TC04472

Appeal number: TC/2014/01771

CUSTOMS DUTY and IMPORT VAT – Whether goods imported met conditions for 'goods for test' relief- no, appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HARLAND MACHINE SYSTEMS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
DAVID EARLE

Sitting in public at Fox Court, London on 9 April 2015

The appellant did not attend and was not represented

Ms Laura Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Harland Machine Systems Limited ("HMS"), did not attend and was not represented at the hearing. We had before us emails (dated 29 September 2014 and 11 November 2014) from HMS stating that they did not intend to attend or send representation to the hearing and that they did not intend to make any further submissions. We were therefore satisfied that HMS had been notified of the hearing and that it was in the interests of justice to proceed with the hearing.

2. HMS appealed against HMRC's decision on review refusing relief from Customs Duty and Import VAT known as 'goods for test relief' on the importation of certain goods. The amount of duties involved was £9663.73 comprising £1084.97 (Customs Duty) and £8578.76 (VAT).

Evidence

3. HMS had submitted before the hearing a notice of appeal and some supporting documents, consisting of:

(1) Earlier correspondence with HMRC, and

(2) Copies of returns and questionnaires submitted to HMRC relating to their historic claims for goods for test relief

Grounds of appeal

4. Based on the arguments raised in their notice of appeal and other correspondence, HMS raised three possible grounds:

(1) They were importing goods in order to test their machines and such imports qualified for goods for test relief.

(2) They were importing goods in order to check that the goods met the characteristics appropriate for their machines in accordance with customer contracts and such imports qualified for goods for test relief.

(3) They had been using the goods for test relief for many years and HMRC had previously accepted the application of the relief.

The law

5. The dispute arose in relation to the application of reliefs from Customs Duty and Import VAT known as 'goods for test relief'.

6. For the purposes of Customs Duty, the relief is found in EC Regulation 1186/2009:

Article 95

> Subject to Articles 96 to 101, goods which are to undergo examination, analysis or tests to determine their composition, quality or other technical characteristics for purposes of information or industrial or commercial research shall be admitted free of import duties.

7. For the purposes of Import VAT, the relief is found in the Value Added Tax (Imported Goods) Relief Order 1984 (1984/746):

> **Regulation 5**
>
> Subject to the provisions of this Order, no tax shall be payable on the importation of goods of a description specified in any item in Schedule 2 to this Order.

8. Schedule 2 of that Order includes, at Group 4:

> Goods imported for the purpose of examination, analysis or testing to determine their composition, quality or other technical characteristics, to provide information or for industrial or commercial research.

Facts

9. HMS manufactures a range of automated labelling systems to apply pressure sensitive, self-adhesive labels onto various types of products used in many industry sectors, for example machines applying labels to bottles containing pharmaceutical products.

10. HMS exports overseas a number of those machines.

11. HMS imports quantities of labels and products (eg the bottles to which the labels are to be applied) (together the "customer products") from their customers before delivering the machine to the customer.

12. In the period 1 January 2013 to 9 November 2013 HMS received 21 imports of goods. HMS claimed goods for test relief for 20 of those imports and commercial samples relief for one import.

13. HMS made no comments or arguments supporting the claim for commercial samples relief at any stage of the correspondence with HMRC or in their notice of appeal. HMRC submitted that the claim for commercial samples relief was a mistake on HMS' part. We find that this was the case and have therefore treated this import as if a claim had been made for goods for test relief.

14. On 6 December 2013, an officer from HMRC's National Import Reliefs Unit notified HMS that, after a review of these 21 imports, they had concluded that the relief did not apply. HMS had 30 days to produce further evidence or arguments.

15. On 10 December 2013, HMS sent an email with arguments and documentation, referred to in para 24 below.

16. On 6 January 2014 the original decision was confirmed and on 7 January 2014 HMRC issued a Post Clearance Demand Note for Customs Duty of £1084.97 and Import VAT of £8,578.76.

17. On 21 January 2014, HMS requested a formal review of the decision, submitting further points for consideration and a further bundle of documents (referred to in para 25 below).

18. On 7 March 2014 the HMRC review response was issued, confirming the original decision.

19. On 1 April 2014, HMS appealed against the review decision.

Parties arguments

HMS' submissions on goods for test relief

20. HMS has described the purpose of the imports in various different ways over time.

21. In an email exchange between HMS and HMRC in 2009 (in which HMS was seeking guidance on the appropriate customs codes to be used for importing these goods), it was described as:

> "In the course of our sales contracts the machines are tested on our customers (*sic*) products before shipping, we therefore receive/import sample products of numerous descriptions ie plastic/glass bottles, cartons, containers, cylinders etc together with the self-adhesive labels (printed and non-printed) which are to be applied to their products, to carry out the machine testing."

22. In the 'Goods for test returns' submitted by HMS to HMRC on 17 June 2010 and 10 May 2012, the purpose was described as:

> "To carry out either pre-order machine trials or pre-delivery machine testing we ask our customers to send samples of their products and the labels which are to be applied. During the testing process the labels are applied to the products until satisfactory finish and throughput speed is achieved."

23. In the 'Goods for test questionnaire' submitted to HMRC in May 2012, it was described as:

> "We need quantities of our customer's (*sic*) products to carry out pre-order and pre-delivery machine testing, we run trials to ensure that the machine will label our customer's (*sic*) products in accordance with the specification, prior to despatch."

24. In response to HMRC's request on 6 December 2013 for further information or arguments to support HMS' claims for relief, HMS stated (in an email dated 10 December 2013) that:

> "The goods are imported to carry out analysis of quality, characteristics and suitability for pressure sensitive labelling, within the commercial contracts we have with our customers."

25. In the request for review letter on 21 January 2014, HMS stated that:

> "We request quantities of our customer's (*sic*) products and associated labels to carry out pre-order and pre-delivery analysis of their quality/composition and to check that the characteristics of the products and labels received are in accordance with the information provided by our customer, conformity of which is stipulated in the sales contracts.
>
> "The quantities of samples requested is dependent on the sophistication of the labelling system sold, the higher the labelling speed would require a larger number of test samples requested. Also customers have varying requirements regarding the pre-delivery factory acceptance trials conducted prior to shipment, For example some Global companies will request 5 day labelling trials at our site in Salford to replicate production line speeds at the installation plant overseas."

HMRC submissions

26. Ms Poots submitted for HMRC that:

(1) the wording of both the Customs Duty and Import VAT reliefs clearly requires the tests to be applied to the imported goods and that therefore using the imported goods to test something else (ie a machine) does not meet this requirement; and

(2) HMS imported the goods in order to test their machines

27. HMRC accepted that there could have been a dual purpose in importing the customer products, ie to test the goods themselves and to test the machines using the goods. However, Ms Poots submitted that if that were the case:

(1) they would expect the testing of the goods to check against customer specifications and suitability for pressure sensitive labelling to happen in advance of (or in the early stages of) manufacturing the machine (not at the same time as testing the already manufactured machine); and

(2) the volume of customer products required for such testing would be substantially smaller. Some of the imports in question were for volumes as high as 15000 vials and it was inconceivable that so many vials would be required in order to test against customer specifications.

28. Ms Poots submitted that, even if HMS had shown that certain volumes of customer products had been imported for testing the products themselves, the testing HMS was conducting on them would not meet the requirement for the relief. In particular that the phrase 'composition, quality or other technical characteristics' required testing of something more technical than purely size, weight or shape and that 'quality' meant 'the quality' not 'a quality' of the goods.

Legitimate expectation submissions

29. In their notice of appeal (in addition to some earlier correspondence), HMS stated that:

> "We have been using this relief for many years. Throughout this time we have completed HMRC 'Goods for test questionnaire'. On several occasions HMRC have confirmed they are satisfied that our goods and tests qualify for this relief".

30. Whilst this is not a fully-fledged argument that HMS had a legitimate expectation that the relief would be allowed, we have treated it as an argument raised in order to dispose of the issue.

31. Ms Poots's argument for HMRC was that the First-tier Tribunal does not have jurisdiction to deal with a claim based on legitimate expectation, relying on *HMRC v Noor* [2013] UKUT 071.

Discussion

Testing of machines

32. We will look first at the question of whether using the imported goods to test the machines meets the requirements for relief.

33. Both HMS and HMRC agree that *a* purpose of importing the customer products was to test the machines manufactured by HMS. The descriptions given by HMS over a number of years (set out in paragraphs 21 – 25 above) make it very clear that at least one of the purposes of importing the customer products is to test the machines they are manufacturing, ie do the machines do the job that they are manufactured for.

34. The Customs Duty relief (set out in full in paragraph 6 above) applies to: "goods which are to undergo examination….to determine their composition…". The use of 'undergo' and 'their' makes it very clear that the examination, analysis or testing must be applied to the goods that are imported and not to a machine that is already in the UK.

35. The wording of the Import VAT relief is slightly less clear and is worth setting out in full again (Group 4 of Schedule 2 to the Value Added Tax (Imported Goods) Relief Order 1984 (1984/746)):

> Goods imported for the purpose of examination, analysis or testing to determine their composition, quality or other technical characteristics, to provide information or for industrial or commercial research.

36. The use of 'their' again supports the argument that it must be the goods that are being tested, not other items. However the way the sentence is constructed makes it less clear where the final two alternatives ('to provide information' and 'for industrial or commercial research') start. It could be read in either of the following ways:

(1) Goods imported for the purpose of examination, analysis or testing:

(a) to determine their composition, quality or other technical characteristics;

(b) to provide information, or

(c) for industrial or commercial research.

(2) Goods imported:

(a) for the purpose of examination, analysis or testing to determine their composition, quality or other technical characteristics;

(b) to provide information, or

(c) for industrial or commercial research.

37. The first formulation is more similar to the Customs Duty relief. The second is a much wider interpretation of the provision allowing goods to be imported without VAT simply for the purposes of providing information.

38. The EU law on which the Import VAT relief is based is EC Directive 83/181, Article 70. The wording of Article 70 is identical to that for the Customs Duty relief. Following the *Marleasing* principle (C-106/89), we must interpret UK VAT law in conformity with EU VAT law. The first interpretation of the UK statute is in conformity with the underlying EU law.

39. On that basis the narrower formulation is the correct one and therefore the relief from Customs Duty and Import VAT can only apply to goods that are being imported to be tested themselves.

40. Therefore, subject to the conclusions on the dual purpose of importing goods set out below, the goods that were imported by HMS in order to test whether the machines applied the labels correctly to the customers' products do not meet the requirements for goods for test relief from Customs Duty or Import VAT.

Testing of the products

41. As set out above, HMS's second argument for the application of the relief is that they imported goods in order to check the goods themselves. HMS described it as assessing the "quality, characteristics and suitability for pressure sensitive labelling" and "the characteristics of the products and labels received", in both cases in accordance with the contracts with their customers.

42. If HMS did in fact import the customer products for this purpose, we must decide whether the tests HMS conducted on the customer products meet the conditions for the relief to apply. This is essentially an interpretation of the phrase "composition, quality or other technical characteristic". HMRC's submission was that this required some testing of a technical or scientific nature.

43. We are of the opinion that the wording of the goods for test relief can be read more broadly than HMRC suggest. There are no interpretative provisions limiting the meaning of the words and therefore composition and quality have their ordinary

meaning. Therefore we find that assessing items to ensure that they meet a contractually agreed specification, for example as to size, weight and/or material could well fall within the description in the relief.

44. There was one additional point on this issue. The goods for test relief is only available for the quantities of goods that are 'strictly necessary' (Article 98 of EC Regulation 1186/2009 for Customs Duty) and 'necessary' (Note to Item 1 of group 4 of Schedule 2 of the Value Added Tax (Imported Goods) Relief Order 1984/746 for Import VAT) for the stated purposes. If HMS could show that they had imported goods for the purposes of testing those goods, the relief would only be available for the number required for that testing. HMRC accepted that these provisions could be applied to allow relief for part of a larger shipment of goods.

45. We agree with this interpretation. Relief from Customs Duty and/or Import VAT could be available for goods that meet the requirements for relief even if they formed part of a larger import, the remainder of which did not so qualify.

46. The burden of proof (as set out in s 16(6) of Finance Act 1994 (FA 1994)) was on HMS to maintain a particular purpose and show that the relief applied. HMS had made some statements in correspondence with HMRC relating to the testing of the customer products but had not provided satisfactory detail on the tests that were carried out, the timing of the testing or the volumes necessary to carry out the testing. Therefore we find that HMS had not met the burden of proof to maintain a claim for goods for test relief for any part of the 21 imports in question.

Legitimate expectation

47. In *Noor,* the Upper Tribunal concluded that the First-tier Tribunal does not have any general supervisory jurisdiction by way of judicial review (para 25). However they left open the possibility that the First-tier Tribunal could consider public law issues where necessary in the context of deciding issues clearly within its jurisdiction (para 31).

48. Following the application of this approach in *L H Bishop v HMRC* [2013] UKFTT 522, we will first consider the statutory rules that give jurisdiction to this tribunal in this case.

49. In relation to Customs Duty, the right of appeal lies in s 16(1B) FA 1994, which states that an appeal against a 'relevant decision' may be made to an appeal tribunal. Relevant decision is defined in s 13A FA 1994. In this case the relevant decision is:

> "(2)(a) a decision by HMRC, in relation to any customs duty…, as to:
>
> …
>
> (iv) whether or not any person is entitled in any case to relief…"

50. Through a rather convoluted route, the same appeal provision applies to Import VAT. The general appeal provisions for import VAT are found in s 83(1)(b) of Value Added Tax Act 1994 (VATA 1994). However that provision is subject to s 84(9)

VATA 1994 which excludes, amongst other things, decisions to which s 15A FA 1994, which are decisions made on a request for review by the taxpayer. Such a review was made in this case, and therefore the appeal provision in s 83(1)(b) VATA 1994 does not apply. We must look instead to the general provision in s 16(1) VATA 1994 which applies the enactments relating to Customs Duty for the purposes of Import VAT. That general rule therefore makes s 16 FA 1994 the appeal provision for Import VAT as well as Customs Duty in this case.

51. On the basis of that appeal provision, the jurisdiction of the First-tier Tribunal is limited to considering the question of whether a taxpayer is entitled to the relief in accordance with the wording of the statute. The provision does not incorporate any jurisdiction to consider arguments based on legitimate expectation.

Decision

52. For the reasons set out above, we dismiss the taxpayer's appeal. This has the effect that the Customs Duty and Import VAT assessed by HMRC is due and payable.

53. We would like to thank Ms Poots, counsel for HMRC, for her assistance in helping us to understand the appellant's case in their absence.

54. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

RELEASE DATE: 9 June 2015