TC01942

Appeal number: MAN/09/7015

CUSTOMS DUTY – transaction values – section 21 VATA 1994 – amount of duty in issue – goods imported by appellant for himself and a third party – liability of declarant for duty – Article 201(3) Commission Regulation 2454/93 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR SALAH MUHAMMAD HUSSEIN t/a EASTERN ORBIT — **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN DAVISON

Sitting in public at Manchester on 19 March 2012

Mr N Khan of Kirtley Qureshi & Co Chartered Accountants for the Appellant

Mr R Chapman of Counsel for the Respondents

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DECISION

Background

1. The appellant is of Yemeni origin living in Sheffield. Over the years he has established a number of businesses in the UK. One such business involved the importation and sale of a recreational drug known as *Khat* or *Chat* which is widely used in East Africa. As will appear below, the shelf life of imported Khat is relatively short. In consequence the appellant would import quantities of Khat two or three times a week by air from Ethiopia. HMRC ultimately issued a C18 post clearance demand note to the appellant seeking customs duty amounting to £73,858.32. This sum relates to imports of Khat by the appellant in the period 24 December 2004 to 19 December 2007. Strictly this sum represents VAT on importation chargeable at the time of assessing customs duty.

2. Mr Khan appeared on behalf of the appellant. He opened the appeal and identified two issues in dispute as follows:

(1) What was the price paid by the appellant to his supplier in Ethiopia for the Khat which was the subject of the import entries in issue ("the Quantum Issue")?

(2) Whether the appellant was liable for the whole duty when some of the Khat imported was for the benefit of a third party ("the Liability Issue").

3. Mr Chapman, on behalf of the respondents, confirmed that these were the two issues to be determined by the tribunal. The grounds of appeal relied upon by the appellant identified a third issue as to the correct customs classification of the Khat. Some imports were imported under commodity code 0709909090 (other vegetables) and some were imported under commodity code 1404100000 (raw vegetables). HMRC contended that the correct commodity code was 1211908500 (plants and parts of plants …used primarily in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes …). Whichever of these commodity codes was correct the rate of customs duty payable would have been nil. In the event the parties confirmed that classification was no longer a live issue on the appeal.

4. Before dealing with the two issues described above we set out the legal framework relevant to those issues.

The Law

5. In general terms the Value Added Tax Act 1994 ("VATA 1994") makes provision for a charge to VAT on the importation of goods into the UK from a place outside the member States. By section 15(2)(a) goods are treated as imported when the customs debt would be incurred on their entry into the Community. Section 15(2)(b) then provides as follows:

"*the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt.*"

6. Section 16 VATA 1994 provides, subject to any contrary intention, that the UK domestic provisions and the Community legislation in relation to customs duties shall apply in relation to the VAT chargeable on the importation of goods from outside the member States. Section 1 states that VAT shall be charged on the importation of goods from outside the member States and provides that it shall be charged and payable as if it were a duty of customs.

7. There is no dispute between the parties that VAT was chargeable on the importation of Khat from Ethiopia and that it was payable as if it were a customs duty. Section 21 makes provision for ascertaining the value of goods imported for the purposes of the VATA 1994. Those purposes will include the charge to VAT on importation of goods. It states as follows:

"*(1) For the purposes of this Act, the value of goods imported from a place outside the member States shall (subject to subsections (2) to (4) below) be determined according to the rules applicable in the case of Community customs duties, whether or not the goods in question are subject to any such duties.*

(2) For the purposes of this Act the value of goods imported from a place outside the member States shall … be taken to include the following so far as they are not already included in that value in accordance with the rules mentioned in subsection (1) above, that is to say –

(a) …

(b) all incidental expenses, such as commission, packing, transport and insurance costs, up to the goods' first destination in the United Kingdom; and

(c) if at the time of the importation of the goods from a place outside the member States a further destination for the goods is known , and that destination is within the United Kingdom or another member State, all such incidental expenses in so far as they result from the transport of the goods to that other destination;

and in this subsection "the goods' first destination" means the place mentioned on the consignment note or any other document by means of which the goods are imported into the United Kingdom, or in the absence of such documentation it means the place of the first transfer of cargo in the United Kingdom. "

8. The UK domestic provisions incorporate the Community regulations on customs duties but, for the purposes of VAT on importation of goods, the domestic provisions go further in defining the value of goods imported. Hence, to ascertain the value of goods imported for the purposes of the charge to VAT it is necessary to look first at the Community provisions. If the incidental expenses of transport or insurance are not included in the value for customs duty purposes, section 21(2) provides that they should be included in the value for the purposes of VAT on importation.

9. The Community Customs Code (Council Regulation 2913/92) ("the Code") makes provision for ascertaining the value of goods for the purposes of customs duty. Article 29 states as follows:

> "1. *The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods … adjusted, where necessary, in accordance with articles 32 and 33 …*
>
> …
>
> *3(a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods …*"

10. Article 32 states as follows:

> "1. *In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods –*
>
> …
>
> *(e)(i) the cost of transport and insurance of the imported goods … to the place of introduction into the customs territory of the Community.*"

11. The history of these provisions was helpfully described by the VAT & Duties Tribunal in *Arcadia Group Limited v HMRC (Decision C00211)*. It does seem to us therefore that for customs duty purposes, the customs value includes the price paid for the goods and the cost of transport to the place of introduction into the Community. In practice we understand that the cost of transport is apportioned so as to include within the customs value that part of the cost which brings the goods to the borders of the Community. However for VAT purposes the effect of section 21 is to treat the value of the goods as the customs value plus the onward costs of transport to a known further destination. We understand that there are provisions which avoid any double taxation on any onward or incidental costs but that is not strictly relevant for present purposes.

12. In relation to the persons liable for customs duty on importation we were referred to Article 199 of the Implementing Regulation (Commission Regulation 2454/93). Article 199 provides as follows:

> *"1. …the lodging of a declaration signed by the declarant or his representative with a customs office … shall render the declarant or his representative responsible under the provisions in force for:*
>
> - *the accuracy of the information given in the declaration,*
> - *the authenticity of the documents presented, and*
> - *compliance with all the obligations relating to the entry of the goods in question under the procedure concerned."*

13. In addition to Article 199 of the Implementing Regulation, Article 4(18) of the Code defines the declarant as the person making the customs declaration in his own name or the person in whose name the declaration is made. Article 201 of the Code deals with the incurrence of a customs debt on importation when goods are released for free circulation. The debt is incurred at the time of acceptance of the customs declaration. Article 201(3) then provides as follows:

> "*The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.*"

14. Article 5(2) of the Code provides that in the case of direct representation, the representative shall act in the name of and on behalf of another person. In the case of indirect representation the representative shall act in his own name but on behalf of another person.

15. Article 213 of the Code states that where several persons are liable for payment of a customs debt they shall be jointly and severally liable for the debt.

The Quantum Issue

16. HMRC have taken the value of imported Khat for VAT purposes as US $5 per kg and that is the basis on which the C18 Demand Note was issued. The Appellant contends that the value for VAT purposes is US $1 per kg. The value of $1 per kg was put forward by Mr Khan on the basis that freight charges were not included in the value for VAT purposes.

17. Our jurisdiction on this appeal is governed by section 16 Finance Act 1994. We have a full appellate jurisdiction by virtue of section 16(5). Section 16(6) also provides that the burden of proof is on the appellant to show that the grounds on which the appeal is brought have been established. Mr Chapman on behalf of the respondents submits that it is for the appellant to satisfy us that the transaction value of $5 is excessive. Mr Khan did not challenge that submission and we accept it.

18. The evidence as to what was paid by the appellant for the Khat which he imported takes the following form:

(1) Documentary evidence in relation to the imports;

(2) Correspondence between the appellant, his advisers and HMRC following the imports;

(3) Oral evidence from the appellant

19. Khat is a plant which is imported in bunches. It has a tough stem with green leaves. The narcotic effect is obtained by chewing the leaves. Bunches of Khat are graded with the best being described as "Grade 1" or "Normal". Below that there is Grade 2 and Grade 3. In addition the appellant explained that people who could not afford to do otherwise would chew what he described as the mid-cuts of the plant which have fewer if any leaves. The narcotic effect is best obtained from chewing fresh leaves and it is for this reason that the appellant imported the Khat by air two or three times a week.

20. The supplier used by the appellant was a business in Ethiopia called Yohannes Afework based in Addis Ababa. The evidence before us was directed towards establishing how much was paid by the appellant to Yohannes Afework. Before dealing with that evidence it is helpful to consider the basis upon which HMRC arrived at a transaction value of $5.

21. During the course of an international trade audit carried out by Mr Manjit Somal, an officer of HMRC, the appellant wrote to Mr Somal by letter dated 26 November 2007. The appellant stated as follows:

> *"Further to our meting (sic) on November 7th. I would like to confirm my statement regarding the price of Chat, Grade one is $15.00 and Grade 3 is $5.00.*
>
> *A copy of my annual account will be sent to you by my accountant very soon."*

22. We should say a similarly worded letter from the appellant to Mr Somal dated 6 December 2007 identifies prices of £15 and £5. We take this to have been a typographical error on the part of the appellant.

23. Following receipt of this correspondence Mr Somal issued a C18 Demand Note based on an average cost per kg of £5.55, which was the sterling equivalent assuming that the Khat imported was an equal mix of Grade 1 and Grade 3. The VAT claimed by HMRC was £175,533.

24. On 15 May 2008, following a review of the decision, the VAT claimed was reduced and a new C18 Demand Note was issued in the sum of £73,858. The reason for the reduction was that HMRC accepted that in the absence of direct evidence as to the quality of Khat being imported they would charge duty based on Grade 3 Khat. The import value taken was therefore $5 per kg with a sterling equivalent of £2.77.

25. Mr Somal did not give evidence on behalf of HMRC. We did hear evidence from Mr Stephen Palmer who is a review officer in the Customs Reviews and Appeals

Team. He was not involved in the review of the present decision but simply described the progress of the review and reconsideration of the C18 Demand Notes.

26. It was not in dispute that the total net weight of Khat being imported over the 3 year period was 208,993.60 kg. Using that figure HMRC calculated the import VAT due as follows:

Customs Value: 208,993.60 × £2.77	=	£ 578,912.27
VAT Value Adjustment		£ 64,756.51

		£ 643,668.78
		=========
VAT @ 17 ½ %		£ 112,642.03
Less VAT paid		£ 38,783.71

VAT Due		£ 73,858.32
		=========

27. The only element of that calculation challenged by the appellant is the price per kg paid for the Khat. We did ask the respondents as to the nature of the "VAT Value Adjustment" identified in the calculation but Mr Palmer was unable to assist. On reflection however it seems to us that it must relate to the items described in section 21(2) VATA 1994, that is costs of transport and other incidental costs not otherwise included in the customs value.

28. We consider that Mr Somal was entitled for the purposes of his audit to take the figure of £2.77 per kg as the price paid for the Khat based on the appellant's letter. It was not in any sense arbitrary. However we must now consider, on the basis of all the evidence adduced by the appellant, whether we are satisfied that the figure of $5 (£2.77) used as the customs value is excessive. We must reach that decision on the balance of probabilities. As set out above, the customs value is the price paid for the Khat together with the cost of freight to the first destination in the Community.

Findings

29. The appellant gave oral evidence as to the price he paid for the Khat. He stated that he had explained to Mr Somal and other representatives of HMRC in a meeting during the course of the audit that he paid $1 per kg for the Khat.

30. We also had by way of example documentation relating to one import of Khat. Both parties accepted that this documentation was representative of all the imports in

question. The documentation included an invoice from Yohannes Afework dated 23 April 2007. The invoice was addressed to the Appellant (Eastern Orbit) and the appellant's customs agent, GNK Freight Services Ltd. It identified 50 cases of Khat with a total price of $400. It also identified freight of $700 giving a total invoice value of $1,100, equivalent to $22 per case. That price was for shipping by air freight from Addis Ababa to London.

31. The import invoice from GNK to the appellant is dated 24 April 2007. It charges the cost of their services to the appellant including the cost of disbursements, in particular the import VAT which they paid on behalf of the appellant. This invoice identifies the weight of goods as 496 kg. The appellant also told us in his oral evidence that each case might weigh anything between 7 ½ kg to 11 kg. The weight of the cases would depend on what the appellant's customers had asked for. We accept that evidence. The documentation we looked at indicated that the average weight of each case was 10kg. The invoice on its face therefore suggested a price of $2.20 per kg including freight charges to Heathrow.

32. In closing submissions Mr Khan accepted that the value for present purposes was the cost of the Khat plus the cost of freight to Heathrow. Hence the real issue between the parties is whether the appropriate value to be used is $5 or $2.20.

33. Notwithstanding the content of the invoice from Yohannes Afework, Mr Chapman submitted that it should not be taken at face value. The burden was on the Appellant to establish that the price paid was less than $5 per kg and we should expect more evidence of this in the light of the letter from the appellant dated 26 November 2007. He also relied upon a letter from Yohannes Afework to the appellant dated 20 July 2007 which stated as follows:

> "*Further to our discussion, following the market Trend and others competition we are ready to supply you:*
>
> *1/ 90% Grade 3 at USD 5.00/kg*
>
> *2/ 10% Normal with 10% Gratis.*
>
> *I hope this will help you to compete better in the market, and gains back some of your customers.*
>
> *Waiting to hear your View to our suggestion, we remain ...*"

34. The appellant maintained in his oral evidence that the price of $5 per kg in this letter referred to the cost to him of buying the Khat and shipping it to Sheffield where he was based. He did not accept that this was the price charged by Yohannes Afework. He also did not accept that this letter was evidence of a price reduction by Yohannes Afework. He claimed that there had been no change in the price charged by Yohannes Afework for a long time.

35. Mr Khan submitted that the appellant was an honest and sincere person who had been consistent in telling HMRC that the price he paid was $1 per kg. For his part, Mr Chapman made a particular point that he was not making any submission that the appellant was dishonest. He relied on the lack of any clear explanation of the difference between the $5 identified in the correspondence referred to above and the $1 claimed by the appellant.

36. We do not find that the appellant has been dishonest in his evidence. However we are unable to accept his evidence in relation to the letter from Yohannes Afework at face value. Firstly, it seems plain to us that the letter at least evidences that Yohannes Afework were offering the appellant better terms for the supply of Khat than they had previously offered. Whichever way one looks at the letter, the better terms must have included a price reduction whether by way of a reduction in the price per kg, a discount of 10% on the total price payable, the inclusion of better quality Khat in the shipments or a combination of the three.

37. Secondly it seems unlikely to us that a supplier would quote a price for goods including the cost of shipping from Heathrow to Sheffield when it was the buyer who was responsible for the shipping between Heathrow and Sheffield. Whilst we can imagine the appellant might discuss with his supplier his total cost including shipping to Sheffield, we find it more difficult to imagine the supplier then effectively quoting a price to Sheffield. He would have no control over the freight costs after the goods arrived at Heathrow.

38. There was no evidence as to how the appellant had arrived at a figure of $5 as the cost of the Khat plus the associated costs of getting the Khat to Sheffield. In the appellant's "Statement of Defence" a calculation shows that cost as being $4.20 per kg. During the course of his evidence the appellant identified cost components giving a total of $4.60 kg. The appellant's evidence in this regard was vague and we are not satisfied that he carried out any exercise in 2007 to calculate a figure of $5 per kg, or that he quoted any such figure to Yohannes Afework.

39. Reading the appellant's letter dated 26 November 2007 together with the letter from Yohannes Afework, suggests to us that where the appellant refers to a "price" of $5 for grade 3 Khat he was referring to the price he paid rather than the price he charged his customers. The appellant tells us otherwise in his oral evidence. We take into account that English is not the appellant's first language. However we would expect to see other evidence to substantiate the appellant's claim that the cost of the Khat was $1 per kg plus freight to Heathrow. Evidence of orders, correspondence and in particular evidence of payments to Yohannes Afework was not provided. In the absence of such evidence and in the absence of any evidence from the supplier or indeed from Ben Ly who (as appears below) were responsible for half the invoice values we are not satisfied that the $5 per kg used by HMRC is excessive.

40. We are mindful that our reading of the letter from Yohannes Afework suggests a change in price effective in July 2007. However we infer that the price prior to that date was if anything more than $5 per kg so that the respondents' calculation of the duty prior to that date is in fact favourable to the Appellant.

41. Taking all the evidence into account, including our assessment of the appellant's oral evidence and the absence of any corroborating evidence, we are not satisfied that the customs value of the imports is any less than $5 per kg.

The Liability Issue

42. We were provided with a customs entry form C88 for an import of Khat on 21 December 2007. This was not an entry included on the C18 Post Clearance Demand Note, but it was inputted by GKN and does identify GKN as a direct representative for the purposes of the importation. As such we find as a fact that they were acting in the name of and on behalf of the appellant as declarant (Article 5(2) of the Code).

43. Liability for customs duty, including the VAT due on importation, is that of the declarant. Even if someone else is also liable for customs duty, the liability of the declarant is joint and several.

Findings

44. Mr Khan sought to persuade us that the appellant had an agreement with a third party who was entitled to approximately half the Khat imported. He submitted that the effect of this agreement was to reduce the appellant's liability for customs duty. The appellant described the arrangement in his oral evidence. In a letter dated 16 April 2008 addressed "to whom it may concern" Yohannes Afework stated that 55% of the Khat exported was shipped to Ben & LY Trading but under one airway bill in the name of Eastern Orbit.

45. As a matter of fact we find that the appellant did have an agreement with a business trading as Ben Ly based in Birmingham. We accept that approximately half the Khat imported was destined for this trader. When the cases of Khat arrived at Heathrow they were marked with a red pen to indicate they were destined for Ben Ly or a black/blue pen to indicate that they were destined for the appellant. The appellant would pay the full price to Yohannes Afework and was reimbursed by Ben Ly for their share. The GKN invoices would be split equally between the appellant and Ben Ly.

46. Until the end of 2005, the appellant stated that he and Ben Ly each imported Khat separately. They then got together with a view to reducing the costs of employing an agent at Heathrow. The schedule of imports for the 3 year period supports that evidence and we accept it. Before the end of 2005 the appellant was importing some 20 to 30 cases at a time. From the end of 2005 onwards that increased to some 50 to 80 cases at a time.

47. Whilst we accept that this arrangement was in place, the only name to appear on any of the documentation we have seen was Eastern Orbit, the appellant's trading name. He is identified as the consignee, both by Yohannes Afework and GNK. He is also identified as the consignee on the airway bill we have seen and on the customs entry form C88. In all the circumstances we are satisfied that the appellant is the

declarant for the purposes of customs duty on the imports in question and he is therefore liable for the full amount charged by the Post Clearance Demand Note.

Conclusion

48. For the reasons given above we are not satisfied that the Post Clearance Demand Note is excessive. We are satisfied that the appellant is liable for the whole of the VAT claimed. In the circumstances the appeal is dismissed.

49. 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: 5 April 2012