TC01391

Appeal number: TC2010/06015

Excise Duty – drawback – whether two clear business days Notice of Intention were given – No – reasonableness of Commissioners' decision not to waive compliance with requirements – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

HAMMONDS OF KNUTSFORD PLC **Appellant**

- and -

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

TRIBUNAL: LADY MITTING (TRIBUNAL JUDGE)
MICHAEL ATKINSON (MEMBER)

Sitting in Manchester on 8 August 2011

Jonathan Hammond for the Appellant

Richard Chapman instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against two decisions of the Commissioners, both dated 28 April 2010, to refuse claims to draw back of Excise Duty on consignments of beer.

The Law

2. The relevant regulations of the Excise Goods (Drawback) Regulations 1995 provide as follows:

"7 General conditions

(1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the Act, every eligible claimant shall –

(a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and

(3)-(6) ….

8 Conditions to be complied with before export

(1) ….

(2) where an eligible claimant intends to claim drawback after export he shall, before export, comply with the following conditions-

(a) he shall deliver to the Commissioners at such address as they shall specify a notice in writing stating that he intends to claim drawback and containing the following particulars –

(i) his name and address,

(ii) the address of the premises at which the goods may be inspected prior to their export,

(iii) the description of the goods, including their nature and quantity,

(iv) the amount of duty paid in respect of the goods, and

(v) the address of the premises to which the goods are being exported;

(b) if the export is a dispatch he shall complete an accompanying document;

(c) if the export is not a dispatch he shall complete a single administrative document; and

(d) the goods and the accompanying document or single administrative document shall be available for inspection by the Commissioners, at any reasonable time, for not less than two clear business days following the day upon which the notice mentioned in sub-paragraph (a) above was received by the Commissioners.

The Facts

3. The facts were largely not in dispute and we find to be as follows. The Appellant is a wholesaler of beers; wines and spirits, trading within the UK market and abroad. When exporting, the company reclaims its Excise Duty under the Drawback system.

4. On Friday 19 March 2010, the Appellant faxed to the Commissioners two Notices of Intention to claim Excise Duty on consignments of beer destined for export from the premises of Safe Cellars Ltd., each claim being in the sum of £20,554.56. Copies of the Notices of Intention were sent by the Appellant to Safe Cellars Ltd. with the instruction 'Subject to the usual approvals these goods can be exported on **24 March 2010**.'

5. In fact, and unknown to the Appellant at the time, the two consignments were dispatched at 5.15pm and 5.25pm on Tuesday 23 March.

6. On 15 April 2010, the Appellant submitted two Claims for Drawback of Excise Duty referable to the two Notices of Intention. The dispatch and delivery documentation which accompanied the Drawback claims expressly referred to the date of dispatch as being 23 March. The claims for Drawback had been completed by the Appellant and dated 25 March 2010 and contained the declaration, inter alia, that the claims complied with the conditions laid down in the Regulations.

7. We accept and find as a fact that the Appellant was unaware at the time of dispatch that the consignments were dispatched on the 23 March. We also accept and find as a fact that the declarations in the Claims for Drawback were signed carelessly and without reference to the dispatch notes. There was not, in our view, an intention by the Appellant to deceive the Commissioners.

8. Although the Appellant's local compliance officer recommended that the claims be paid, it was the decision of Mrs Anne Fitzcharles of the National Drawback Centre that the claims be refused and her decision was notified to the Appellant by letters dated 28 April 2010. The letters were in similar terms and refused repayment on the basis that two clear business days notice had not been given, the date of the giving of notice being excluded, in accordance with the Regulations.

9. The Appellant then entered into correspondence with the Commissioners, seeking a reversal of the decision to refuse repayment. In its correspondence, the Appellant pleaded that it had given the instruction that the goods should not be dispatched until 24 March and that it was not its fault but that of Safe Cellars that the instruction had not been complied with. The point was also made that the consignments were dispatched after the close of business hours and that the Commissioners had had sufficient time to inspect the goods if they had wished to but in fact they made no attempt to inspect either before or after dispatch. The Commissioners refused to reverse their rejection.

Submissions

10. Mr Hammond submitted that the purpose of this particular Regulation was to allow the Commissioners the opportunity to inspect the goods before export. The mere fact here that as it turned out insufficient notice had been given did not prevent

the Commissioners from inspecting because they had made no attempt to inspect on either day. The purpose of the Regulation therefore had not been breached. He stressed that the error was not the fault of his company and that Safe Cellars had acted in breach of a clear instruction given to them. Mr Hammond also highlighted previous occasions when the company had technically been in breach but payment had on each of these occasions been allowed. One such occasion was in March 2010 and this particular occasion was in fact specifically referred to also by the review officer. We were not given very much information about what had happened but it appears that there had been a clerical error by the warehouse (not the Appellant) and the Commissioners accepted this and allowed repayment. The letter from the Commissioners however which had been dated 3 March 2010 specifically set out the two day rule and concluded that 'Any further claims submitted with incorrect information will be rejected.' We were also referred to an occasion in July 2009 when an inexperienced employee made an identical mistake in a number of claims which resulted in numerous dispatches not meeting the two day requirement. Again these claims were all refused initially but for reasons which are not apparent on the face of the correspondence were then allowed by letter dated 5 February 2010.

11. Mr Chapman's submission was that two clear business days notice has to be given and it was not. There had therefore been a clear breach of the Regulations. Given that breach, the decision of the Commissioners to refuse payment of the Excise Duty was not unreasonable. We were referred by Mr Chapman to the following cases:

The Vintry v HMRC E00969

Charles Cooper Ltd v HMRC E01168

Pierhead Purchasing Ltd v HMRC TC00433

Conclusions

12. Regulations 7 and 8 allow the Commissioners a degree of discretion. Regulation 7 (1)(a) requires every eligible claimant to meet certain stipulated conditions 'save as the Commissioners may otherwise allow…' The Commissioners are therefore empowered to waive a breach and permit payment, as indeed they had done at least twice before in respect of this particular Appellant. In this case however, the Commissioners declined to exercise their discretion to permit payment and refused the payment as the Appellant had failed to meet one of the stipulated conditions. The jurisdiction of the tribunal requires us to examine the reasonableness of that decision. In so doing we have to be satisfied that the Commissioners took into account all relevant matters and did not consider any that were not relevant; that they did not make any error of law and that the decision was not one which no reasonable body of Commissioners could have reached.

13. Regulation 8(2)(d) requires the goods to be available for inspection 'for not less than two clear business days following the day upon which the notice…' was given. By cross reference to the Bills of Exchange Act 1882, a business day is defined, by way of exclusion, as any day other than Saturdays, Sundays or Bank Holidays. We accept Mr Chapman's contention that a 'clear business day' is one complete 24 hour period. What is being designated is the nature of the day, not a limitation on the hours within the day. The fact that dispatch took place after Safe Cellars' normal business

hours is immaterial. The regulatory requirement, as notice was given on Friday 19, was that the goods should not be removed until Wednesday 24 March. This indeed was recognised by the Appellant in its letter of instruction to Safe Cellars. There was therefore a clear breach of that condition.

14. The Commissioners had a discretion to waive that breach but decided not to. Mrs Fitzcharles in her unchallenged witness statement, sets out the matters which she took into consideration. She clearly considered first that there had been a breach. She did not suggest or imply or believe that the Appellant was complicit in the early dispatch. She took into account the written instruction given by the Appellant but considered this to be a commercial issue between the two companies and that the Commissioners should not be expected to repay duty for what had been a commercial error by Safe Cellars. She did make reference to the signed declaration which was in fact an incorrect declaration as the conditions had not been fully complied with. She also considered the most recent incident where despite a breach, based on a clerical error, repayment had been made. All these factors are relevant. We were not alerted to any other factors which ought to have been taken into account which were not. Further, Mrs Fitzcharles was correct in her interpretation of the Regulations and made no error in law. Given all of these factors, the Appellant has not succeeded in satisfying us that the decision to refuse repayment was one which could not reasonably have been arrived at and we find that the decision not to waive non compliance was not unreasonable. The appeal is therefore dismissed.

15. As we set out in paragraph 12, Tribunal jurisdiction is limited to considering the reasonableness of the Commissioners' decision. Once we have found the decision meets the test we have to apply and is not one which no reasonable body of Commissioners could have reached, it is not open to us to allow the appeal or to substitute our own view for that of the Commissioners. We should say that we have every sympathy with the Appellant company and the fact that we have had to reach this decision does not mean that we have any doubts as to the Company's integrity. As we stated previously, we fully accept that the consignments were dispatched in breach of an express instruction by the Appellant and without the Appellant's knowledge. It may well be that this is a matter which can be resolved between the two companies.

16. 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: 11 August 2011