[2017] UKFTT 579 (TC)

TC06022

Appeal number: TC/2016/01577

CUSTOMS DUTY – import licence –preferential tariff rate - % tolerance

FIRST-TIER TRIBUNAL
TAX CHAMBER

FEED FACTORS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL MAINWARING-TAYLOR

Sitting in public at the Royal Courts of Justice on 8th December 2016

Jason Hopkinson, director of Feed Factors Ltd, for the Appellant

Simon Pritchard of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. During 2013, 2014 and 2015 the Appellant applied for and was granted various licences to import goods (variously, organic wheat and barley from Ukraine and wheat from Russia) at preferential tariff rates.

2. The licences set out the quantities of grain to be imported and the preferential rates applicable to them. The licences also included a 'tolerance % more' which in all relevant cases was 5%.

3. The Appellant imported grain in excess of the quantities specified in the licences but within the tolerance and claimed the preferential tariff in relation to the whole amount imported.

4. The consignments to which the appeal relates can be summarised as follows:

(1) 9 and 18 September 2013: organic wheat from Ukraine; licence for 3,000,000kg excluding tolerance; exceeded by 150,000kg; further amount assessed as payable £10,746.84;

(2) 17 and 31 January 2014: organic wheat from Ukraine; licence for 6,000,000kg excluding tolerance; exceeded by 49,720kg; further amount assessed as payable £3,445.43;

(3) 2 and 15 September and 1 October 2014: organic wheat from Ukraine; licence for 10,000,000kg excluding tolerance; exceeded by 186,487kg; further amount assessed as payable £13,831.83;

(4) 12 and 23 February 2015: organic barley from Ukraine; licence for 3,600,000kg excluding tolerance; exceeded by 59,380kg; further amount assessed as payable £4,122.98;

(5) 13 October 2015: organic wheat from Ukraine; licence for 4,250,000kg excluding tolerance; exceeded by 150,000kg; further amount assessed as payable £9,153.24;

(6) 24 September 2015: wheat from Russia; licence for 10,776,000kg excluding tolerance; exceeded by 212,160kg; further amount assessed as payable £12,875.91.

5. In all cases the Appellant met its obligations under the import licences granted to it by importing the goods stipulated within the specified period and not exceeding the 5% tolerance.

6. The Appellant believed it was entitled to claim the preferential rate on the whole amount imported, including the excess within the tolerance.

7. HMRC say the excess was not subject to the preferential rate but to the standard rate and issued C18 assessments in respect of each of the relevant consignments accordingly.

8. The Appellant requested a review of these decisions under section 14 of the Finance Act 1994 (**FA 1994**). HMRC upheld its original decisions in its review decision (section 15 FA 1994). The Appellant appealed the section 15 review decision to the Tribunal in accordance with its right under section 16 FA 1994.

Relevant law

9. Council Regulation (EEC) No. 2913/92 of 12 October 1992 established the Community Customs Code (**the Code**) that applied at the relevant time, an EU-wide system of rules governing, amongst other things, the importation of goods from third countries (i.e. countries outside the EU).

10. Article 20 of the Code provides for a Customs Tariff setting out the rates generally applicable to different goods, as well as preferential tariff measures that have been agreed with third countries or adopted universally by the Community in respect of particular countries, groups of countries or territories.

11. Article 78 of the Code provides that a customs authority, such as HMRC, may amend declarations relating to goods even after the goods have been released into free circulation. It may do so either on its own initiative or at the request of the declarant. Further, Article 78(3) provides:

> "Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularize the situation, taking account of the new information available to them".

12. Article 201(1) of the Code provides that a customs debt on importation arises on "the release for free circulation of goods liable to import duties". Article 201(2) of the Code provides for a customs debt to be incurred when a declaration is accepted by the relevant customs authority. Article 201(3) explains that the debtor is the 'declarant', defined in Article 1(18) as "the person making the customs declaration in his own name or the person in whose name the declaration is made".

13. Article 220(1) of the Code provides that:

> "Where the amount of duty resulting from a customs debt has…been entered in the accounts at a level lower than the amount legally owed, the amount of duty…which remains to be recovered shall be entered into the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor"

14. Article 221(1) of the Code states that:

> "As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures".

15. Article 221(3) of the Code states that:

> "Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred".

16. Under Article 239 customs authorities have power to repay or remit import duties resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. An application for repayment or remission should be made to the appropriate customs officer within 12 months of the amount of the duties being communicated to the debtor, but the customs authorities may permit this period to be extended in "duly justified exceptional cases".

17. Commission Regulation (EEC) No. 2454/93 of 2 July 1993, which implements the Code, provides at Article 199 that a declarant is responsible for the accuracy of information contained in a declaration.

18. Commission Regulation (EEC) No. 1067/2008 of 30 October 2008 (**the Wheat Regulation**) deals with the Community tariff quotas for common wheat of a quality other than high quality from third countries.

19. Article 2 of the Wheat Regulation provides that a preferential tariff will apply to a specific quota of non-high quality wheat from third countries. This quota is divided between imports from the USA, Canada and other countries by Article 3.

20. Article 4 of the Wheat Regulation explains the information traders must submit when applying for licences to participate in the preferential tariffs and the timetable for applications and the granting of licences.

21. Commission Regulation (EEC) 376/2008 of 23 April 2008 (**the Agricultural Products Regulation**) sets out detailed rules for the system of import and export licences and advance fixing certificates for agricultural products (including wheat).

22. Recital 33 to the Agricultural Products Regulation reads as follows:

> "…To avoid any overrun in the quota, the preferential arrangements must apply up to the quantity for which the licence or certificate was issued. However, in order to facilitate imports, the tolerance provided for in Article 7(4) should be permitted, provided that it is specified at the same time that the part of the quantity exceeding that shown on the licence or certificate but within the tolerance does not qualify under the preferential arrangements and full duty is payable thereon on import".

23. Article 7(1) states that an import licence constitutes "an authorisation and give[s] rise to an obligation…to import…under the licence…during its period of validity, the specified quantity of the products or goods concerned".

24. Article 7(4) states that "where the quantity imported…is greater by not more than 5% than the quantity indicated in the licence or certificate, it shall be considered to have been imported…under that licence or certificate".

25. Article 7(5) states that "where the quantity imported…is less by not more than 5% than the quantity indicated in the licence or certificate, the obligation to import…shall be considered to have been fulfilled".

26. Article 17 requires licence applications to be made on the form at Annex 1 to the Agricultural Products Regulation. Sections 17 and 18 of that form state (in figures and words respectively) the amount for which the licence is sought.

27. Article 20 states that where a licence is issued for a smaller quantity than that applied for, the issuing body must state the quantity for which the licence is issued in sections 17 and 18 of the licence.

28. Article 48 provides that:

> "Where imports of a product are subject to presentation of an import licence and where that licence also serves to determine eligibility under preferential arrangements, the quantities imported within the tolerance in excess of the quantity shown on the import licence shall not qualify for the preferential arrangements".

Appellant's arguments

29. Mr Hopkinson explained that he felt let down by HMRC and the Rural Payments Agency (RPA). In particular he felt that the guidance the Appellant had obtained had been misleading and the length of time it had taken for the authorities to raise the issue was excessive; had it been raised sooner the Appellant could have changed its behaviour and would have faced a much lower 'penalty'.

30. He explained that the Appellant was a family owned grain shipping company established over 30 years ago. The company had eight full time employees and one part time. The way they work is to find goods (grain) overseas, then to apply to the RPA for an import licence. They receive email confirmation of the application and are allocated a licence provided there is still availability within the quota. They then import the grain, lodging the licence with HMRC and obtaining customs clearance.

31. He did not feel that the way the tolerance worked was made clear during the licencing procedure. When lodging the application they included the specific amount they were applying to import. On this application form there was no mention of tolerance. The email reply from the RPA merely acknowledged the application and gave no further information. The first mention of the tolerance appeared on the licence confirmation from HMRC which included a figure for "tolerance % more".

32. Mr Hopkinson explained that in the grain trade one dealt with very high volumes with a very low profit margin. In these circumstances it was simply not viable to import grain at anything other than the preferential rates. The 'standard' rates were punitive and commercially unviable: 95 Euros compared with the 12 Euro preferential rate.

33. The quality of grain varies from year to year and is measured as a density figure. A good crop may be 80kg/litre; a less good crop perhaps 70kg/litre. This is the practical reason for having a tolerance in shipping grain. The vessels used to ship grain have multiple hold dividers that can be moved to ensure there is no slack space at the top of the hold so the cargo does not shift in rough seas and risk tipping or capsizing the vessel. For safety reasons the cargo must properly fill the hold and the volume necessary to achieve this will depend on the quality of the grain and result in a full cargo varying somewhat in weight. In the industry, they understand tolerance as the necessary flexibility to deal with this issue. Therefore, when they saw the word tolerance on the licence they understood it in these terms. The company's approach, Mr Hopkinson explained, was to use the tolerance to ensure safe loading of the vessel and then to pay customs for the actual weight of grain shipped. It did not occur to them that the same rate would not apply to the whole shipment provided it was within the overall amount allowed under the licence.

34. As a company, they always did everything 'by the book' and they had had no discussion with HMRC in 30 years until this point. Being a small company in terms of people, they could not afford a compliance desk internally and so relied on the RPA for guidance. This they found to be of a varying quality due to a high turnover of staff at the RPA. The only guidance available was through telephone calls. The RPA would not put anything in writing.

35. HMRC's database must have recorded the amount of the licence and the actual amount of grain imported and the rate of duty paid on it at the time. Only three years later did the company receive a bill for the additional duty. If it was not clear to HMRC or the customs agent during that period that an error had been made, how could it be clear to the Appellant? Had the Appellant been told sooner of its error, it would have corrected it.

36. HMRC had cited various guidance documents but none of these had been offered to the Appellant by the RPA when it sought advice.

37. The Appellant found the additional duty of £51,000 to be quite punitive for 'an honest mistake', especially in such difficult economic times.

38. The Appellant's arguments can be summarised as follows:

(1) The licences were misleading as they incorrectly state the tolerance and make no reference to the 5% upper tolerance not being subject to the preferential rate;

(2) The authorities should have brought any irregularities to the Appellant's attention in a timely manner, not three years after the event.

(3) The Appellant sought guidance from the RPA and acted in reliance on it;

(4) The authorities should have informed the Appellant of its error at the first instance. Had they done so, the Appellant could have taken action to avoid incurring fines on the later imports.

HMRC's arguments

39. Mr Pritchard submitted that the licences issued were not misleading. They contained the information required by law. He directed me to the part of the licence headed 'Special conditions' and specifically to the words "preferential arrangements applicable to the quantity given in sections 17 and 18", which, he said, made clear that those arrangements did not apply to any amount in excess of that quantity.

40. Mr Pritchard also argued that even if the licence were misleading, that would not constitute grounds to appeal in this case, noting that the Appellant had not applied for repayment or remission under Article 239 of the Code.

41. On the three year delay, Mr Pritchard argued that Article 201(3) provided a three year limitation and that it could not therefore be argued that HMRC were not entitled to seek payment of customs duty in relation to imports made within that time.

42. Mr Pritchard directed me to a leaflet issued by the RPA entitled ET13, and specifically to a paragraph therein headed 'Tolerance' which reads:

> "There will be a 5% upper and lower tolerance. Therefore you can import 5% under or over the licence quantity. You must use at least 95% of the quantity issued on the licence for your security to be released. However, the reduction in duty will only apply to the quantity shown in sections 17 and 18 of the licence."

43. He submitted that the RPA's guidance was clear, contrary to the assertions of the Appellant. He also noted that whether or not customs duty was payable was a matter for EU law, not any guidance on it, and that this was in fact stated within the RPA guidance, which recommended seeking legal advice.

44. Mr Pritchard said that although the Appellant had apparently not been aware of leaflet ET13, it had been publically available at the relevant time (published May 2012) and may have assisted the Appellant had it sought it out. Mr Pritchard noted that the Appellant had not given any specific detail of the guidance it had been given and apparently relied on.

45. Mr Pritchard suggested that it was common sense that only the amount for which a licence had been applied for and granted could be imported at the preferential rate. He explained that if a licence enabled a trader to import 105% of the permitted quantity at the preferential tariff, it would not only call into question the amount a trader applied to import, but also mean that the total, finite quantity of goods that the Community had decided could be imported at a preferential rate could be exceeded. He submitted that leaving aside the clear provisions of EU law, these factors inevitably pointed to the conclusion that the preferential tariffs could only apply to the quantity of goods the importer had applied and been granted a licence for.

46. Finally, Mr Pritchard submitted that it was the Appellant's responsibility as a trader to know and comply with the law.

47. In response to the assertion that HMRC or the RPA should have informed the Appellant of its mistake sooner, Mr Pritchard stated that neither body were under a duty to inform the Appellant of its error, let alone to do so more quickly.

48. Mr Pritchard said that the Code placed the responsibility for trading on declarants, citing Article 199 as an example of this. He cited authority for customs agents assuming responsibility for the validity of documents presented to customs authorities, but said there was no precedent for the UK or one of its agencies to be obliged to advise traders that they are not complying with the applicable law. The only obligation was to generally make any efforts to recover customs debts within three years.

49. He concluded that the Appellant's grounds of appeal did not constitute any legal defence or other right not to pay the customs duty due. He also asserted that it was significant that the Appellant sought a direction to uphold the C18 relating to the oldest import and cancel all subsequent C18s. This, he said, implied that the Appellant conceded all of the C18s were payable.

Findings of fact and discussion

50. In all the relevant consignments, the Appellant exceeded the quantity for which the licence was granted by the amounts stated in the C18s and in all cases it declared and paid customs duty on the excess at the preferential rate. This is not in dispute.

51. The law states that the preferential rate does not apply to the % tolerance, but only to the amount for which the licence is applied and granted (i.e. the figure in sections 17 and 18).

52. The Appellant should have paid customs duty at the general rate on the excess over the specified quantity within the tolerance.

53. The Appellant under-declared and underpaid customs duty and the C18s issued by HMRC sought to correct this error.

54. The Appellant has not sought remittance of the import duties by HMRC under Article 239.

55. I found Mr Hopkinson to be honest and credible. It is clear to me that the Appellant made an honest mistake. I appreciate and am sympathetic to the challenges faced by businesses such as the Appellant.

56. However, I am constrained in making my decision in determining what is the correct legal position. Mr Hopkinson admitted that the Appellant had made a mistake in assuming the preferential rate applied to the 5% tolerance.

57. I cannot see that any of the Appellant's arguments alter the position at law.

58. If the licence were misleading, it remains the case that the law is clear and the Appellant made an error.

59. Whilst HMRC d not generally owe a duty to taxpayers to advise them as to their they are complying with relevant laws, a duty of care may arise in circumstances where a particular taxpayer asks HMRC for specific advice and HMRC goes on to give it. In this case no evidence has been put forward to establish that such a duty of care arose. The same applies in relation to the RPA; no evidence was given of specific advice given and relied upon.

60. I am sympathetic to Mr Hopkinson's sense of injustice at the length of time HMRC appeared to take to raise the issue with the Appellant and his regret that the Appellant was not given the opportunity to alter its behaviour after the first error. However, having heard from both parties, it seems clear that rather than wait three years before notifying the Appellant of the error, HMRC first became aware the most recent error (import dated 13 October 2015). It was in light of this discovery that it looked back at the Appellant's previous imports, limiting its review to those that were within the three year limitation period. In these circumstances HMRC could not have informed the Appellant sooner. Further, HMRC have a duty to correct an error when they become aware of it.

61. I therefore dismiss the appeal.

62. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 25 JULY 2017