been made, so on 8 April the post clearance demand note was accordingly issued.

7 On 18 April, however, Belgrave replied with supporting evidence showing that some of the goods had been re-exported from Dover on 6 September 2007 (thus within the IPR throughput time) but claiming that duty of only £1,777.07, together with any charges, remained due for the part of the import not discharged under the IPR procedure. On 21 April, HMRC replied to both the appellant and Belgrave that since the bill of discharge was out of time and the case was not one of 'obvious negligence', full duty would be payable as if no re-export had occurred.

8 Belgrave then wrote back on 25 April, conceding that the failure to submit the bill of discharge within the time limits was an error; the writer claimed that he had believed that the fact of the re-export would have been captured automatically by customs' computers and admitted "I was unaware of this procedure" of submitting the actual bill of discharge and promising full compliance in future.

9 On 28 May, as already noted, the respondents issued Belgrave their formal review decision upholding the issue of the post clearance demand note on the ground that the case did not fall within the relief provided by article 859 of Regulation 2454/93 allowing remission of duty where there had been no loss to the revenue and where there had been no 'obvious negligence'. Further correspondence took place and it was made plain to Belgrave that it was the failure to submit a bill of discharge within the period allowed that triggered the customs debt, notwithstanding that the relevant goods had been re-exported within that period.

10 In this instance, Belgrave had been warned of the need for compliance with the time limits 30 days before they expired, and the company had moreover a history of failures to respect the limits in no fewer than seven cases for imports on 21 November 2006, 2 February, 13 April, 19 April, 1 June, 8 June and 11 June 2008. In four of those cases, the respondents had exercised discretion under article 859 and remitted the duty otherwise payable.

11 The import entry of 28 August 2007 had been made electronically and a print-out of it was in evidence. The document was completed for the most part by reference to codes or numbers, which Mr Young did his best to explain. The entry showed that the goods had been cleared without examination, that Belgrave was the declarant and the appellant the consignee; that the goods originated in Brazil, had been shipped from Russia by Euroglobal Trade and then transhipped from Rotterdam to Dover, where they had been entered for the simplified IPR regime; as such they were to undergo processing in the UK for re-export outside the EU.

12 What was not clear from the entry was the capacity in which Belgrave had acted, whether as a direct representative of the appellant or as an indirect representative. Mr Young told us that if Belgrave had been acting as a direct representative, they would have produced supporting evidence of that fact to customs officials, but since that was not apparent from the document it was to be inferred that they were acting as indirect representatives. Mr Young agreed, however, that the import entry documentation could – and in our view should – make it explicit in which capacity the declarant was acting.

13 We were concerned at this point that there was nothing to show that the appellant company itself had taken any active part in the appeal or in the preliminary correspondence with HMRC, and our concern was underlined by the fact that the tribunal office had received no authorisation from the appellant for Belgrave to represent it in the appeal, which we understood to be the practice adopted wherever the representative was not a solicitor. The lack of clarity in the import entry form about the declarant's role was a further reason to verify that the appellant was indeed correctly identified as such.

14 We therefore adjourned the proceedings for further investigation and requested submissions by the respondents as to whether Belgrave should have been identified as the customs debtor rather than the appellant. A detailed submission was made by the respondents accordingly on 12 December 2011 and disclosed the following.

15 First, the post clearance demand note had been sent only to the appellant, so that Belgrave could only have become acquainted with the matter on a referral from the appellant. Second, the appellant itself had in fact paid the customs debt at issue on 28 November 2008, and had at no stage raised the question of whether it was or was not the person legally liable for the debt. It was submitted that it was clear therefore that the appellant was correctly so named and that, if the tribunal were not to be satisfied on that account, the correct course would be to dismiss the appeal on the ground that it had not been properly brought by the appellant.

Legislation

16 The relevant legislation is as follows.

Regulation 2913/92 – the Customs Code

Article 4

For the purposes of this Code, the following definitions shall apply:

. . .

(18) 'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

Article 5

(1) Under the provisions 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 acts and formalities laid down by customs rules.

(2) Such representation may be:

- *direct, in which case the representative shall act in the name of and on behalf of another person, or*

- *indirect, in which case the representative shall act in his own name but on behalf of another person.*

A Member State may restrict the right to make customs declarations:

- *by direct representation, or*

- *by indirect representation,*

so that the representative must be a customs agent carrying on his business in that country's territory.

(3) Save in the cases referred to in Article 64(2)(b) and (3), a representative must be established within the Community.

(4) A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect, and be empowered to act as a representative. A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.

(5) The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative.

Article 59

1 All goods intended to be placed under a customs procedure shall be covered by a declaration for that procedure.

2 Community goods declared for an export, outward processing, transit or customs warehousing procedure shall be subject to customs supervision from the time of acceptance of the customs declaration until such time as they leave the customs territory of the Community or are destroyed or the customs declaration is invalidated.

Article 64

(1) Subject to Article 5, a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.

(2) However,

(a) Where the acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on his behalf;

(b) The declarant must be established in the Community.

Article 118

1 The customs authorities shall specify the period within which the compensating products must have been exported or re-exported or assigned another customs-approved treatment or use. That period shall take account of the time required to carry out the processing operations and dispose of the compensating products.

2 The period shall run from the date on which the non-Community goods are placed under the inward processing procedure. The customs authorities may grant an extension on submission of a duly substantiated request by the holder of the authorisation.

Article 204

1 A customs debt on importation shall be incurred through:

(a) non-fulfilment of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2 The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.

Article 239

1 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.

2 Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.

Regulation 2454/93- the Customs Code's Implementing Regulation

Article 199

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

Article 200

Documents accompanying a declaration shall be kept by the customs authorities unless the said authorities provide otherwise or unless the declarant requires them for other operations. In the latter case the customs authorities shall take the necessary steps to ensure that the documents in question cannot subsequently be used except in respect of the quantity or value of goods for which they remain valid.

Article 205

1. The official model for written declarations to customs by the normal procedure, for the purposes of placing goods under a customs procedure or re-exporting them in accordance with Article 182 (3) of the Code, shall be the Single Administrative Document.

2. Other forms may be used for this purpose where the provisions of the customs procedure in question permit.

3. The provisions of paragraphs 1 and 2 shall not preclude:

- waiver of the written declaration prescribed in Articles 225 to 236 for release for free circulation, export or temporary importation,

- waiver by the Member States of the form referred to in paragraph 1 where the special provisions laid down in Articles 237 and 238 with regard to consignments by letter or parcel-post apply,

- use of special forms to facilitate the declaration in specific cases, where the customs authorities so permit,

- waiver by the Member States of the form referred to in paragraph 1 in the case of existing or future agreements or arrangements concluded between the administrations of two or more Member States with a view to greater simplification of formalities in all or part of the trade between those Member States,

- use by the persons concerned of loading lists for the completion of Community transit formalities in the case of consignments composed of more than one kind of goods,

- printing of export, transit or import declarations and documents certifying the Community status of goods not being moved under internal Community transit procedure by means of official or private-sector data-processing systems, if necessary on plain paper, on conditions laid down by the Member States,

- provision by the Member States to the effect that where a computerized declaration-processing system is used, the declaration, within the meaning of paragraph 1, may take the form of the Single Administrative Document printed out by that system.

4. When formalities are completed using public or private computers which also print out the declarations, the customs authorities may provide that:

- the handwritten signature may be replaced by another identification technique which may be based on the use of codes and having the same legal consequences as a handwritten signature. This facility shall only be granted if the technical and administrative conditions laid down by the competent authorities are complied with,

- the declarations thus produced may be directly authenticated by those systems, in place of the manual or mechanical application of the customs office stamp and the signature of the competent official.

5. Where in Community legislation, reference is made to an export, re-export or import declaration or a declaration placing goods under another customs procedure, Member States may not require any administrative documents other than those which are:

- expressly created by Community acts or provided for by such acts,

- required under the terms of international conventions compatible with the Treaty,

- required from operators to enable them to qualify, at their request, for an advantage or specific facility,

- required, with due regard for the provisions of the Treaty, for the implementation of specific regulations which cannot be implemented solely by the use of the document referred to in paragraph 1.

Computerized customs declarations

Article 222

1. The customs authorities may authorize the declarant to replace all or part of the particulars of the written declaration referred to in Annex 37 by sending to the customs office designated for that purpose, with a view to their processing by computer, codified data, or data made out in any other form specified by those authorities, corresponding to the particulars required for written declarations.

2. The customs authorities shall determine the conditions under which the data referred to in paragraph 1 are to be sent.

Article 223

The customs authorities may authorize the use of computers, inter alia, as follows:

- they may stipulate that the data necessary for completing the formalities in question shall be entered in their computerized declaration-processing systems, without a written declaration being required,

- they may provide that the declaration within the meaning of Article 205 (1) shall be constituted by entry of the data in the computer if a document corresponding to a declaration is not produced.

Article 224

1. When formalities are completed using public or private computer systems, the customs authorities shall authorize persons who so request to replace the handwritten signature with a comparable identification device, which may be based on the use of codes, and which has the same legal consequences as a handwritten signature.

2. The customs authorities may authorize the persons concerned to make out and transmit by computer in whole or in part the supporting documents referred to in Articles 218 to 221.

3. The facilities referred to in paragraphs 1 and 2 shall be granted only if the technical and administrative conditions laid down by the customs authorities are met.

Article 859

The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the Code, provided:

- they do not constitute an attempt to remove the goods unlawfully from customs supervision,

- they do not imply obvious negligence on the part of the person concerned, and

- all the formalities necessary to regularize the situation of the goods are subsequently carried out:

1. exceeding the time limit allowed for assignment of the goods to one of the customs-approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time limit would have been extended had an extension been applied for in time;

Article 860

The customs authorities shall consider a customs debt to have been incurred under Article 204 (1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled.

Article 899

Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239 (2) of the Code:

- is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.

'The person concerned` shall mean the person or persons referred to in Article 878 (1), or their representatives, and any other person who was involved with the completion of the customs formalities relating to the

goods concerned or gave the instructions necessary for the completion of these formalities,

- is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned.

Article 905

1. Where the decision-making customs authority to which an application for repayment or remission under Article 239 (2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.

The term 'the person concerned` shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making customs authority shall refuse the application.

2. The case sent to the Commission shall include all the facts necessary for a full examination of the case presented.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may ask for additional information to be supplied.

3. Without awaiting completion of the procedure laid down in Articles 906 to 909, the decision-making customs authority may, if requested, permit the customs formalities relating to the re-export or destruction of the goods to be carried out before the Commission has given a ruling on the application in question. Such permission shall be entirely without prejudice to the final decision on the application.

Conclusions

17 The case falls, in principle, within the scope of Article 204(1)(a) as one where there is "non-fulfilment of one of the obligations arising, in respect of goods liable to import duties ... from the use of the customs procedure under which they are placed", namely the failure to report re-export within the time limits appropriate. It was common ground that the relevant limits were exceeded, and a customs debt is therefore *prima facie* due in respect of the goods. We first we consider whether the grounds on which the debt may be cancelled are present.

18 Article 204(1)(a) does not apply to establish a customs debt where "it is established that the failure in question has no significant effect on the correct operation of the temporary storage or customs procedure in question". Article 859 of the Implementing Regulation applies this where "all the formalities necessary to regularise the situation of the goods are subsequently carried out" – which is the case here – and the fault has been "exceeding the time limit allowed ... where the time limit would have been extended had an extension been applied for in time" – an issue which has not been argued in this case. The question therefore remains: was there 'obvious negligence' on the part of the debtor?

19 On this, the principal authority to which we were referred was the decision of the Court of Justice in Case-48/98 *Firma Söhl & Söhlke v Hauptzollamt Bremmen* [1999] ECR I-7877. In that case, the Court interpreted the same expression used in Article 239 as requiring account to be taken (i) of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, (ii) the professional experience of the trader concerned, and (iii) the care taken by the latter. Holding that the term 'obvious negligence' should be interpreted in the same way wherever it occurred in the legislation, the Court observed (at paragraph 52) that:

> Since a lack of 'obvious negligence' is an essential condition of being able to claim repayment or remission of import or export duties, it follows that the term must be interpreted in such a way that the number of cases of repayment or remission remains limited.

20 Under Article 239, which deals generally with cases where duty may be repaid or remitted, the available ground is that there has been no 'obvious negligence' on the part of the debtor. Article 899 of the Implementing Regulation gives effect to this in relation to the various types of situation enumerated in Articles 900 to 904, none of which in fact apply to this case.

21 The appellant's case is essentially that the goods had been re-exported within the time limits, that there had been no loss of duty and that the re-export, which was in time, could have been picked up by customs' computers and indeed that Belgrave had assumed that that had been done. But there was no explanation of why the warning letter of 28 February 2008 was ignored, merely a plea that the effect of requiring the full duty to be paid was draconian in the circumstances, and effectively a massive 'fine' for an administrative oversight.

22 There is, as a matter of common sense, some force in these arguments but we have no jurisdiction to do other than apply the law as interpreted by the Court of Justice. Bearing this in mind, and considering Belgrave's record of past failures to respect the time limits for bills of discharge, we reach the conclusion in the circumstances of this case that the condition requiring the absence of 'obvious negligence' was not satisfied. The workings of the IPR scheme in itself have not been claimed as particularly complex - this was a case using the simplified procedure - and the time limits for re-export are quite straightforward; Belgrave is a shipping agent whose profession is to deal with the procedures relative to customs legislation, and who must therefore be expected to be familiar with them. We add that the negligence of Belgrave in the matter is of course deemed to be that of the appellant, on whose behalf Belgrave acted.

23 Article 905 then, as a longstop, provides that where the customs authority in question cannot take a decision on the basis of Article 899 "but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission".

24 If we had concluded that there had been no 'obvious negligence', the case would be referred to the Commission for a ruling under the procedure laid down in Articles 906 to 909 of the Implementing Regulation. Since we have found that there was 'obvious negligence' on the part of Belgrave, there is no occasion for examining whether a 'special situation' existed for referring the case to the Commission.

25 We remain concerned, however, that the form of the import entry in this case – the standard format used in the vast majority of cases – did not indicate clearly whether the declarant acted as a direct or indirect representative. As will be seen from the legislation, and from Articles 5 and 64(2) of the Code in particular, the distinction can be significant in deciding who the correct customs debtor is. But as the respondents have correctly submitted, the burden of proof in the appeal lies on the appellant not on the Crown, and in this instance neither the appellant nor its representative was present to assist the tribunal at the hearing.

26 In the circumstances the matter can be taken no further, but it is to be hoped that the respondents will take the opportunity to review the mechanisms for electronic import entries to clarify on the record the capacity in which the declaration is made. As it is, this appeal must be dismissed.

27 This document contains the full findings of fact and reasons for the decision. The appellant, not having been present or represented at the hearing of this appeal, may under Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 apply in writing to the tribunal for the decision to be set aside; the application must be received by the tribunal no later than 28 days after the decision is sent to the appellant.

28 In addition, any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 10 January 2012