TC02631

Appeal number: TC/2012/05329

CUSTOMS DUTY – Outward Processing Relief – Re-imported goods after repair – wrong information on documents – no relief
VALUE ADDED TAX – whether VAT chargeable on re-import after repair – yes – wrong information on documents – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAPCARGO LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
CAROLINE DE ALBUQUERQUE

Sitting in public at Bedford Square, London on 14 January 2013

Glyn Smith, Director for the Appellant

Oliver Connolly, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an Appeal for Decision by HMRC ("the Respondents") to uphold a review on 27 January 2012 of its decision to issue a C18 Post Clearance Duty Demand Notice (C18090767) on 7 December 2011 in the amount of £33,355.72.

2. The amount comprises import VAT of £21,779.50 and import duty of £11,576.22. These sums arise from the Appellant not having met the conditions for claiming Outward Processing Relief ("OPR") which is a relief from Customs Duty.

Background

3. The facts in this case are largely undisputed.

4. The Appellant is a freight forwarding agent in Wembley, Middlesex, HA40 4PE which provides logistical support to SuperGroup plc, a UK fashion retailer.

5. The Appellant exported and then re-imported two sets of goods on separate occasions, for repair purposes, which were carried out at no cost. The transactions are called First and Second Transactions.

6. OPR is a relief which applies to the import to the European Community ("EC") from third countries of goods produced from previously exported EC goods. The relief is intended to allow business to benefit from cheaper labour costs outside the EC, while encouraging the use of EC produced raw materials to manufacture finished goods. The procedure also enables faulty goods to be returned to a third country for a replacement with equivalent goods under the Standard Exchange System ("SES").

7. The Simplified Authorisation Procedure ("SAP") (HMRC Notice 235) is intended to be used by parties who occasionally need to export faulty goods for repair. The exporter applies for authorisation to use the procedure by entering the Customs Procedure Code (CPC) 21 004 in box 37 of the C88 or Single Administrative Document ("SAD") used in the shipment. When goods are re-exported, the CPC 61 21 001 is entered in Box 37 on the C88 for that import.

8. On 19 October 2011 the National Imports Relief Unit ("NIRU") wrote to SuperGroup plc regarding Customs Entry 290 024818H requesting confirmation that the goods imported under that entry reference were goods repaid free of charge under a warranty agreement or were replacements. SuperGroup plc confirmed that the goods were free of charge although not under warranty, and provided documentation which was accepted.

9. Questions were raised regarding two customs entries made by SuperGroup plc which were then investigated.

10. The first entry queried was Number 290 007863C ("the First Transaction") where the goods were described as "women's anoraks" (code 6202 1210) and "men's anoraks" (code 6201 1210). The Customs Processing Code ("CPC") is 2100004 for both items. The consigner is identified as C Retail LLP which is a subsidiary of SuperGroup plc.

11. On 6 August 2010, the Appellant declared an import of "men's cotton tops" (tariff classifications 6101 2090 00) and "women's cotton anoraks" (code 6202 1210 90).

12. The Appellant attempted to declare both movements to OPR by using Customs Code 6121001. This is a code for goods which are re-imported under the Simplified Repair Procedure ("SRP") (CPC 21 00 004).

13. The problem seems to be that the description of the imports and exports did not match both in terms of written description and tariff classification codes.

14. The second entry queried was Number 290 024500E ("the Second Transaction"). In this transaction the export document date 13 July 2010 referred to "men's anoraks" (code 6201 1210) and "women's anoraks" (code 6202 1210). The consigner was declared to be unregistered. The export documents did not properly identify the consigner who is listed as Belspeed NV, at a Belgian address. This should have been SuperGroup plc or C Retail LLP in the UK.

15. The goods were imported back into the UK on 21 October 2010 under entry 290 024500E. They were declared to be "men's cotton tops" (61012090 00) and "women's cotton anoraks" (62021210 90).

16. There was a mismatch between the import and export documents in terms of the written description and tariff classification code. The documentation did not properly identify the consigner or their number.

17. As a result of these investigations, on 22 November 2011 a demand for VAT totalling £9,583.52 and duty totalling £17,972.07 on the First Transaction and VAT totalling £3,807.42 and duty totalling £1,992.70 on the Second Transaction was assessed.

18. The Appellant was held responsible by SuperGroup plc for errors in relation to Customs entries, and the Appellant had had to satisfy the C18 Demand (£33,355.72) on SuperGroup plc's behalf. The Appellant on 1 December 2012 requested a review of the Decision which on 27 January 2012 upheld HMRC's decision.

19. On 18 April 2012 a Notice of Appeal was filed.

Relevant Legislation

20. The following legislation is considered relevant:

European Council Regulation 2913/92 ("the Customs Code")

Article 16

21. The persons concerned shall keep the documents referred to in Article 14 for the purposes of customs controls, of the period laid down in the provisions in force and for at least three calendar years, irrespective of the medium used. That period shall run from the end of the year in which:

(a) in the case of goods released for free circulation in circumstances other than those referred to in (b) or goods declared for export, from the end of the year in which the declarations for release for free circulation or export are accepted;

(b) in the case of goods released for free circulation at a reduced or zero rate of import duty on account of their end-use, from the end of the year in which they cease to be subject to customs supervision;

(c) in the case of goods placed under another customs procedure, from the end of the year in which the customs procedure concerned is completed;

(d) in the case of goods placed in a free zone or free warehouse, from the end of the year on which they leave the undertaking concerned.

22. Without prejudice to the provisions of Article 221 (3), second sentence, where a check carried out by the customs authorities in respect of a customs debt shows that the relevant entry in the accounts has to be corrected, the documents shall be kept beyond the time limit provided for in the first paragraph for a period sufficient to permit the correction to be made and checked.

Article 59

1. All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs 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 85

The use of any customs procedure with economic impact shall be conditional upon authorisation being issued by the customs authorities.

Article 182

3. Save in cases determined in accordance with committee procedure, re-exportation or destruction shall be the subject of prior notification of the customs

authorities. The customs authorities shall prohibit re-exportation should the formalities or measures referred to in the first subparagraph of paragraph 2 so provide. Where goods placed under an economic customs procedure when on Community customs territory are intended for re-exportation, a customs declaration within the meaning of Articles 59 to 78 shall be lodged. In such cases, Article 161 (4) and (5) shall apply.

European Commission Regulation 2454/93 ("the Implementing Provisions")

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 508

1. Except for the customs warehousing arrangements, the customs authorities may issue a retroactive authorisation.
Without prejudice to paragraphs 2 and 3, a retroactive authorisation shall take effect at the earliest on the date on which the application was submitted.

2. If an application concerns renewal of an authorisation for the same kind of operation and goods, an authorisation may be granted with retroactive effect from the date the original authorisation expired.

3. In exceptional circumstances, the retroactive effect of an authorisation may be extended further, but not more than one year before the date the application was submitted, provided a proven economic need exists and:

(a) the application is not related to attempted deception or to obvious negligence;

(b) the period of validity which would have been granted under Article507 is not exceeded;

(c) the applicant's accounts confirm that all the requirements of the arrangements can be deemed to be met and, where appropriate, the goods can be identified for a period involved, and such accounts allow the arrangements to be controlled; and
(d) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the declaration.

Findings of Fact

23. The Appellant is the freight forwarding agent for SuperGroup plc.

24. The Appellant exported and re-exported two sets of goods on separate occasions for the purposes of repair.

25. There were flaws in the documentation relating to the export and import of goods under the First and Second Transactions with resulted in a liability to Customs Duty.

26. These flaws in the documentation meant that OPR was not given.

27. The Appellant lost a significant amount of relevant documentation as a result of a fire at their head office in June 2011.

28. It is accepted that the commodity code and description of the goods were different on the import entries and the export entries on both transactions.

Appellant's Submissions

29. The Appellant stated that there was a major fire experienced at their head office in June 2011 where they lost the files relating to export and import shipments and therefore were reliant on copies supplied by SuperGroup plc and the Respondents.

30. The Appellant only became aware of an issue relevant to the import/export entries after the Respondents contacted SuperGroup plc on 22 November 2011. This was outside of the 12 month amendment window and consequently the Appellant was unable to make amendments to the entries within the requisite time limits.

31. In relation to entries relating to the Second Transaction, the Appellant is unable to explain the errors in the documentation and name of the Consignor. They say that this was an error made by operational staff or they were instructed to complete the entries in that way.

32. In relation to the First Transaction, the Appellant accepts that the commodity code and description for the men's jackets were different on the import entries and the export entries. The Appellant contends that the shipments out were handled by the Appellant's Southampton office who did not have access to the New Export System ("NES") and on re-import the entries were completed by Southampton using a different clearance service provider using a commodity code used for previous importations of men's jackets. The Appellant contends that both codes used incurred the same rate of duty of 12%.

33. The Appellant contends that there are at least three possible commodity code categories for men's jackets and two of those codes, 6201121090 and 61012090, were used on the export and import documents respectively. A third, 6201920090, was provided subsequently by the Respondents' tariff team. The Appellant states that given that there are three commodity codes reflecting the same item and incurring the

same duty percentage, the Appellant should be allowed some leniency and granted relief from Customs Duty and VAT.

The Respondents' Submissions

34. The Respondents' case is that the flaws are fatal to the availability of OPR. It is a requirement that export and import documentation is completed correctly and that goods in relation to which OPR is claimed are correctly classified.

35. The mis-match between the declared exported and imported goods in relation to the First and Second Transactions are determinative. Such errors can only be remedied through amendments of the documentation.

36. It is not possible to retroactively amend the entries. The authorisation for simplified OPR cannot be issued retrospectively at all. Under Article 508(3) of the Implementing Provisions, amendments to customs entries are permitted in exceptional circumstances and only where the amendment is made less than one year after the date upon which the entry was made, where proven economic need exists and the amendment is not related to obvious negligence. The Appellant is seeking retrospective authorisation more than one year after the transactions took place. Further, it is for the Appellant and not the Respondents to discover the errors within the time limit. No authorisation was given to SuperGroup plc or C Retail LLP in relation to the export on the second entry as they were not named as a consignor. This is critical as Article 147 of the Customs Code makes it clear that "authorisation to use the outward processing procedure shall be issued at the request of the person who arranges for the processing operations to be carried out".

37. With regard to VAT, the Commissioners are not satisfied that the goods exported are the same as those imported, and therefore deny VAT relief under Regulation 126 of the VAT Regulations 1995 (SI 1995/2518).

38. The Respondents rely on the Court of Justice of the European Union ("CJEU") case *Gefco SA v Receveur Principle Des Douanes* (Case C-411/01) which considered the position of triangular outward processing where goods were exported from Italy to a third country and re-imported into France. The CJEU held that it was possible, in some circumstances, for the person paying the Customs debt to produce evidence that the goods in question were the same, without amending the documents in question.

39. Such evidence must establish a case without the slightest ambiguity. The Respondents say the case of *Gefco SA* is not relevant since there was no accurate description of the goods which was at variance to the tariff classification codes given to them. There were also several errors in the tariff classification. In that sense, the case can be distinguished, since the "slightest ambiguity" test is not satisfied.

Discussion

40. The question to be answered is whether the Appellant qualifies for OPR and whether for VAT purposes the goods exported are the same as those imported for the purposes of Regulation 126 of the VAT Regulation 1995.

(a) OPR

41. OPR is a Customs procedure which allows re-imported goods to pay duty on any added value where goods have been processed or repaired outside the EU. Duty is therefore not paid on the full value of the re-imported goods.

42. VAT is paid on the value of the process not the full value of the goods.

43. The NIRU operates a simplified OPR authorisation for repair. Simplified authorisation for repair is applied by completing a C88 form at export, using the appropriate CPC. The relief is claimed at re-import after the process of repair. It is important that sufficient documentation is provided to prove that the goods being imported were exported under the OPR arrangements and to allow Customs to establish that the goods being re-imported are the goods which were originally exported for repairs. It is important that all documentation is correctly completed and supporting documentation provided to establish the identity of goods. Where this is not done, OPR may not be available.

44. The provisions under the Customs Code are relevant. Articles 145 to 159 of the Customs Code sets out the procedural requirements for "outward processing". Article 145 state the relief is to "allow Community goods to be exported temporarily from the Customs territory of the Community in order to undergo processing operations and the products resulting from those operations to be released for free circulation with total or partial relief from import duties". Article 147, provides that "authorisation to use outward processing procedure shall be issued at the request of the person who arranges for the processing operations to be carried out". Article 148 (1)(b) of the Customs Code provides that authorisation shall only be granted "where it is considered that it will be possible to establish that the compensating products have resulted from processing of the temporary export goods".

45. Article 150 (2) provides that the relief "shall not be granted" where one or more conditions laid down in Article 151 are not fulfilled, "unless it is established that the said failures have no significant effect on the correct operation of the set procedure". This means that the total or partial relief from import duty provided by Article 151(1) shall not be granted where the conditions relating to the outward processing procedure are not fulfilled, unless it is established that the failures have "no significant effect" on the correct operation of the set procedure.

46. OPR allows traders to temporarily export goods from the EU for processing/repairs in non EU countries and then claim full or partial duty relief when the goods are re-imported. It is imperative that the paperwork dealing with the export and re-import is correct. If errors have been made concerning customs declaration then full Customs Duty may be payable. It is important that the customs procedure

codes are correctly stated in the forms. Once the goods have been exported for repairs they can be re-imported back into free circulation normally without a charge to duty.

47. Under Article 199 of the Implementing Provision the declarant is responsible for the accuracy of information given in the customs declaration.

48. Under Article 508, HMRC has the power to issue a retroactive authorisation. This would be valid from the date the application for authorisation but not more than one year before the application was submitted. Retrospective authorisation is not available in circumstances where the simplified procedure is used. Article 508 (3) (b) of the Implementing Provisions makes it clear that one of the conditions for retroactive authorisation is the presence of a "period of validity". It cannot apply to the simplified authorisations, since this procedure does not have a "period of validity".

(b) VAT Law

49. Section 33(3) of VATA 1994 gives HMRC the power to make provision by regulations with regard to the repaying of VAT on imports or such goods which "are shown to their satisfaction" to have been previously exported from the United Kingdom or removed from any Member State.

50. Regulation 126 of the VAT Regulations (SI 1995/2518) provides:

> "Subject to such conditions as the Commissioners may impose, VAT chargeable on the importation of goods from a place outside the member States which have been temporarily exported from the member States and are re-imported after having undergone repair, process or adaptation outside the member States, or after having been made up or reworked outside the member States, shall be payable as if such treatment or process had been carried out in the United Kingdom, if the Commissioners are satisfied that –
>
> (a) at the time of exportation the goods were intended to be re-imported after completion of the treatment of process outside the member States, and
>
> (b) the ownership in the goods was not transferred to any other person at exportation or during the time they were abroad".

51. The effect of this provision is to treat repairs as having taken place in the United Kingdom and consequently there is no importation of goods. An importation would ordinarily attract VAT pursuant to Section 1(1) (b) VATA 1994.

(c) HMRC Notices

52. HMRC Notice 235 (April 2005) does not have the force of law but explains the OPR at the relevant time. It explains the importance of getting the documentation right in using the simplified authorisation for repairs. It states in paragraph 3.4.1:

"You should make sure that you or your agent completes the export declaration in full with special attention being paid in box 31 (Marks, Numbers and description). Failure to do so could lead to the relief of duty at re-imports being disallowed".

53. When repaired goods are re-imported it is required that import declaration use the CPC 612108 in Box 37 of the SAD. This is provided with export documentation to match the goods. If the goods are matched relief from duty is given.

54. The completion of accurate information is to aid identification of goods on return. If these forms are not properly completed it is possible that relief may not be given.

(d) Transactions

55. In both the First and Second Transactions there were errors in the documentation. In the First Transaction the description of the imports did not match the exports. The goods exported were described as "women's anoraks" and "men's anoraks" but the import documents stated the goods were "men's cotton tops" and "women's cotton anoraks". The descriptions were wrong and the tariff classification was wrong.

56. In the Second Transaction there was also a mismatch between the import and export documents both in terms of the written description and the tariff classification codes. In the export documents the goods were referred to as "men's anoraks" and women's anoraks" but the import documents stated the goods to be "men's cotton tops" and women's cotton anoraks". There were further flaws in the export documents in this transaction since it did not identify the Consignor number or the name SuperGroup plc nor C Retail LLP on the authorisation forms.

57. In the Tribunal's view, this mismatch between the declared exported and imported goods in the First and Second Transactions meant that OPR relief was not available. These errors can only be remedied though amendments to the documentation.

58. It was not possible to retroactively amend the entries since the authorisation for simplified OPR cannot be issued retrospectively at all. The wording of Article 508(3)(b) of the Implementing Provisions is clear and states that one of the conditions for retroactive authorisation is that the "period of validity" which would have been granted under Article 507 is not exceeded. Simplified authorisations do not have a period of validity. In any event, under Article 508(3) of the Implementing Provisions no discretion is given to exercise retroactive authorisations after more than one year prior to the date of the application on submission. The application for a retrospective OPR authorisation took place on 15 December 2011 which is more than one year from the date of the transaction on 20 April 2010 and 13 July 2010 respectively. It is therefore outside the time limit and cannot be amended in any event.

59. Further, no authorisation was given to SuperGroup plc or C Retail LLP in relation to the export relating to the Second Transaction, as they were not named as the Consignor. This is critical as Article 147 of the Customs Code states "authorisation to use outward processing procedure shall be issued at the request of the person who arranges for the processing operations to be carried out".

60. Regarding the VAT liability, it should be noted for the record that the Commissioners were not satisfied that the goods exported were the same as those imported for the purposes of Regulation 126 of the VAT Regulations 1995. It is the Tribunal's understanding that VAT is not an issue since it has now been recovered.

61. Lastly, the Respondents draw a reference to the CJEU in *Gefco SA* case. The court in that case decided that where there is incorrect export documentation but other documentation makes it possible to identify the goods "without the slightest ambiguity" then such proof should be used. Under Article 150(2) of the Customs Code, it is provided that relief from import duty should not be granted where one of the conditions or obligations relating to the outward processing procedure is not fulfilled unless it is established that the failure will "have no significant effect on the current operation of the set procedure".

62. Given the documentary errors, it cannot be said that those errors did not have a "significant effect" on the correct operation of the procedure. Both transactions were conducted with faulty procedures and there was no description of the goods which would have allowed the exported goods to be matched with the re-imported goods. The documentation was not reliable.

Findings

63. For the reasons given above the Appeal is dismissed.

64. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 27 March 2013