



Neutral Citation: [2024] UKFTT 001099 (TC)

Case Number: TC09373

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/03135

Customs Duty and Import VAT – whether customs clearance agent was an indirect representative of the importer and so jointly and severally liable for the unpaid taxes in accordance with Articles 77(3) and 84 of the Union Customs Code – Council Regulation (EU) No. 952/2013.

Heard on: 11-12 January 2024
Judgment date: 2 December 2024

Before

**JUDGE VIMAL TILAKAPALA
MEMBER SONIA GABLE**

Between

IT WAY TRANSGROUP CLEARANCE LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Leslie Allen of counsel

For the Respondents: Ms Charlotte Brown of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against an assessment for Customs Duty and Import VAT in the sum of £36,929.28 (the “Assessment”).
2. The Assessment relates to a shipment of face masks (the “Goods”) imported by a trader, Fowlers Finance Ltd (the “Trader”), into the UK on which “Disaster Relief” from Customs Duties and Import VAT had been incorrectly claimed.
3. The Appellant is a customs clearance agent and has been assessed jointly and severally with the Trader for the unpaid Customs Duty and Import VAT. This is because it declared itself as acting as the Trader’s “indirect agent” rather than “direct agent” and was consequently treated as the customs declarant in respect of the importation.
4. The Appellant contends that it was not an indirect agent as it subsequently signed terms with the Trader under which both parties agreed that it was to be a direct agent. HMRC contend that this is not the case as there is no evidence of such an agreement.
5. This appeal was heard over two days. We were provided with a hearing bundle of 1493 pages, an authorities bundle and skeleton arguments from each party. We heard evidence from Mr Haoxiang Du, a director of the Appellant and from HMRC officer Kevin Gardner.

BACKGROUND AND RELEVANT FACTS

6. The following is a summary of the material background facts.
7. Disaster Relief was introduced by the EU in April 2020 as a result of the Covid 19 pandemic. The relief extended to Customs Duty and import VAT on protective equipment and other relevant medical devices or equipment imported by state or approved charitable or philanthropic organisations for the purpose of combatting the COVID-19 outbreak.
8. To be eligible for Disaster Relief, importers required authorisation from the National Imports Relief Unit (“NIRU”) and evidence demonstrating that the end user of the goods was one of the eligible organisations. Evidence was also required to allow HMRC to trace the goods from their initial import to their ultimate end use by one of the relevant organisations.
9. The Goods were imported into the UK on 3 June 2020.
10. Following a post clearance check, HMRC discovered irregularities and suspected that Disaster Relief had been applied for in circumstances where the Goods were not in fact eligible for relief.
11. On 22 October 2020 a “Right To Be Heard Letter” (a “RTBH Letter”) was issued to the Trader, this explained that HMRC intended to send a post clearance demand for £36,929.28 to the Trader and gave it a chance to question that decision and to provide extra information to HMRC that might change the amounts potentially to be charged.
12. On 18 March 2021 having not heard from the Trader, HMRC (Officer Gardner) issued a decision letter to it explaining that a post clearance demand for £36,929.28 would shortly be sent. The letter also offered the opportunity for an independent review.
13. On 22 March 2021 a post clearance demand note (a “C18”) was issued to the Trader and to the Appellant. This was sent by HM Officer Katrina May of the C18 Team.
14. On 26 March 2021 the Appellant sent an email to the NPCC HMRC email address – the address specified in the post clearance demand as the address for the accounting team for remittances. In its email the Appellant stated that it was the customs clearance agent who accepted the instruction from the Trader to clear the Goods and asked the NPCC team to

“refer the charges to the company [the Trader]” and to let the Appellant know if more information was needed. Various documents were attached to the email including: (i) an email chain between the Appellant and Trader confirming the Trader’s “EORI” number and delivery address of the Goods, and (ii) emails in which the Appellant asked the Trader to confirm the details which had not been provided to HMRC and which led to the C18 Demand. This email was forwarded to Officer Gardner on 31 March 2020 by the National Post/Processing Clearance House (the “NPCC Hub”).

15. A letter from the Appellant, dated 1 April 2021 was received by Officer Gardner (“Letter 1”). The letter was posted via special delivery with the reference VE 0191 0560 9 GB and addressed to Office Gardner at City Centre House, Birmingham B2 4AD. Although the letter was addressed to Officer Gardner at City Centre House, it appeared that it had been posted to a different HMRC office – postcode BX9 1LE, and then scanned and emailed by the NPCC Hub to Officer Gardner on 9 April 2020.

16. Letter 1 was sent in response to the receipt of the C18 demand of 22 March 2021. Its content is set out below:

“I am writing to appeal the inclusion of our Company in this C18, In my opinion we should have used Direct representation.

We received a shipment of PPE in the height of the Pandemic, we contacted the Importer directly and spoke with Chris from Fowlers finance. He confirmed via email that the Value of the goods and description were correct. Normally we would email a direct representation letter ask them to print, sign and return.

As people were working from home we were advised that this could not be done. We received an email from Chris as attached, 17.55 on the 2nd June 2020 advising of the EORI and that the goods should have no VAT. My colleague confirmed with him that they were to use the goods in the fight against the Pandemic.

With these written instructions, it is my belief that we did as much as we could in the Pandemic to secure direct representation, but we did not enter it into the C88 Correctly.

If after the event the client is not able to prove his email of the 2nd of June then we agree he must be liable for Duty and Vat, we just do not agree that we should be jointly liable as we have clear written direct instructions.” [sic]

17. Letter 1 also enclosed copies of the following documents: the air waybill, the commercial invoice, the “C88 form” on which the Appellant had declared itself as the Trader’s “indirect representative” by inputting Code 3 in Box 14 of the form, the March 2021 C18 demand, and e-mail correspondence between the Appellant and Trader including an email dated 2 June 2020 from the Trader confirming that “as per government guidelines” there was no VAT due on PPE and emails correcting an initially incorrect EORI number.

18. The hard copy of Letter 1 was destroyed as per HMRC’s protocol at the time and a soft copy returned to the Appellant in an email dated 12 July 2021 at the Appellant’s request – as to which see further [26], [28] and [29] below.

19. On 13 April 2021 Officer Gardner received an internal email from the City Centre House Post Room (the “CCH Post Room”) in Birmingham (the office where he was based) stating that he had post. After asking several questions about the letter (as to which see further [29] below), Officer Gardner concluded that the letter in question was a hard copy of the Letter 1 which had been scanned to him on 9 April 2021. On that basis he did not ask for

the letter to be sent to him. It was subsequently discovered that this was not that letter but a second letter (“Letter 2”) – as to which see further [29] below.

20. On 20 April 2021 Officer Gardner issued withdrawal letters to the Trader and Appellant withdrawing the March 2020 C18 demand. This was because he realised that he had omitted to send an RTBH letter and a decision letter to the Appellant and had sent them (on 22 October 2020 and 18 March 2021 respectively) only to the Trader.

21. New RTBH letters to both the Trader and the Appellant were accordingly issued on 19 April 2021, notifying the recipients that a new decision letter would subsequently be issued followed by a new C18 demand if no additional information was received.

22. On 22 April 2021 Mr Du emailed Officer Gardner stating that he believed the new letter referred to the same case in respect of which he had already submitted his appeal letter. He asked whether on that basis it was still necessary to respond.

23. On 17 May 2021 Officer Gardner spoke to Mr Du, who explained that he would not be sending any further information as he had already sent in all information when requesting a review of the withdrawn decision, Officer Gardner explained that a new request for a review would be needed once the decision had been reissued.

24. On 20 May 2021 the decision was reissued.

25. A series of emails between Mr Du and Officer Gardner followed, with Officer Gardner explaining the review and appeal process to Mr Du and Mr Du emphasising that the Appellant had already requested a review in relation to the withdrawn decision. During the course of this correspondence Mr Du notified Officer Gardner that he had sent two letters to HMRC – both by special delivery: (a) a letter to City Centre House B2 4AD with tracking reference VE 0191 0560 9GB, and (b) a letter to the C18 Team at BX9 1GZ with tracking reference VE 0191 0559 0GB.

26. The Appellant asked for both letters to be returned to it. HMRC complied with this request. A soft copy of Letter 1 was sent by email to the Appellant on 12 July 2021 – as the hard copy had been destroyed as per HMRC’s protocol at the time. A hard copy of the unopened letter was returned to the Appellant by post on or around 30 June 2021.

27. The Appellant lodged its appeal on 17 August 2021.

Witness Evidence

Mr Du

28. The following is a summary of our findings from Mr Du’s written and oral witness evidence:

(1) Mr Du has been a director of the Appellant since 2018.

(2) On 2 June 2020 the Appellant received the Goods by air transport and at 17.43 on that day an IT Way import clerk emailed “Chris” at Fowlers Finance to confirm that the Trader was happy with the import documents and to provide its EORI number. Chris replied quickly providing the EORI number and confirming that no VAT or Customs Duty needed to be paid under then current Government PPE regulations.

(3) Mr Du explained that “they” (the Appellant) checked the 20 May 2020 guidance on importing medical supplies and protective equipment headed “*Pay no import duty and VAT on medical supplies and protective equipment brought in due to coronavirus*”. He thought that it was clear under this guidance that the Goods were not subject to duty or VAT.

- (4) On 3 June 2020 the IT Way import clerk emailed Chris to verify the EORI number as the number provided was incorrect. This was clarified and the Trader's trading address was also clarified.
- (5) Having discussed the position with the import clerk Mr Du called the Trader to check on the usage of the masks and was satisfied with the position after hearing that the masks were to be given away to customers and employees of a used car dealer. On this basis he gave the import clerk permission to claim relief for the importation.
- (6) The import clerk submitted the information electronically to HMRC using the Disaster Relief code and the Goods were cleared on 3 June 2020 at 9.55.
- (7) He said that the customs entry form ("Form C88") submitted listed the Appellant as an "indirect representative" because the "direct representative" hard copy form was in the Appellant's office. This was inaccessible to the Appellant's employees as they were working from home because of the pandemic lock down.
- (8) On 15 June 2020 he became aware that the relevant government guidance had been updated on 4 June 2020 to include information about goods imported on behalf of an organisation and that the COVID-19 Commodity List CSV file had been updated.
- (9) He said that he then decided "to sign the 'direct representative' form" with the Trader "as he could not verify if the masks were for giving away or re-selling". Accordingly he posted a direct representative form to the Trader and "by the end of June 2020" had received a letter with a signed form by post (the "Direct Representation Letter"). He kept the signed letter on file. He was unable to amend the Form C88 as the Goods had already been customs cleared.
- (10) He subsequently received the March 2021 C18 Demand (reference C18322192) dated 22 March 2021.
- (11) On 26 March 2021 he emailed the Trader to ask it to provide the requested information to HMRC. No reply was received.
- (12) As he was at that time dealing with a similar case, with another HMRC officer (Catherine Stevenson) he was aware that he should have received a RTBH letter and decision letter before receiving the March 2021 C18 Demand. He thought that these might have been lost in the post.
- (13) He said that he wrote two letters, each posted by special delivery on 1 April 2020.
- (a) The first was addressed to Kevin Gardner at postcode B2 4AD. This was sent to Officer Gardner as he was the decision maker and this was the address set out in the C18322192 to which further information should be sent. It was posted with Tracking No VE 01910559 0GB. This letter enclosed copies of the importation documents and, critically, contained the original copy of the direct representation letter – which Mr Du expected to result in Mr Gardner reconsidering his decision.
- (b) The second was addressed to the National Clearance Hub C18 team. This letter was addressed to the C18 team at postcode BX9 1GZ. It was posted with Tracking No VE 01910560 9GB. This letter explained that the Appellant had not received the right to be heard letter or decision letter – and enclosed the importation documents. This letter did not however include a copy of the direct representation letter received from the Trader. He said that this letter was to show the C18 team that the Appellant was dealing with the issue.

(14) He received the new RTBH letter dated 19 April 2021 followed by the withdrawal letter withdrawing the earlier RTBH letter and earlier decision. There then followed a new decision letter.

(15) Mr Du had also entered into discussion with Officer Gardner in respect of the case, with Officer Gardner explaining that new representations needed to be made in respect of the new RTBH letter and the new decision.

(16) Mr Du asked for the return of the two letters that had been sent to HMRC. Officer Gardner arranged for an email copy of Letter 1 to be sent to Mr Du, explaining that the original had been destroyed. He also explained that Letter 2 had not been read and would be returned.

(17) The second C18 demand was received on 9 August 2021 and Mr Du appealed to the Tribunal on 17 August 2021.

(18) During lockdown, the Appellant dealt generally with its customers by phone and email. He however, dealt with matters exclusively by phone, this was in contrast the junior employees.

(19) He became involved in the matter as the situation was out of the ordinary – because duty was unpaid.

(20) He said that he had decided to change the status from indirect to direct when he realised that duty was likely to be payable. This was when he became aware that HMRC guidance had changed.

(21) He sent a direct representation form/letter directly to the Trader – asking for it to be signed and returned to him. The letter was sent by recorded delivery. He received back the signed Direct Representation Letter. He did not keep a copy of the letter that he sent to the Trader as “there was no need to”, and in any event he had received the signed Direct Representation Letter back.

(22) He sent the original copy of the Direct Representation Letter to Officer Gardner as he realised that providing it was “so important”. That was also why he sent it by special delivery. He could not explain why he did not retain a copy of the Direct Representation Letter nor why there was no specific reference to it in either Letter 1 or Letter 2.

Keven Gardner

29. The following is a summary of our findings from HMRC Officer Gardner’s written and oral witness evidence:

(1) Officer Gardner has been an HMRC officer since 20 March 2017 and at the time of these events was a compliance officer in the Individual and Small Business Compliance Team, specialising in Customs and International Trade.

(2) On 10 Sept 2020 he began enquiries into the Trader as part of post customs clearance assurance checks. The Trader had been identified as claiming Disaster Relief without having NIRU authorisation. The purpose of his enquiries was to determine whether the Trader met the qualifying conditions and to let it know that NIRU authorisation was necessary.

(3) Between 23 September and 16 October 2021 he contacted the Trader several times by telephone and email but did not get any engagement from it.

(4) Accordingly he sent a RTBH letter to the Trader on 22 October 2020. As the Trader made no contact, he issued a decision letter on 18 March 2021.

(5) His decision that the goods did not qualify for Disaster Relief meant that customs duty and import VAT was due. Accordingly on 22 March 2021 a Post Customs Clearance Demand Note - C18322192 (the C18) for payment of £12,822 of Customs Duty and £36,929.28 Import VAT was issued to the Trader and the Appellant (the Customs Duty together with the Import VAT being the “Customs Debt”).

(6) On 31 March 2021 he received from the NPCC Hub a copy of Mr Du’s email (dated 26 March 2021) with attachments requesting that the charges should be referred to the Trader as the Appellant had done all that it could reasonably do. This did not, however, alter his view that the Appellant was to be held jointly and severally liable with the Trader.

(7) On 9 April 2021, he received a PDF document again from the NPCC Hub containing a scanned copy of a letter from the Appellant which was addressed to him at his HMRC address at City Centre House (CCH) (but which had been posted to an HMRC office in an envelope with postcode BX9 1GZ) and which contained various copy enclosures relating to the importation. This letter had been sent by special delivery with tracking number VE 0191 056 09 GB. He did not consider that there was anything in the letter or the enclosures that was sufficient to change his determination that the Appellant should be held jointly and severally liable with the Trader. The enclosures did not include the direct representation letter.

(8) On 13 April 2021 he received an internal email from the CCH Post Room informing him that post had been received in his name. He called and emailed the post room on the same day asking whether this was the same letter that he received an electronic copy of on 9 April, asking also whether it was dated 1/4/21 and whether it began with “I am writing to appeal the inclusion of our company in this C18”. He also asked whether it had the “ENVA reference of the electronic copy letter which he had “ENVA53209532”. He concluded by saying that if it was the same letter he did not need to see the paper copy. He received no response to this email and assumed on that basis that the letter was simply a hard copy of the earlier letter that had been scanned to him. He was not informed that this letter had been sent by special delivery.

(9) On or around 14 April 2021 he realised that he had made a procedural mistake in not sending a copy of the RTBH letter of October 2020 and decision letter of March 2021 to the Appellant. All that had been sent to the Appellant was the C18 demand for payment. Consequently he issued withdrawal letters and a new RTBH letter to both the Trader and the Appellant.

(10) He subsequently received an email from Mr Du (on 22 April 2022) and then had a call with Mr Du during which he explained his error and his decision to issue a new RTBH letter which was to be followed by a new decision, which meant that Mr Du would need to resubmit his review request. It was then that Mr Du indicated that he had already requested a review and would not do so again.

(11) On 20 May 2021 he issued a new decision letter – the contents of this (and the sums being claimed) being the same as those of the earlier withdrawn decision.

(12) There then followed further correspondence with Mr Du, with Mr Du again stating that he had already requested a review. It was only in June 2022 that Mr Du informed him that two separate letters had been sent to HMRC.

(13) A soft copy of Letter 1 together with its enclosures was emailed to the Appellant on 12 July 2021. The hard copy had been destroyed in accordance with HMRC’s policy at the time.

(14) He learnt that Letter 2 had been posted back to the Appellant, unopened on or shortly after 20 June 2021. This was a consequence of the email correspondence between him and the post room – and the assumption that the letter was a hard copy of the scanned copy he had already received.

(15) Mr Gardner explained how post received centrally generally went to the central scanning centre to be scanned to the relevant HMRC case worker. The originals were kept for a period of time and destroyed if not required or requested by the sender. He said that this was for GDPR reasons.

(16) He explained that another complication was that this case arose over the COVID lock down period. Post received at CCH would not physically be seen by the intended recipient – hence the reliance on post room emails. He added that a business case was needed in order to get physical mail rather than scanned copies. In addition, if a letter was addressed to a specific case worker then it was kept sealed. He added that he would also not be aware of whether a letter had been sent by special delivery or not and would have just been told “there is a letter for you, do you want to collect it?”.

(17) He acknowledged that if provided with a copy of a letter signed by the Trader confirming that the Appellant was its direct agent, he would have accepted that the Appellant was a direct agent notwithstanding it recording itself as indirect agent on the computerised form.

(18) Following his discussions with Mr Du he attempted to verify whether the Appellant usually used direct representation when making customs declarations, He reviewed two years: 2019 the year prior to importation of the Goods, and 2021 the year in which the goods were imported. These reports showed that in 2019 out of 26,326 lines of data only 93 lines used direct representation (0.35%) and in 2020 out of 36,857 lines of data 99 lines used direct representation (0.27%). Direct representation was therefore very much the exception with indirect representation being normal business practice. (The Appellant however explained at the hearing that for goods imported by a non-EU based company, a customs agent could only be an indirect agent, whereas with a UK company a customs agent could be either a direct or indirect agent. The statistics should therefore be seen in that context).

The letters

30. We found the following facts relating to the Letters from the evidence presented to us.

The Letter read by Officer Gardiner

31. This letter (Letter 1) did not contain any original documents (including the signed direct representation letter). It was also sent to the C18 team postcode rather than to Officer Gardner’s address at CCH. It was under the special delivery reference ascribed by Mr Du to the C18 team letter.

32. The content of the letter (as set out at [19] above) does not however match the description of the content of the C18 Letter given by Mr Du in his written statement.

The letter returned by HMRC to the Appellant

33. It is impossible to ascertain the content of the letter returned by HMRC to the Appellant (Letter 2). This is because it was not opened and the Appellant has not provided a copy of it. It is also because Mr Du has described this letter as the letter to Officer Gardner which conflicts with the content of the letter received earlier by Officer Gardner.

34. The inference that we draw from this is that either (i) Mr Du’s descriptions of the C18 letter and the letter to Officer Gardner were not correct, or (ii) that the “wrong” letter had been placed in the envelope but with the “right” enclosures.

The Grounds of Appeal

35. The Appellant’s single ground of appeal was expressed as follows:

“The decision maker didn’t follow the correct procedure cause our evidence lost and through the emails, this officer can’t not explain himself, the later email doesn’t match the previous” [sic]

36. This was clarified by Mr Allen in his skeleton argument and at the outset of the hearing as an appeal on the basis that the Appellant should be regarded as the direct rather than the indirect representative of the Trader for the purpose of the applicable Customs Duty and Import VAT provisions, and consequently should not be jointly and severally liable with the Trader for the Customs Debt.

37. Mr Allen confirmed that this was the sole ground of appeal and that the Appellant was not disputing the Classification of the Goods, or the fact that Customs Duty and Import VAT was payable as Disaster Relief did not apply as the Trader had failed to produce evidence to HMRC demonstrating eligibility for that relief.

Issues to Determine

38. The only issue for the Tribunal to determine is therefore whether the Appellant should be regarded as a direct or an indirect representative of the Trader and accordingly whether it should be jointly and severally liable for the Customs Debt.

Jurisdiction and the Burden of Proof

39. Under s.16 of the Finance Act 1994 (“FA 94”), the Appellant has a right to appeal to the Tribunal against “relevant decisions”.

40. “Relevant decisions” are defined in s.13A FA 94 and include, at s.13A(2)(a)(iii):

“any decision by HMRC, in relation to any customs duty ... as to ... (iii) the person liable in any case to pay any amount charged, or the amount of his liability ...”

41. HMRC’s decision to assess the Appellant for Customs Duty is, therefore, a relevant decision for the purposes of s.13A FA 94.

42. Under s.16(6) FA 94 the burden of proof lies with the Appellant to evidence their grounds of appeal. The standard of proof is the ordinary civil standard which is the balance of probabilities.

THE RELEVANT LEGISLATION

43. The UK ceased to be a member of the European Union on 31 January 2020. EU law continued however to apply in the UK, with necessary modifications, until 31 December 2020 (the end of the Implementation Period or “IP Completion Day”).

44. The Goods were imported prior to IP Completion Day and so EU Customs legislation applied in relation to their importation.

45. References to legislation are references to the legislation as it was in force at the relevant time.

Customs Duty

46. Under Articles 56 and 57 of Council Regulation (EU) No. 952/2013 (The Union Customs Code), goods are to be classified using the Common Customs Tariff of the European Union.

47. The Combined Nomenclature Regulation (EEC) No. 2658/87 of 23 July 1987 (Official Journal of the European Union L256 of 7.9.87), provides the legal basis for the Common Customs Tariff. An annual amendment to this regulation contains the Combined Nomenclature which is reproduced in the UK Tariff.

48. The Goods (being non-medical dust masks) were determined by HMRC to fall within Commodity Code 63079010 00, so attracting customs duty of 12.00%.

49. Liability for customs duty is provided for in Council Regulation (EU) No. 952/2013 (“Union Customs Code” or “UCC”) which had effect in the UK at the time of the relevant import in accordance with s.1A(3)(e) of the European Union (Withdrawal) Act 2018.

50. The following provisions of the UCC are relevant to this appeal:

Article 18 - Customs representative

1. Any person may appoint a customs representative.

Such representation may be either direct, in which case the customs representative shall act in the name of and on behalf of another person, or indirect, in which case the customs representative shall act in his or her own name but on behalf of another person.

2. A customs representative shall be established within the customs territory of the Union. Except where otherwise provided, that requirement shall be waived where the customs representative acts on behalf of persons who are not required to be established within the customs territory of the Union.

3. Member States may determine, in accordance with Union law, the conditions under which a customs representative may provide services in the Member State where he or she is established. However, without prejudice to the application of less stringent criteria by the Member State concerned, a customs representative who complies with the criteria laid down in points (a) to (d) of Article 39 shall be entitled to provide such services in a Member State other than the one where he or she is established.

4. Member States may apply the conditions determined in accordance with the first sentence of paragraph 3 to customs representatives not established within the customs territory of the Union.

Article 19 - Empowerment

1. When dealing with the customs authorities, a customs representative shall state that he or she is acting on behalf of the person represented and shall specify whether the representation is direct or indirect.

Persons who fail to state that they are acting as a customs representative or who state that they are acting as a customs representative without being empowered to do so shall be deemed to be acting in their own name and on their own behalf.

2. The customs authorities may require persons stating that they are acting as a customs representative to provide evidence of their empowerment by the person represented. In specific cases, the customs authorities shall not require such evidence to be provided.

3. The customs authorities shall not require a person acting as a customs representative, carrying out acts and formalities on a regular basis, to

produce on every occasion evidence of empowerment, provided that such person is in a position to produce such evidence on request by the customs authorities.

Article 77 - Release for free circulation and temporary admissions

1. A customs debt on imports shall be incurred through the placing of non-Union goods liable to import duty under either of the following customs procedures:

- (a) Release for free circulation, including under the end-use provisions

[...]

2. A customs debt shall be incurred at the time of acceptance of the customs declarations

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

Article 79 - Customs debt incurred through non-compliance

1. For goods liable to import duty, a customs debt on import shall be uncured through non-compliance with any of the following:

[...]

- (c) A condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of duty

2. The time at which the customs debt is incurred shall be either of the following:

- (a) The moment when the obligation the non-fulfilment of which gives rise to the customs debt is not met or ceases to be met
- (b) The moment when a customs declaration is accepted for the placing of goods under a customs procedure where it is established subsequently that a condition governing the placing of goods under that procedure or the granting of a duty exemption or a reduced rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

[...]

3. In cases referred to under point (c) of paragraph 1, the debtor shall be the person who is required to comply with the conditions governing the placing of goods under a customs procedure or the customs declaration of the goods placed under that customs procedure or the granting of a duty exemption or reduced rate of import duty by virtue of the end-use of the goods.

Where a customs declaration in respect of one of the customs procedures referred to in point (c) of paragraph 1 is drawn up, and any information required under the customs legislation relating to the conditions governing the placing of the goods under that customs procedure is given to the customs authorities, which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the customs declaration and who knew, or ought reasonably to have known, that such information was false shall also be a debtor.

Article 84 - Several debtors

Where several persons are liable for payment of the amount of import or export duty corresponding to one customs debt, they shall be jointly and severally liable for payment of that amount.

Import VAT

51. Pursuant to s.1(1)(c) and s.2(1)(c) of the Value Added Tax Act 1994 (“VATA”), import VAT was charged on the importation of goods into the UK from outside the EU Member States at a rate of 20% of the value of the goods.

52. S.21(2)(a) of VATA provides that the valuation of goods for import VAT purposes includes

“all taxes, duties and other charges levied...by reason of the importation... within the UK (except VAT)”

53. Additional import VAT is therefore due as a corollary of the additional customs duty.

54. S.16 VATA and s.6 of the Taxation (Cross-Border Trade) Act 2018 both provide that liability falls on both the declarant and the person on whose behalf the customs declaration is made

Disaster Relief

55. Disaster Relief applied to both Customs Duties and Import VAT.

56. In order to be eligible for “Disaster Relief”, the imported goods had to comply with the following criteria laid out in Article 1 of the Commission Decision (EU) 2020/491 (“the Commission Decision”):

Goods shall be admitted free of import duties within the meaning of Article 2(1)(a) of Regulation (EC) No 1186/2009 and exempted of value added tax (VAT) on the imports within the meaning of Article 2(1)(a) of Directive 2009/132/EC, where the following conditions are fulfilled:

(a) the goods are intended for one of the following uses:

- (i) distribution free of charge by the bodies and organisations referred to in point (c) to the persons affected by or at risk from COVID-19 or involved in combating the COVID-19 outbreak;
- (ii) being made available free of charge to the persons affected by or at risk from COVID-19 or involved in combating the COVID-19 outbreak while remaining the property of the bodies and organisations referred to in point (c);

(b) the goods satisfy the requirements laid down in Articles 75, 78, 79 and 80 of Regulation (EC) No 1186/2009 and Articles 52, 55, 56 and 57 of Directive 2009/132/EC;

(c) the goods are imported for release for free circulation by or on behalf of State organisations including State bodies, public bodies and other bodies governed by public law or by or on behalf of organisations approved by the competent authorities in the Member States.

57. Guidance published by HMRC on 31 March 2020 on the relief from import duty on medical supplies, equipment, and protective garments stated that NIRU authorisation was required and provided as follows:

“Goods can be imported on behalf of one of the organisations if they are to be donated or sold (directly or indirectly) to them. If you are importing goods on behalf of one of the organisations listed, you need to obtain

authorisation to claim this relief from NIRU. You can email niru@hmrc.gov.uk for an application form.

If you have imported the items on behalf of another organisation, to claim the relief as the importer you must hold clear evidence that demonstrates the end user of the goods was one of the eligible organisations. This evidence must also allow HMRC to trace the goods from their initial import through to their ultimate end use by one of these organisations.

Failure to provide this evidence, may result in you having to pay duty and import VAT.

[...]

How to claim relief on goods that have already been imported

If you imported goods on or after 30 January 2020 but did not claim relief, you may be eligible to reclaim payment of import duties.

You will need to request authorisation by contacting the National Import Relief Unit (NIRU) by emailing niru@hmrc.gov.uk for an application form.

Once you're authorised by NIRU, you can submit your claim to the National Duty Repayment Centre (NDRC) for repayment of overpaid customs duty and import VAT.

[...]”

58. Although the law relating to this appeal is extensive, there is no dispute as to its interpretation.

59. The following facts are common ground:

- (1) classification of the Goods;
- (2) that Customs Duty and Import VAT are payable (in the amounts claimed); and
- (3) that Disaster Relief is not available.

60. The single issue for determination is whether the Appellant was a direct representative or indirect representative of the Trader and so a declarant for the purposes of 77(3) and 84 of the UCC, s.16 VATA and s.6 TCBTA.

61. If it was, then the Appellant accepts that it is jointly and severally liable with the Trader for the Customs Debt. If it is not then HMRC accept that it will not be jointly and severally liable for that debt, which will be the sole liability of the Trader.

The Submissions

62. Mr Allen saw this as a simple case hinging on the evidence of whether the Appellant was the Trader's direct representative.

63. He said that the Appellant had told HMRC consistently that it was instructed as a direct representative and had sought to provide direct evidence of that status. The critical item of evidence (i.e. the Direct Representation Letter) was sent to HMRC by special delivery as an enclosure to a letter which HMRC received but did not open. Further, the letter and enclosures were returned to the Appellant by ordinary mail, no evidence of postage had been provided and the Appellant did not receive the returned item. The critical item of evidence was in Mr Allen's view, therefore, lost or destroyed through no fault of the Appellant's own.

64. In short Mr Allen asked the Tribunal to accept the Appellant's evidence as to its intention and its agreement with the Trader to be its direct representative and to accept that the Direct Representation Letter made that agreement between the Trader and the Appellant

clear. In accepting those facts he asked us also to take into account the fact that the Direct Representation Letter had, in his contention, been lost by reason of HMRC actions.

65. Ms Brown's submissions were based on there being little evidence of direct representation. She pointed out the following:

- (1) That the Appellant had entered itself as indirect representative of the Trader deliberately.
- (2) That there were inconsistencies in the Appellant's evidence. For example Mr Du had described Letter 1 and Letter 2 as being different in his witness statement, later changing his position to say that one letter was a copy of the other.
- (3) That the Appellant had presented no evidence of what might have been the content of the Direct Representation Letter.
- (4) That there was no evidence other than the purported Direct Representation Letter of any arrangement or agreement between the Appellant and Trader showing it to be the Trader's direct representative.
- (5) That the existence of the Direct Representation Letter was not mentioned at all by the Trader in correspondence with HMRC and was mentioned only after the Appellant became aware that HMRC had not opened Letter 2.
- (6) The sheer improbability of the Appellant not keeping a record of such an important letter.

DISCUSSION

66. The facts of the case, as set out above, are relatively straightforward. Without repeating all of them we find the key facts to include the following:

- (1) The Trader has not been co-operative and attempts by both HMRC and the Appellant to contact it have been unsuccessful. Neither party has raised the possibility of seeking further information from the Trader as to what was agreed with the Appellant.
- (2) Having initially recorded itself as the Trader's indirect representative, the Appellant sought to change that once Mr Du realised that applicable HMRC guidance had changed and that Customs Duty and Import VAT was likely to be payable on the Goods.
- (3) Having become aware of the changed guidance Mr Du purportedly posted a letter to the Trader asking for it to sign and return the enclosed confirmation that the Appellant was acting as its direct representative.
- (4) No copy or record of the letter sent or the signed letter received was made or retained by the Appellant and no evidence has been provided as to its content.
- (5) The Appellant sent two letters by special delivery to HMRC; one intended to be sent to Officer Gardner, and the other to the C18 Team. The letter to Officer Gardner purportedly contained the Direct Representation Letter as one of its enclosures.
- (6) The letter received by Officer Gardner was sent to the C18 team's address but scanned to Mr Gardner. It did not contain the Direct Representation Letter although it contained copies of other documents related to the importation.
- (7) The letter sent to Officer Gardner's address was received by the post-room but purportedly posted back unopened to the Appellant by ordinary mail. As this letter was not opened it is not possible to ascertain what it contained.

(8) HMRC (Officer Gardner) accepted that notwithstanding the Appellant's initial decision to classify itself as indirect agent, it would treat the Appellant as an indirect agent if suitable evidence of the agreement between the Trader and the Appellant could be provided.

67. It is apparent from HMRC's evidence that for the Appellant to be regarded as direct representative (and so not jointly and severally liable with the Trader for the Customs Debt) there must be clear evidence to displace its initial submission that it was an indirect representative.

68. No clear evidence has been submitted to show that this is the case.

69. The evidence for direct representation consists primarily of Mr Du's written and oral witness evidence, the Appellant's primary contention being that the one piece of clear evidence available (the Direct Representation Letter) was provided to HMRC but has been lost by reason of HMRC's failure to open the letter and review the contents followed by HMRC's decision to return the unopened letter to the Appellant by ordinary post.

70. The Appellant's case relies heavily therefore on Mr Du's witness evidence and inevitably on our findings in respect of the purported Direct Representation Letter.

71. On the evidence before us we cannot conclude, on the balance of probabilities, that the Direct Representation Letter existed. Even if it did exist no evidence has been adduced as to its contents and it is therefore not possible to consider whether it would be sufficient to displace the fact that the Appellant entered itself as the Trader's indirect agent.

72. We accept that this will be a hard conclusion for the Appellant to accept – but it is a consequence of where the burden of proof lies in this Appeal. Put simply, the Appellant has not managed to persuade us on the evidence before us that, on the balance of probabilities, it was the Trader's direct representative.

73. Our decision takes into account all of the evidence before us. We also took into account in our deliberations the fact that Mr Du's first language is not English. We found the following points to be particularly relevant:

(1) The Appellant is a well-established customs clearance agent and Mr Du is experienced in dealing with HMRC. It is difficult therefore to accept that no record would have been kept of a document as important as the Direct Representation Letter. This is particularly the case given that the Appellant decided specifically to seek confirmation of direct representation as it was concerned about the expected Customs Duty and Import VAT liability having entered itself as on the customs clearance form as an indirect representative.

(2) The Appellant did not refer to the existence of the Direct Representation Letter in its correspondence with HMRC until after it realised that one of its letters sent to HMRC had been returned to it unopened. This reference was in an email to HMRC dated 17 August 2021 when it referred to an "importer signed direct representation letter" which had been sent to HMRC and lost.

(3) In the Appellant's email sent to the NPCC team at HMRC on 26 March 2021 (and copied to Officer Gardner) in which Mr Du outlined the Appellant's position explaining that it had done all that it could do to ensure direct representation, there was no mention of the Direct Representation Letter nor was the letter included in the various enclosures attached to the email – despite what would have been its centrality to the question of its liability.

(4) In the formal letter dated 1 April 2021 received by Officer Gardiner, again there was no specific reference to the Direct Representation Letter despite its importance.

(5) There is significant confusion in the description and circumstances relating to the two letters sent by the Appellant to HMRC via special delivery. The letter scanned to Officer Gardner although addressed to him was in an envelope addressed to the C18 team. The enclosures did not include the Direct Representation Letter which Mr Du contends was included in the letter to Officer Gardner. It is simply not possible to determine what actually happened here. The lack of inclusion of the Direct Representation Letter may have been because it did not exist or because the incorrect enclosures were placed in the correct envelope or *vice versa*.

(6) Mr Du gave somewhat inconsistent evidence in respect of the two letters sent to HMRC on 1 August 2021. In his written evidence he indicated that the letter to the C18 team was not the same as the letter to Officer Gardner – as the C18 letter referred to not receiving a right to be heard letter or decision. However in his oral evidence and in his email to Officer Gardner on 12 July 2021 he appeared to say that the two letters were copies (the only difference being that one of the letters included the Direct Representation Letter as an additional enclosure).

(7) There was no reason for the Appellant to have sent the original Direct Representation Letter to HMRC, given that HMRC did not require original documentation to be submitted to it as evidence. Mr Du’s explanation was that the original was sent because it was so important for HMRC to see it. We found this hard to accept.

DISPOSITION

74. For the reasons given the Appellant has not persuaded us that, on the balance of probabilities, it was the Trader’s direct representative rather than the Trader’s indirect representative as stated on the Customs clearance form. We find that the Appellant was therefore the Trader’s indirect representative and so jointly and severally liable for the Customs Debt.

75. The Appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

76. 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.

**VIMAL TILAKAPALA
TRIBUNAL JUDGE**

Release date: 02nd DECEMBER 2024