TC02165

Appeal number: LON/2008/7166

Customs Duty - Import of product from Liechtenstein - Supplier's invoice indicated that the nil preferential rate of duty was appropriate to the goods - Invoice constituting the "proof of origin" - Failure by the forwarding agent to indicate on the "simplified" electronic filing details submitted to HMRC that preference was available such that duty was in fact paid - four month period for which the proof of origin remained valid - whether the entry of the goods for customs purposes (albeit incorrectly) enabled it to be said that the proof of origin had been submitted within the four-month period - Whether a repayment claim could be made under Article 236 of the Customs Code, or whether the liberty of HMRC to amend incorrect declarations under Article 78, possibly coupled with a claim under Article 236 nevertheless enabled the Appellant to recover duty unnecessarily paid in the periods more than four months prior to the actual late submission of the proofs of origin - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SKILLBOND DIRECT LIMITED **Appellant**

-and-

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

Tribunal: JUDGE HOWARD NOWLAN
HARVEY ADAMS

Sitting in public at 45 Bedford Square in London on 24 July 2012

Paul Ellis of Paul Ellis Consultancy Ltd on behalf of the Appellant

Mark Fell, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was an unfortunate case where the Appellant had unwittingly borne Customs Duty on the regular import of various dental products supplied by a Liechtenstein company called Ivoclar Vivadent AG ("Ivoclar"), notwithstanding that by submitting a proof of origin, a preferential (in fact "nil") rate of duty was applicable. The Customs entries made by the Appellant's freight forwarder had failed to indicate the existence of proofs of origin that were in fact shown on the Ivoclar invoices, and the result was that duty was paid. When the errors came to light and the original paper invoices with the proofs of origin were then submitted to HMRC, approximately 18 months after the first relevant importations, HMRC refunded the wrongly-paid duty that had been paid in the four months prior to presentation of the various proofs of origin. HMRC refused, however, to refund the duty paid prior to the four month cut-off point because Article 22 of the Decision of the EEA Joint Committee No 38/2003 ("the Joint Committee Decision") generally provided that proofs of origin remained valid only for a four-month period from their date of issue.

2. Our decision is that HMRC's refusal to refund the duty paid prior to the four-month period preceding the actual presentation of the proofs of origin was correct, and that the Articles providing for repayment claims, and for HMRC to make retrospective alterations to customs declarations initially made wrongly on the basis of incomplete or incorrect information did not enable the Appellant to sustain its repayment claim.

The Background

The various methods of certifying "proofs of origin"

3. It will be clearest to summarise first the way in which the customs authority of the supplier (i.e. in fact this was the customs authority of Switzerland since that authority acts in this respect on behalf of Liechtenstein) or the supplier can provide "proofs of origin" that are required to substantiate claims for preferential rates of duty when such preferential rates are applicable for importations into EU member states of certain products.

4. We were told that such "proofs of origin" could be provided either in a form, known as an EUR 1 form, issued by the appropriate (i.e. in this case, the Swiss) customs authority, or exporters could "self-certify" on their invoices on exportations of product with a value of up to Euro 6000, or finally "authorised exporters" could self-certify on invoices, regardless of the value of their exports.

5. We were told that Ivoclar was authorised to "self-certify", regardless of the value of supplies made. We were also told that in the appropriate manner all of Ivoclar's invoices duly indicated that the product being supplied to the Appellant carried "proof of origin" certificates indicating Liechtenstein, such that the goods could be imported into the United Kingdom without payment of duty, on the making of the appropriate submission of the proofs of origin.

The normal rules for the issue of "proofs of origin", and for the validity of such "proofs", once issued

6. It is next important to understand the slightly curious rules governing when proofs of origin "may" be issued, and once issued, the periods for which they generally remain valid.

7. In the normal case, proofs of origin will be issued at the point of the supply of the goods, often thus being certified on the supplier's invoices, and in one of the permissible ways they will be submitted or presented to the customs authority of the importer at the point of entry of the goods. Accordingly in the normal case, neither of the curious time periods to which we now turn will be particularly relevant.

8. Article 20.6. of the Joint Committee Decision provided in relation to invoice declarations that:

> *"6. An invoice declaration may be made out by the exporter when the products to which it relates are exported, or after exportation on condition that it is presented in the importing country no longer than two years after the importation of the products to which it relates."*

9. Article 22 of the Joint Committee Decision dealt with the period for which proofs of origin, once issued, remained valid in the following terms:

> *1. A proof of origin shall be valid for four months from the date of issue in the exporting country, and must be submitted within the said period to the customs authorities of the importing countries.*
> *2. Proofs of origin which are submitted to the customs authorities of the importing country after the final date for presentation specified in paragraph 1 may be accepted for the purpose of applying preferential treatment, where the failure to submit these documents by the final date set is due to exceptional circumstances.*
> *3. In other cases of belated presentation, the customs authorities of the importing country may accept proofs of origin where the products have been submitted before the said final date."*

10. Ignoring at this stage the meaning of the very obscure Article 22.3 and just addressing the relationship between the rules summarised in paragraphs 8 and 9 above, the position is as follows. Article 20.6 makes it clear that while it will normally be the case that proofs of origin will be issued when products are exported, it is still possible for them to be issued after export, provided that they are submitted to the authorities in the importing country within 24 months of importation into that country. In order, however, to be valid when submitted, the importer must still demonstrate either that the proof of origin was issued within the 4 months prior to it being presented, or (again ignoring at this point Article 22.3) at some later point where Article 22.2 can be relied upon and exceptional circumstances can be shown for the late presentation. Thus, if the exporter provides a proof of origin to the importer or the importer's freight forwarder, say, 15 months after export, and there were no exceptional circumstances, then for that proof to be valid, and for the resultant preferential rate of duty to be applicable, the proof of origin must be submitted by

month 19. Were the proof of origin only issued in month 23, then it would have to be filed within the one remaining month in order for that late issue to be valid.

The Customs Freight SimplifiedProcedure ("CFSP")

11. The final introductory point to mention is that the CFSP enables imported product to be entered for customs purposes in a simplified manner that initially involves just an electronic, non-paper, filing. The relevant documents, including the proof of origin, in whatever form it was issued, all need to be retained in case HMRC request to see the original documentation, but in the normal run of events, the CFSP is effected electronically.

12. So far as is material for the purposes of this Appeal, the most important entry to be made in relation to proof of origin when effecting an electronic filing under the CFSP is to insert code 300, when a proof of origin is held, such that a preferential rate of duty is claimed. When no proof of origin is held or asserted to be held, then the code 100 rather than 300 is filed. When code 300 is filed, a further detailed entry must be made to indicate the type of proof of origin. We were told that in this case where the proofs of origin had been self-certified on the invoices by the authorised exporter, the appropriate code to input in the electronic filing would be code 9001.

13. We should finally mention that regardless of the filings in relation to proof of origin, the electronic filing did still indicate where the goods had come from. Thus the initials LI or CH would indicate that the goods had come from Liechtenstein, or that the Swiss authorities would have dealt with the exportation.

The material facts in this case

14. We understand that on numerous occasions between March 2007 and May 2008, the Appellant's freight forwarder had dealt with the importation of dental products from Liechtenstein for the Appellant. Ivoclar had indicated on every invoice that proof of origin in Liechtenstein was asserted. Rather than enter Code 300, however, the freight forwarder had entered the goods and entered Code 100, and naturally having indicated that no proof of origin was being asserted, no entry was made in the details box that might have included the appropriate number in this case, namely 9001. All the filings did however indicate that the goods came either from Switzerland or Liechtenstein, there being no material difference in relation to which country was mentioned in that regard.

15. At some time in May 2008, HMRC must have queried with the Appellant whether or not proof of origin was being asserted, and the Appellant then realised the mistake that had been made. Very shortly after that, all the original proofs of origin were submitted in paper form, and a claim was made for the repayment of duty that need not have been paid since March 2007. In fact two claims were made, the first relating to those importations in the year 2008, and the second relating to those between March and December 2007, but there is no practical relevance to the distinction between the two claims.

16. HMRC immediately corrected the erroneous filings for those importations that had been made where the proofs of origin submitted in paper form in May 2008 had

been submitted within the four-month period of their date of issue. Those proofs of origin were accepted to be valid, having been submitted within the four-month period provided by Article 22.1 of the Joint Committee Decision. Other claims for refunds were refused, however, on the basis that although no duty would have been owed had valid proofs of origin been submitted in due time, this had not been done so that the duty paid had been rightly paid (albeit in a sense unnecessarily paid) so that it was not open to HMRC to refund the relevant duty.

17. The Appellant appealed against the relevant refusal (in fact the partial refusal in relation to the first claim, and the total refusal of the second claim relating to the yet earlier wrong filings), and against the Review Decision confirming the refusals.

The relevant law

18. In paragraphs 8 and 9 above, we have already quoted two of the provisions that are material to this Appeal, Article 22 of the Joint Committee Decision quoted in paragraph 9 above being the single most material provision.

19. Two other provisions are however material, the first of which is Article 236 of the Customs Code which provides as follows:

> *"1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).*
>
> *No repayment … shall be granted when the facts which led to the repayment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned."*

20. The other material provision is Article 78 of the Customs Code which provides as follows:

> *"1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.*
>
> *2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods.*
>
> *3. 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."*

The contentions on behalf of the Appellant

21. It was contended on behalf of the Appellant that:

- by virtue of the facts that the goods had been entered for customs purposes; that there did exist at all the times of importation (for the various consignments) valid proofs of origin and that HMRC could have called for those, had they wished to do so, all the proofs of origin had thereby been "submitted" at importation within the meaning of Article 22.1 of the Joint Committee Decision;
- Article 236 of the Customs Code provided that the wrongly-paid duty should be refunded; and that
- Article 78 provided that in rectifying the erroneously completed original declarations, the customs authorities should *"take the measures necessary to regularize the situation, taking account of the new information available to them"*, such that again (possibly then in conjunction with Article 236), the wrongly-paid duty should be refunded.

22. We should mention that no contention was advanced to the effect that there were exceptional circumstances to justify late submission of the proofs of origin within the meaning of Article 22.2. We will also consider the possible application of the obscure provision contained in Article 22.3, though it is fair to say that the Appellant was placing little emphasis on any contention that that provision applied in this case.

The contentions on behalf of the Respondents

23. Our decision largely reflects the legal submissions made on behalf of the Respondents, so that it is superfluous to summarise those contentions.

Our decision

24. The fundamental rule relevant to the decision in this case is the rule contained in Article 22.1 of the Joint Committee Decision to the effect that proofs of origin remain valid in the normal case for just four months, and must be submitted to the customs authorities of the importing country within that period.

25. The Appellant's contention mentioned in the first bullet-point of paragraph 21 above was the subject of a recent Tribunal decision (John Walters QC and Sheila Cheesman) in the case of *DSG Retail Limited v. HMRC* [2010] UKFTT 413 (TC). In that case it was decided that those facts did not result in the proofs having been "submitted" in the requisite sense. We agree.

26. When the content of the electronic filing suggested that no preferential treatment was being claimed on the basis of "origin" of the supplies, and no reference whatsoever was made in the filing to the existence of the proofs of origin, we fail to see that there can be any credible argument that the proofs of origin had been submitted in any sense. They admittedly existed and they could have been called for, though since the filing indicated that none were being proffered in any way, it is difficult to see why HMRC should have called for documents that the filing suggested

did not exist. We agree with the decision in the *DSG Retail* case and with the Respondents' contention in this case that some positive act to submit the proofs of origin had to have occurred for it to be possible to contend that the proofs had been submitted. The fact that the filings indicated that the goods had come from either Switzerland or Liechtenstein was insufficient to amount to a submission of the proofs of origin because there could be several reasons why goods originating in those countries might not be accompanied (or possibly accompanied at the outset) by valid proofs of origin.

27. We admit that it is slightly curious that there is a 24-month period, following the exportation of goods, for the issue of a proof of origin, but nevertheless that proofs (whenever issued during that window-period) generally remain valid for only a four-month period. That however is clearly the correct reconciliation between these two time periods. In paragraph 10 above we summarised the way in which it appeared that these two periods interacted, and we now expressly confirm that that summary is the correct reconciliation.

28. Since no contention was advanced under Article 22.2, and we will deal with any very limited contention advanced under Article 22.3 below, we now turn to the contentions based on Article 236 of the Customs Code and Article 78.

29. Addressing the terms of Article 236 in isolation, the fatal flaw in the Appellant's claim is that when the duty was paid, it cannot be said that it was *"not legally owed"*. Since no proof of origin had then been submitted, i.e. when the duty was in fact paid, the duty was in fact owing. In other words, until the proof of origin has been submitted, the duty was owing and the amount of duty in fact paid was entered in the accounts in conformity with Article 220(2). Accordingly, addressing Article 236 in isolation, the Appellant's claim for repayment must be dismissed.

30. Turning now to the contention under Article 78, this provides that where the customs authorities amend the customs declaration after release of the goods in order to rectify a wrong declaration, the authorities shall *"take the measures necessary to regularize the situation, taking account of the new information available to them."* The Respondents' contention as to the effect of this provision is that it means that the goods should thereafter be treated as having been entered as goods potentially qualifying for preference on the basis that they were sourced in Liechtenstein, but Article 78 does not have the effect of also deeming a valid proof of origin to have been submitted. When no proof had been submitted for many months after the original wrong entry of the goods, and when the proofs applicable to all importations made before January 2008 had ceased to be valid under Article 22.1, because of the expiry of the four-month period, *"regularising the position"* under Article 78 could extend to changing the designation of goods, where appropriate, but it could not deem an invalid proof of origin to become valid, or modify the validity period specified in Article 22.1.

31. The effect of the Respondents' contention is neatly illustrated by the immediate treatment that they conceded in relation to those imports made in the final four-month period immediately before all the invoices and their proofs of origin had in fact been furnished to HMRC in May or June 2008. As regards importations made in that last four-month period, since at the time of importation and entry, no proofs of origin had

been submitted, the duty paid was properly paid, and considering Article 236 in isolation, the duty had almost certainly been legally owed at that time, precluding a repayment even of those amounts of duty. Once the wrong entry was corrected, however, following the submission of the paper proofs of origin, and once the goods had been shown potentially to qualify for preference, preference then became due because as regards those goods imported in the last four-month period before May 2008, valid proofs of entry had been submitted. That then meant that the duty is now known not to have been legally owed when it was paid (even though on the original facts it was correctly thought to have been duty legally owed), because the goods are now classified as being eligible for preference and valid proofs of origin have been submitted in respect of them.

32. That, however, is the crucial distinction that undermines the claim for all importations made before January 2008 because although it is now known that the goods potentially qualified for preference, nothing can now change the fact that one of the key requirements for establishing the entitlement to preference, the submission of a valid proof of evidence, cannot now be supplied or deemed to have been supplied.

33. We should add that Article 890 of the Implementing Regulation, which supplements Articles 78 and 236, further confirmed that when repayment requests were made and were accompanied by certificates of origin, repayments should be granted, but Article 890 very specifically required that *"all the conditions relating to acceptance of the said documents [must have been] fulfilled"*. In other words it confirmed that repayment requests had to be accompanied by valid certificates, and not by certificates rendered invalid by virtue of not having been submitted within the four-month period.

34. We should refer finally to the obscurely worded Article 22.3, already quoted in paragraph 9 above. The intent of this sub-Article is difficult to discern. The reference in it to *"belated presentation"* is clearly a reference to a submission of the proof of evidence after the final date, i.e. after the expiry of the four-month period from the issue of the proof. Equally it is clear that the word *"presentation"* has the same meaning as the word *"submission"*. This appears immediately to create the rather extraordinary notion that the customs authorities may accept proofs of origin where the case is one of *"belated presentation"* (i.e. seemingly presentation or submission of a proof of origin **after** the expiry of the four-month period) but then only where *"the products have been submitted before the said final date"*. In other words the provision appears to contemplate the two irreconcilable notions that the proofs of origin have **not** been submitted or presented within the four-month period, but that they have been submitted **before** the said final date.

35. We note that the Tribunal in the *DSG Retail* case struggled and accorded some meaning to Article 22.3. During our hearing, the Respondents advanced a coherent suggestion as to the type of situation to which Article 22.3 might apply, but that was certainly of no relevance to the issue before us, and it appeared to bear little relationship to the actual wording of Article 22.3 either. We can avoid advancing any interpretation of the relevant wording, first because the Appellant barely advanced any contention on the basis of Article 22.3, and secondly because none seems remotely tenable in the present case in any event. For the contention would have to assert that *"the products had been submitted before the expiry of the four-month*

period from the issue of the proofs of origin", and when the goods had been entered in a manner that indicated that duty was owing, and no suggestion of any submission of a proof of origin was being advanced, we fail to see that that wording about *"submission before the final date"* could have been satisfied.

36. This raises the final point that the Respondents stressed in this case, and that also strongly influenced the Tribunal in the *DSG Retail* case. This is that on the overall structure of the customs legislation, it certainly appears that the fundamental rule is that in order to establish entitlement to preference, proofs of origin have to be submitted, and in order to be effective those proofs must be valid which means that they must (exceptional circumstances, and Article 22.3 apart) be submitted within four months of issue. Any contentions that repayment claims can be made after that period, or that the effect of reclassifications made under Article 78 should enable the wrongly-paid tax to be reclaimed when more than four months have elapsed since the issue of the proofs, would completely undermine what appears to be the fundamental rule, namely the four-month period for the validity of the proofs. We agree with the Respondents and the earlier Tribunal that any such contention runs counter to what appears to be the fundamental rule, and is unlikely to be correct. Both as a matter of wording, therefore, and in accordance with the overall structure of the legislation, we consider that the Appellant's Appeal must be dismissed.

Right of Appeal

37. This document contains full findings of fact and the reasons for our 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.

HOWARD NOWLAN
TRIBUNAL JUDGE

RELEASE DATE: 1 August 2012