TC04503

Appeal number: TC/2014/01863

Customs Duty – imports of cotton goods classified as duty free "cotton combed or carded"– whether the goods should have been correctly classified as 'knitted or crocheted fabrics' subject to 8% customs duty – yes – whether Appellant entitled to a waiver of customs duty under Article 220(2)(b) of Regulation (EEC) No 2913/92 because of an error on the part of the customs authorities which could not reasonably have been detected by the Appellant – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

S I R FABRICS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SHAMEEM AKHTAR

Sitting in public at Priory Courts, Bull Street, Birmingham on 3 February 2015

Mr Russ Calcutt for the Appellant

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

DECISION

1. This is an appeal by S I R Fabrics ("the Appellant") against the review decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") dated 29 January 2014 to uphold the decision issued on 28 November 2013, to assess the Appellant for import duty by way of a post-clearance demand notice in the sum of £218,352.51.

The facts

2. The Appellant Company is based in Leicester, trading under the name of S R Textiles. Its notepaper describes the company as "knitters of quality fabrics and converters - specialists in single and double jersey fabrics, cotton Lycra and shinney". The company is run by its sole director Mr Salim Esmail. It imports its cotton fabric in rolls, mainly from India but also from Tanzania and other countries under Tariff Chapter 52, commodity code 5203 00 00 0, the Tariff description of which is "cotton, carded or combed". Import declarations are made on the company's behalf by its import agent Caltrans Logistics. The description given to the cotton material on import is "combed cotton interlock".

3. On 9 September 2013 HMRC's Officer Konteh conducted an assurance visit at the Appellant's premises at 57 Rowsley Street, Leicester. During the visit, Officer Konteh noted that the Appellant had been classifying imported rolls of cotton to commodity code 5203 00 00 0, which in her view was applicable to raw cotton, attracting a nil rate of customs duty, but not cotton fabric which attracted duty.

4. On 25 October 2013, Officer Konteh wrote to the Appellant to explain that in her view, imports of cotton fabric had been misclassified and should have been classified as "knitted or crocheted fabrics" under Tariff Chapter 60 and commodity code 6004 14 10 00 9, and subject to 8% customs duty. She gave notice to the Appellant that she would be raising a post clearance demand note in the sum of £218,352.51.

5. Mr Esmail on behalf of the Appellant responded on 19 November 2013, indicating he stood by the classification as entered of commodity code 5203 00 00 0, but was willing to submit to a formal tariff classification ruling on the product. He described the goods "Cotton 100% Combed, un-dyed, bleached and unfinished". He said that the Company had used the code classification:

> "openly, without any recourse for many years, furthermore we know that over the years HMRC has had ample opportunity to query our coding against the documents provided under the "Routing" selected at the time of import. This has always proven to be correct by either your port operatives or the Manchester hub, so why after such a long period of time, is HMRC now all of a sudden wanting to change the code?"

6. The Appellant also said that the duty demand included goods from Tanzania which attracted a preferential duty free status and this had not been taken into account.

7. On 27 November 2013 Officer Konteh upheld her classification decision in writing. She explained that the Tariff description for commodity code 5203 00 00 0 is "cotton, carded or combed". In the Harmonised Commodity Description and Coding System, Explanatory Notes, published by the World Customs Organisation, Tariff Heading 5203 covers "cotton (including garnetted stock and other cotton waste) which has been carded or combed, whether or not further prepared for spinning". Tariff Headings 5208 to 5212 inclusive covered different types of "woven" cotton fabric but not knitted fabric. In her opinion, the type of knitted fabric the Company imports was more properly classified under commodity code 6004 10 00 91 - "knitted or crocheted fabrics of a width exceeding 30cm, containing by weight 5% or more of elastomeric yarn, of wool, cotton or artificial fibres". Officer Konteh's letter was accompanied by a duty demand note in the sum of £218,352.51.

8. On 13 January 2014 the reviewing Officer was provided with a representative samples of the imported products, Mr Esmail saying in his covering letter,

> "We enclose herewith a sample of the cloth we believe to be free of duty under the respective Customs Tariff heading used."

He went on to say that the declared classification heading had been taken from HMRC's Integrated Tariff. He said that over the many years of trading:

> "they had received various visits from the HMRC officers checking vat and other aspects of our business. We have never to our knowledge failed any inspection and always complied 100%. Again we have no physical evidence but are certain you as HMRC will be able to obtain any information from your records held."

9. The reviewing Officer examined the samples provided and concluded that Officer Konteh had correctly established that the products fell under Chapter 60 which covers "Knitted or crocheted fabrics". However, as he could detect no presence of elastomeric yarn in the fabrics in question, he concluded that the fabric was a weft knit fabric. As a result, he concluded that the appropriate heading for the products examined was 6006, as "other knitted or crocheted fabric" (of cotton, bleached or unbleached), the full code for which is 6006 21 00 00.

10. On 29 January 2014 the review Officer notified the Appellant of his decision, identifying the new full code that applied. He also advised the Appellant that the revised code attracted the same amount of customs duty of 8% and VAT, which meant that the amount due as notified earlier had not changed.

11. The Appellant lodged its Notice of Appeal on 2 April 2014.

The Relevant Legislation

12. *The Tariff — General Interpretative Rules* (GIRs)

The Combined Nomenclature Regulation (Reg (EEC) No.2658/87 of 23 July 1987 published in Official Journal L256 dated 7 September 1987) provides the legal basis for the Community's Tariff. An annual amendment to this Regulation contains the Combined Nomenclature, which is reproduced in the UK Tariff. The Combined Nomenclature provides a systematic classification for all goods in international trade and is designed to ensure, with the aid of the six General Rules of Interpretation (GIRS) that any product falls to be classified in one place and one place only.

Volume 2 Part 1 Section 3 of the UK Tariff explains the legal procedure for tariff classification. The first step is to establish the correct 4-digit Heading number.

GIR 1 states, inter alia, that classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes. It also provides that, where appropriate, classification shall be determined according to the provisions of Rules 2, 3, 4 and 5, provided the headings or notes do not otherwise require. GIR 6 extends the scope of the other rules to sub-heading level.

GIR 2 is in two parts:

(1) extends the scope of any heading to cover an incomplete or unfinished article provided that, as presented, it has the essential character of the complete or finished article.

(2) covers mixtures or combinations of materials or substances.

GIR 3 provides for the classification of goods which, *prima facie*, fall to be classified under two or more headings. The rule is in three parts, which apply sequentially:

(1) directs that the heading which provides the most specific description is to take precedence over one which provides only a general description.

(2) states that "mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character insofar as this criterion is applicable".

(3) states that "when goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

GIR 4 states that "goods that cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin".

GIR 5 allows for cases, boxes and packing materials to be classified together with the goods they contain.

GIR 6 extends the scope of the other rules to sub-heading level.

There are also explanatory notes to the harmonised system (HSENS) and to the combined nomenclature (CNENS). Although the HSENS are not legally binding they have consistently been held by the European Court of Justice to be highly persuasive and in its judgment *Develop Dr Eisbein GmbH & Co v Hamptzollant Stuggardt-West* (Case C-35/93) stated that these notes:

> "constitute an important means of ensuring the uniform application of the common customs tariff by the Customs Authorities of the Member States and, as such, may be considered a valid aid to the interpretation of the tariff."

Reference to the HSENS and CNENS is made at paragraph 3.3 of Volume 2 Part 1 of the UK Tariff.

13. *Council Regulation (EEC) No 2913/92 — The Community Customs Code*

Article 78 states:

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. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.

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 regularise the situation, taking account of the new information available to them.

Article 201 states:

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

(a) the release for free circulation of goods liable to import duties; or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

Article 217 states:

1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called the "amount of duty" shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

Article 220 states:

Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in 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 (subsequent entry in the accounts). The time limit may be extended in accordance with Article 219.

Article 220 (b) states:

Except in the cases referred to in the second and third subparagraphs of Article 217 (1), subsequent entry in the accounts shall not occur where

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

Article 221 states:

1. 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.

2. ..

3. 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. This period shall be suspended from the time an appeal within the meaning of Article 234 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.

14. *European Commission Regulation 2454/93 — The Implementing Regulation*

Article 199 states:

> 1. Without prejudice to the possible application of penal provisions, the lodging of a declaration signed by the declarant or his representative with a customs office or a transit declaration lodged using electronic data-processing techniques shall render the declarant or his representative responsible under the provisions in force for the accuracy of the information given in the declaration, the authenticity of the documents presented, and compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.

The Appellant's Case

15. The Appellant's case, as set out in the Notice of Appeal, is as follows:

> "A. HMRC has been fully aware of our heading for over 5 years and have accepted the entries as being correct by not bringing the "error" to our attention earlier. They have failed in their duty and have compounded the so-called "felony" to put the blame solely on us which is both unfair/unjust we feel. We also feel that HMRC should have requested samples of our cloth for analysis and issue a branch ruling years ago rather than 2014.
>
> B. The demand includes goods from Tanzania which attracts "Duty Free" status with EUR form which we hold. £27,122 duty is not applicable and should never have been included.
>
> C. We cannot reclaim duty on past goods from our customers at such a late stage. We cannot pay such an amount.

16. At the hearing, Mr Calcutt for the Appellant said that they did not dispute HMRC's classification of the imported goods.

17. A sample of the goods was produced and appeared to be machined thin woven undyed cotton cloth or fabric.

18. Mr Calcutt said that his company, Caltrans Logistics, deals in all aspects of shipping, freight forwarding, and transport of goods, providing and handling customs clearance packages for both import and exports. He said that in order to determine the correct tariff for imported goods he would either rely on the sellers UK agent or refer to HMRC's 'Integrated Tariff for the United Kingdom', which sets out the duties and measures affecting the import, export and transit of goods to and from the UK. The Tariff is published as a whole every year, is updated monthly and is based on EU legislation. It provides essential information including duty rates and descriptions on numerous Commodity codes.

19. Importers have to complete a 'Single Administrative Document' (SAD), or form C88 using the UK Trade Tariff which is available online. Sometimes it would be necessary to contact the Tariff Classification Service (TCS) in Southend on Sea.

20. Mr Calcutt said that if he went onto the online system and entered "cotton combed" this brought up "Chapter 52 Cotton", classification Code 52 01, and "cotton carded or combed", was coded as 52 03. He agreed that a sample of the goods had not been sent to the TCS and that the Appellant had relied on the online classification. Once a code is selected the system selects a Route by which the goods may be processed through customs. In the Appellant's case this was Route 6, that is paperless processing. However over the years there had been numerous checks at the port, sometimes as frequent as three or four a year and occasionally customs would require a sample of the goods to be X-rayed. He acknowledged however that neither the Appellant nor to his knowledge HMRC, had any record of this. He could not provide dates or supporting documentary evidence other than copy Movement Certificates which clearly described the goods as "combed interlocked fabrics"

21. He said that HMRC organise checks every three years or so when C88 import and VAT records are inspected. His client had been importing the goods under code 52 03 for almost ten years without any difficulty or questions from HMRC. The importer is only allowed a brief description when completing form C88, whereas HMRC have the right to view all documentation including bills of lading, invoices, descriptions given in the Movement Certificates and an actual inspection at the point of import.

22. Mr Callcutt said that a VAT inspection had taken place in 2009, and HMRC's records showed there had been "no cause for concern" and the Appellant's record keeping had been described as "good".

23. He said that HMRC's decision was unfair. In his submission the Appellant was entitled to a waiver of the customs debt under Article 220(b). The Appellant was a relatively small company and would not be able to afford the assessed back duty.

The Respondent's Case

24. HMRC contend that it is the legal responsibility of the Appellant to classify goods correctly on importation. In cases of doubt, the Appellant is able to seek non-binding advice from the TCS or obtain a binding decision by way of a Binding Tariff Information ("BTI") decision.

25. The "selection routes" for import control purposes, are set out at Volume 3 Part 5 of the UK Tariff. Route 1 clearance requires that the supporting documents be examined and Route 2 that the goods be examined. The Appellant's goods were cleared by way of Route 6 which provides for automatic clearance of the goods for "paperless entries". This is a concession to importers under which they are not required to submit a paper entry with supporting paperwork at the time of import but are required to retain such paperwork if required for post clearance checks. It is not an indication that the Commissioners are satisfied with the information supplied and the Commissioners had not erred in following this procedure.

26. In the course of a post clearance check, the Commissioners identified that an error in classification had arisen. The Appellant had classified the imported fabric

under heading 52 03 as "cotton, carded or combed". This was not appropriate because the General HSEN for Chapter 52 states that the Chapter covers:

> "cotton fibres at various stages of their conversion from raw material to woven fabrics"

and the HSEN to heading 52 03 states that the heading covers:

> "Cotton (including garneted stock and other cotton waste) which has been carded or combed, whether or not further prepared for spinning.
>
> The main purpose of carding is to disentangle the cotton fibres, lay them more or less parallel, and entirely or largely free them from any extraneous matter they may still contain. The fibres are then in the form of wide webs (laps) which are generally condensed into slivers. These slivers may or not be combed before converted into rovings.
>
> Combing, which is chiefly practiced for the spinning of long staple cotton, removes the last traces of extraneous matter clinging to the fibres and eliminates the shorter fibres in the form of combing waste; only the longer fibres, lying parallel, remain."

27. The HSENS confirm that Chapter 52 and heading 52 03 cannot include knitted fabrics which have their own Chapter 60 "Knitted or crocheted fabrics".

28. The imported fabric should have been properly classified under Chapter 60, which covers knitted or crocheted fabrics. The Commissioners unit of expertise, the TCS, had examined a sample and determined that the fabric appeared to be a weft knit fabric produced on a knitting machine. This classification was in fact supported by the description that appears on all the Appellant's import documentation, which describes the fabric as "cotton interlock".

29. The appropriate heading for knitted or crocheted fabrics is 6006. The full code applicable is 6006 21 00 00 for cotton, unbleached or undyed, and as it also attracts import duty at 8%, the amount of customs duty and VAT outstanding remained as notified.

30. Waiver of customs duty under Article 220(2)(b) of Regulation (EEC) No 2913/92 is permitted provided:

> "the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration".

31. Guidance issued by the European Commission indicates that any "error" on the part of the authorities should be an "active" error, such as a written response to a specific request for advice. As regards the nature of the error, the question that is to be determined in each case is whether the rules concerned are complex.

32. Notwithstanding this, the Guidance accepts that some "passive" acts can be deemed errors within the meaning of this Article, "for example where the customs authorities have raised no objection concerning the tariff classification of goods imported in large numbers over a long period of time, even though a comparison between the tariff heading declared and the explicit description of the goods in accordance with the indications of the nomenclature would have disclosed in incorrect tariff classification".

33. The expressions "long period of time", "large numbers" and "objections" must be defined in each individual case - *Hewlett Packard* Case Ref C250/91.

34. The tests for the conditions that need to be fulfilled for recovery to be permitted were summarised in the case of *Illumitornica* [2002] ECR 1¬10433 as follows:

> i. the non-collection of the duties must have been due to an error made by the competent authorities themselves;
>
> ii. the error they made must be such that the person competent, acting in good faith, could not reasonably have been able to detect it, in spite of professional experience and exercise of due care by him; and
>
> iii. he must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned

35. A trader who has not consulted the relevant issues of the Official Journal to ascertain the provision of EU law applicable to his transaction will be considered negligent and will not comply with the conditions — *Binder v Hauptzollamt Bad Reichanall* Case Ref 161/88.

36. HMRC submits that in this case the goods have not been imported in large numbers over a long period of time. The goods in question are not complex as they could have been classified with little difficulty simply by following the normal tariff classification. The Appellant did not at any time check the tariff classification of its product with the Commissioners, nor did it obtain any binding rulings from them. Consequently, there is no error on the part of the Commissioners within the meaning of Article 220(2)(b).

37. The different elements of Article 220(2)(b) were summarised by the First-tier Tribunal in *Beko Plc v HMRC* [2014] UKFTT 060 (TC) as follows:

> 43. There are a number of elements of Article 220(2)(b) that fall to be considered:
>
> 1. Was there an error?
>
> 2. Was the error made by the "customs authorities"?
>
> 3. Was the failure to enter in the accounts the amount of duty legally owed a result of the error?
>
> 4. If (1), (2) and (3) are established:
>
> a) Is it the case that the error could not reasonably have been detected by the person liable for payment?

b) Did that person act in good faith?

c) Did that person comply with all the provisions laid down by the legislation in force as regards the customs declaration?

38. HMRC argue that taxpayers are not entitled to rely upon HMRC to highlight an error by that taxpayer. Indeed, taxpayers are not even entitled to rely upon general advice by HMRC. In *R (on the application of Corlteck Ltd) v HMRC* 120091 STC 1681, Sales J held at paragraphs 24 to 31 (albeit obiter*)* that no legitimate expectation could arise where general advice is given by HMRC in circumstances in which it is not reasonable to treat it as a source of binding rulings.

39. Similarly, in *Commissioners ex p Faroe Seafood Co Ltd and another*: *R v Customs and Excise Commissioners ex p Smith,* joined cases C-153/94 and C-204/94, the ECJ said as follows at paragraph 91 in respect of Article 220(2)(b):

> "... the legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities 'themselves' which created the basis for those expectations, Thus only errors attributable to acts of the Competent authorities confer entitlement to the waiver of post-clearance recovery of customs duties ..."

40. The inspection undertaken by HMRC in 2009 was a VAT inspection. HMRC did not inspect the Appellant's import documentation and records and had no need or duty to do so.

41. HMRC argue that in any event the First-tier Tribunal does not have a general supervisory jurisdiction. This was made clear by Warren J and Judge Bishopp in both *HMRC v Abdul Noor* [2013] UKUT 71 (TCC), [2013] STC 998 at paragraph 25 and *HMRC v Hok Ltd* [2012] UKUT 363 (TCC), [2013] STC 225 at paragraph 36.

42. The Appellant therefore has no grounds for requesting a waiver of its customs debt and is not entitled to such a waiver.

43. The Appellant has asserted that the duty demand included goods from Tanzania which attract a preferential rate of duty. That may be the case, but the Appellant is required to submit valid EUR1 certificates in respect of goods subject to a preferential rate of duty. The forms are valid for ten months but the Appellant has failed to submit them and they are now out of time. The Appellant has not made a formal remission claim and so there is not in any event a decision to refuse remission which can be appealed.

Conclusion

44. The correct classification for the imported materials is 6006 21 00 00 ("other knitted or crocheted fabrics", "of cotton: unbleached or bleached"). The materials clearly do not fall under heading 52 03, because this only covers cotton which has not yet been spun. The materials have been machine knitted and as evident from the sample provided at the hearing was as the HMRC assurance Officer said, "a weft knit fabric produced on a knitting machine". This is further supported by the description of

"cotton interlock" that appears on nearly all of the Appellant's import entries. "Interlock" is a type of weft-knitted fabric with interlocking stitches.

45. Classification 6006 21 00 00 is appropriate because the material is knitted cotton unbleached or undyed. Mr Calcutt on behalf of the Appellant confirmed that the Appellant now accepts that classification.

46. The Appellant, or the Appellant's agent, made an error when completing form C88.

47. The process by which cotton is made into fabric can be summarized as follows. Raw cotton goes into a carding machine which cleans the fibres and makes them lie side by side. The combing action of the carding machine finishes the job of cleaning and straightening the fibres, and makes them into a soft, untwisted rope called a sliver. Spinning devices take fibres from the sliver and rotate and twist the fibres into a cotton yarn. Looms weave the yarns into fabrics interlacing the length-wise yarns. The woven fabric is then sent to a finishing plant where it is bleached, pre-shrunk, dyed, printed and given a special finish before being made into clothing or products. The material imported by the Appellant, which had begun as combed and carded cotton, had also been spun and woven on machines and had reached the stage of woven fabric which could be delivered on rolls. The goods being imported by the Appellant were therefore neither raw cotton nor cotton combed and carded

48. It should have been obvious that an error had been made by the Appellant when entering the description of the goods on submission of form C88. To that extent it cannot be said that the Appellant complied with all the provisions laid down by the legislation in force as regards submission of the customs declaration.

49. There is no evidence that the customs authorities were provided with a sample of the imported goods, or asked to provide a classification. There was therefore no error by the customs authorities, or in any event no error that could not have reasonably been detected by the Appellant, either initially or by its agent over the period that the goods were imported.

50. The Appellant therefore has no grounds for requesting a waiver of its customs debt.

51. In those circumstances we have to conclude that the post-clearance demand note in the sum of £218,352.51 was correctly issued. The appeal is accordingly dismissed.

52. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 25 June 2015