TC03355

Appeal number: TC/2013/02593

Customs Duty – inward processing relief – failure to lodge C99 bill of discharge within time limit – whether Appellant obviously negligent – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAT-COMM BROADCAST LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
MRS GILL HUNTER

Sitting in public at Bedford Square on 4 February 2014

Mr Keith Lardner, Finance Director of the Appellant company for the Appellant

Sadiya Choudhury of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This matter concerns the Appellant company's appeal against HMRC's post-clearance demand note dated 17 January 2013 by which HMRC refused the Appellant's claim for Inward Processing Relief. The amount of tax in issue is £46,163.79, comprising customs duty, import VAT and interest. The decision to issue the post clearance demand note was reviewed by HMRC on 6 March 2013, but the decision was not revised.

2. The Appellant filed its Notice of Appeal to the Tribunal on 10 April 2013. Its grounds of appeal were set out in the letter to HMRC dated 17 January 2013 in which it had asked for HMRC's decision of the same date to be reviewed. In this letter it is stated that (1) the shipping agent Allport Limited was the shipping agent of the Appellant's Australian customer Network Seven; (2) the Appellant did not initially realise that it had to complete the Form C99 but was alerted to the need to do so by HMRC's letter dated 30 November 2012; (3) the Appellant did not have the information required to complete Form C99 and so it had contacted Allport Limited by e mail repeatedly between 3rd and 17th December, requesting the information but receiving no reply. The Appellant company was then closed for Christmas and New Year but attempted to make contact with Allport Limited again when it re-opened on 3 January 2013, finally receiving the information it needed on 4 January. The Form C99 was submitted to NIRU on that date; (4) the demand for payment is disproportionate in these circumstances.

The Facts

3. Sat-Comm Broadcast Limited is a business which equips outside broadcast vehicles. As Mr Lardner explained to the Tribunal, customers send the company their "empty shell" vehicles, which the company equips as mini TV studios and returns to them. Mr Lardner also explained that as the industry tends to use Mercedes vans for this purpose, most of the vehicles received by the company are imported from within the EC so that Inward Processing Relief is not relevant. However, in the transaction with which we are concerned in this case, the vans were imported from Australia, fitted out and re-exported to Australia.

4. The vans were imported under the customs code for Inward Processing relief. This has the effect of suspending the imposition of customs duties and import VAT while the imported goods are being processed, provided that certain procedural requirements are met. These requirements are that the goods must be re-exported within 6 months of import (the "throughput period") and that a bill of discharge known as Form C99 must be submitted to the National Import Relief Unit ("NIRU") no later than 30 days after the end of the throughput period.

5. The Tribunal heard that this was the third time that the Appellant had claimed Inward processing Relief. On the first occasion, the procedure had not been complied with correctly but HMRC cancelled the post clearance demand. On that occasion HMRC had written to the Appellant warning that in future non-compliance would be

viewed as "obvious negligence". On the second occasion, the procedure had been complied with correctly. In this third case, the vehicles were exported within the six month throughput period but there was a delay in sending the Form C99 to NIRU so that HMRC decided to issue the post clearance demand on the basis that the Appellant was obviously negligent.

6. It was agreed by the parties that the vehicles were imported into the UK by a shipping agent called Allport Limited on 30 May 2012 and exported by the same agent on 30 November 2012. In the throughput period they were equipped by Sat-Comm Broadcast Limited. It was also agreed that Form C99 should have been submitted to NIRU by 30 December 2012 but the Appellant did not send that form until 4 January 2013. It was received by NIRU on 7 January 2013.

7. HMRC's decision that the Appellant had been "obviously negligent" in failing to submit Form C99 on time was clearly based on an understanding that Allport Limited was Sat-Comm Broadcast Limited's own shipping agent. This is referred to in the decision review letter of 6 March. HMRC's Statement of Case for the Tribunal describes Allport Limited as the Appellant's agent at paragraphs 2 and 12. Ms Choudhury also referred to the assumed relationship of principal and agent between the Appellant and Allport Limited in her skeleton argument for the Tribunal. However, the grounds of appeal referred to at [2] above clearly state, and the Tribunal again heard from Mr Lardner in his submissions, that Allport Limited was in fact the agent of Network Seven, the Australian television company which was Sat-Comm Broadcast Limited's customer. In answer to a question from Ms Choudhury, Mr Lardner replied that his company had not paid Allport Limited for its services and that he assumed Network Seven had done so. We return to the relevance of this misunderstanding between the parties in our conclusions below.

The Law

8. Ms Choudhury provided the Tribunal with a helpful summary of the law in her skeleton argument. We are satisfied that it is correct and, as the legal framework was not in dispute between the parties, we gratefully reproduce it here:

> "Applicable Law
>
> 8. IP Suspension is governed by European Council Regulation 2913/92/EEC ("the Customs Code") and European Commission Regulation 2454/93 ("the Implementing Regulation"). The relevant provisions are at Tabs 1 and 2 of the Authorities Bundle and some of these are set out below for ease of reference.
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> 9. Article 4 of the Customs Code states:
>
> "(9) 'Customs debt' means the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force.
>
> …

(13) 'Supervision by the customs authorities' means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.

…

(16) 'Customs procedure' means:

(d) inward processing

(17) 'Customs declaration' means the act whereby a person indicates in the prescribed form and manner a wish to place goods under a given customs procedure.

(18) 'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

(21) 'Holder of the procedure' means the person on whose behalf the customs declaration was made or the person to whom the rights and obligations of the abovementioned person in respect of a customs procedure have been transferred."

10. Article 204 of the Customs Code imposes a customs debt in certain circumstances:

"1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, …

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure."

11. Article 199(1) of the Implementing Regulation provides that:

"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."

12. Article 521 of the Implementing Regulation imposes an obligation to provide a bill of discharge, i.e. Form C99 within a specified time:

"1. At the latest upon expiry of the period for discharge, irrespective of whether aggregation in accordance with Article 118(2), second subparagraph, of the Code is used or not:

− in the case of inward processing (suspension system) or processing under customs control, the bill of discharge shall be supplied to the supervising office within 30 days;…

Where special circumstances so warrant, the customs authorities may extend the period even if it has expired."

13. Article 859 of the Implementing Regulation sets out failures that have "no significant effect" on the operation of temporary storage or the customs procedure:

"The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204 (1) of the Code, provided:

- they do not constitute an attempt to remove the goods unlawfully from customs supervision,

- they do not imply obvious negligence on the part of the person concerned, and

- all the formalities necessary to regularize the situation of the goods are subsequently carried out:…

9. in the framework of inward processing and processing under customs control, exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time;"

14. Finally, Article 860 of the Implementing Regulation provides that:

"The customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled."

Submissions

9. Ms Choudhury helpfully summarised the issue between the parties in this appeal as follows:

It is common ground between the parties that the failure to submit the Form C99 on time means that the Appellant has failed to meet one of

> the conditions for claiming IP Suspension so that a customs debt is incurred under Article 204(1) of the Customs Code. However, the customs debt is not incurred under this Article if it can be established that the failure did not have a significant effect on the operation of the customs procedure. The failure will not have a significant effect if the conditions in Article 859 of the Implementing Regulation are satisfied. The only condition in Article 859 that is in issue in this appeal is whether the Appellant was "obviously negligent" in failing to provide the Form C99 on time. The Appellant contends that it was not obviously negligent whereas HMRC contends that it was".

10. Ms Choudhury submitted that "obvious negligence" must be interpreted in the light of the decision in *Terex Equipment Ltd v HMRC* [2010] STC 575, in which the ECJ held at [42] that inward processing relief is an "*exceptional measure*" and that the "*beneficiaries of that regime are required to comply strictly with the obligation therefrom…the consequences of non-compliance with their obligations must be strictly interpreted*". She also referred us to C-48/98 *Firma Söhl & Söhlke* at [56] to [60] in which the CJEU held that the term should be interpreted in the same way whenever it occurred in the legislation and that, in order to determine whether there is obvious negligence, account must be taken of (i) the complexity of the provisions, the non-compliance with which has resulted in the customs debt being incurred, (ii) the professional experience of the trader, and (iii) the care taken by the trader.

11. Ms Choudhury submitted that in relation to (i) the legislation requiring the lodging of the Form C99 is not complex and referred the Tribunal to two decisions of differently-constituted panels of the First-tier Tribunal which had reached that conclusion: *K C Engineering Limited v HMRC* [2012] UKFTT 440 (TC) at [63] and *Euro Trading Limited v HMRC* [2011] UKFTT 56 (TC) at [39]. As to (ii), she referred us to the agreed fact that the Appellant company was an experienced importer, had used the Inward Processing Relief procedure on two previous occasions, and had been warned of the consequences of future non-compliance. As to (iii) HMRC's case was that the Appellant did not have appropriate procedures in place to ensure compliance, despite having been warned of the need for this. Having taken the view that Allport Limited was the Appellant's agent, Ms Choudhury submitted that any failure by an agent to supply the information required by the principal to complete the Form C99 was properly to be treated as negligence by the principal. She referred the Tribunal to a decision of the First-tier Tribunal in *Loudwater Trade and Finance Limited v HMRC* [2012] UKFTT 37 (TC), in which the agent's negligence had been attributed to the principal. In conclusion, she invited the Tribunal to find that the Appellant had been "obviously negligent" in failing to file the Form C99 on time and in these circumstances to dismiss the appeal.

12. The Appellant's grounds of appeal were as set out in at paragraph [2] above. Mr Lardner's submissions to the Tribunal were directed principally to the perceived unfairness of HMRC's approach in this case, but he also repeated that the shipping agent Allport Limited was the shipping agent of the Appellant's Australian customer Network Seven and that Sat-Comm Broadcast Limited had no on-going relationship with Allport Limited, which made it difficult to obtain the relevant information from

them. He explained that Sat-Comm Broadcast Limited had reviewed its procedures after the first importation and problem with Form C99 and these had worked well in relation to the second import where Inward Processing Relief had been claimed. In this third case, he said that the procedures had not been implemented initially because the Appellant had not thought that the responsibility for completing the form fell to it, but after it was advised differently by HMRC, it had taken steps to obtain the information from Allport Limited and submitted the form to HMRC as quickly as possible.

Conclusion

13. We have considered all the evidence and the submissions carefully in this case and concluded that we should allow the appeal for the following reasons.

14. We accept the Appellant's case that it submitted the Form C99 late in circumstances where it had to obtain the required information from a third party which was slow to provide it. The Appellant had played no part in the practical importation arrangements for the vehicles and it is difficult to see how it could have put in place prospective procedures to deal with the unusual situation in which it found itself (although it may be that it should now take steps to ensure that these circumstances are not replicated in the future).

15. If Allport Limited had been the Appellant's own agent then we agree with Ms Choudhury that the Appellant would have been negligent if it had not put in place procedures that allowed it to obtain the relevant information from its agent timeously. However, the circumstances of this case were that the Appellant needed to obtain the information from a third party with whom it had no business relationship and thus no control over the speed of its response to requests for information. We accept the Appellant's submission that it took all reasonable steps to obtain the relevant information from Allport Limited and that it submitted the information to HMRC expeditiously once the information was obtained. In these circumstances, we are not satisfied that there was "obvious negligence" by the Appellant in its late submission of the Form C99 and so we allow the appeal.

16. We note that HMRC was informed by the Appellant as long ago as January 2013 that Allport Limited was not the Appellant's agent, but it nevertheless appears to have misunderstood the factual background to this appeal in making its Statement of Case to the Tribunal. Ms Choudhury was unable to refer the Tribunal to any legal authority in which an Appellant had been found to be "obviously negligent" in circumstances where it had been unable to obtain information from a third party. For these reasons we reject HMRC's case.

17. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 20 February 2014