[2012] UKFTT 386 (TC)

TC02070

Appeal number: LON/2008/7164
MAN/2007/7008

COSTS – Customs duty – Reference to CJEU – Challenge by Appellants to inappropriate CNEN – HMRC a party as Respondents – Appellants' challenge succeeded – Whether costs of Appellants should be awarded against HMRC – Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 r.10

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRITISH SKY BROADCASTING GROUP PLC
PACE PLC Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in public in London on 9 May 2012

Tim Ward QC, instructed by Herbert Smith, solicitors, for British Sky Broadcasting Group Plc

George Spalton, counsel, instructed by Eversheds LLP, solicitors, for Pace Plc

Owain Thomas, counsel, instructed by the General Counsel for HM Revenue and Customs, for the Respondents

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DECISION

1. Costs applications have been made by British Sky Broadcasting Group Plc and Pace Plc ("the Appellants") for orders that HMRC should pay the costs of their appeals which included references to the Court of Justice of the European Union ("CJEU"). Following the CJEU's decision on the references the appeals of the Appellants were allowed by the Tribunal; the Tribunal ordered that "all matters relating to costs are stayed for three months (but if the Appellants have not resolved the costs issues by then the matter is to be referred back to the Tribunal)".

2. The Appellants have, in circumstances that will be explained, achieved their objectives for launching their appeals. They say that HMRC should consequently pay the Appellants' costs of the appeals. HMRC' response is that it would not, in the circumstances, be fair for the Appellants' costs to be borne at the public expense. As the revenue authority they had been obliged to act as they did and they had taken a responsible course of action in seeking the payment of duty on the basis of the relevant CNEN (declared by the CJEU to have been inappropriate) from the time when it had been issued by the Commission.

3. The issue in the references relating to the appeals of both Appellants was the question of the correct classification of set-top boxes with a communication function. An Explanatory Note to the Combined Nomenclature ("CNEN") issued by the Commission on 7 May 2008 had served to classify such products to subheading 8521 of the Combined Nomenclature ("CN") as opposed to subheading 8528. The disputed action taken by HMRC had been taken in the light of that CNEN; in conformity with the terms of that CNEN, HMRC disregarded BTIs that did not conform with it and levied customs duties that conformed with the CNEN.

4. The amounts of customs duty involved in the appeals were significant. Goods falling within subheading 8521 90 00 are liable to ad valorem 13.9% customs duty; goods within subheading 8528 71 13 are not subject to duty. (The amounts involved in the BSkyB appeals, I understand, many times greater than the amounts involved in the Pace appeal.)

The circumstances of the BSkyB appeal

5. Following the issue of the BTI to BSkyB on 12 June 2008 classifying the goods within subheading 8521 90 00, BSkyB appealed to the Tribunal and sought a reference to the CJEU. It brought three appeals and the substantive issues raised by each appeal were identical.

6. On 8 June 2009 the principal appeal by BSkyB was allocated to the "complex" category. On 6 July 2009, the Tribunal ordered that a reference should be made to the CJEU in both BSkyB's case and in the Pace appeal (referred to below). The CJEU subsequently (on 22 September 2009) joined the references together.

7. On 14 April 2011, the CJEU (in a decision that will be examined later) ruled that the set-top boxes should have been classified under subheading 4528 71 13 of the CN.

The circumstances of the Pace appeal

8. On around 17 November 2008 HMRC issued a decision that stated that set-top boxes with a communication function and a hard disk drive had been incorrectly classified. Following a departmental review maintaining the classification of the settop boxes under subheading 8521 90 00 90, Pace appealed to the Tribunal which ordered that the appeal be allocated to the complex category.

9. Two of the questions referred to the CJEU were in the same terms as those referred in relation to the BSkyB appeal. Two further questions were referred exclusively in relation to the Pace appeal; these raised matters concerned with the construction and understanding of Article 12(5)(a)(i) and (6) of the Customs Code.

The rulings of the CJEU

10. The first question referred by the Appellants asked whether the CN must be interpreted as meaning that set-top boxes with a communication function and a hard disk drive, such as the present boxes, are to be classified under subheading 8528 71 13, despite the CNEN published on 7 May 2008, according to which those set-top boxes come under subheading 8521 90 00. Observing that the CNEN in question was contrary to the wording of the CN, the Court ruled that the CNEN was to be disregarded. Specifically the Court ruled that the set-top boxes were to be classified under subheading 8528 despite the CNEN. It was on the strength of that ruling that the Tribunal subsequently allowed the appeals of both Appellants.

11. The other question common to the references of both Appellants was as follows:

> "Does Article 12(5)(a) of Council Regulation (EEC) No.2913 of 12 October 1992 establishing the Community Customs Code oblige a national customs authority to issue a BTI in accordance with a CNEN unless and until that CNEN has been declared to be in conflict with the wording of the relevant provisions of the CN or may the national customs authorities form their own view and disregard the CNEN if they consider there to be such a conflict?
>
> The relevance of this question, as already noted, is that all the actions (including the issuing of new BTIs) taken by HMRC had been taken in conformity with the CNEN that had served to classify the set-top boxes within heading 8521.

12. The CJEU answered this question, stating:

> "91. Article 12(1) and (2)(a), third indent, of the implementing regulations states that, following an amendment to the Explanatory Notes of the CN, the customs authorities are to take necessary steps to ensure that BTIs are thenceforth to be issued only in conformity with those notes 4 as of the date of their publication in the Official Journal of the European Union.
>
> 92. However, as was observed in paragraph 63 of this judgment, the Explanatory Notes to the CN, whilst they constitute an important means of

ensuring the uniform interpretation of the CN by the 5 customs authorities of the Member State, do not have legally binding force … .

93. Those considerations lead to the conclusion that when an application is made to the customs authorities for the issuing of a BTI, those authorities must comply with the Explanatory Notes to the CN in order to ensure the uniform application of customs law in the European Union. If there is a disagreement between those authorities and economic operators as to whether those notes are consistent with the CN and on the classification of goods, it is incumbent on economic operators to bring proceedings before the competent authority."

13. Reverting to the position in which HMRC found itself prior to the decision of the CJEU in the present references, the following points are relevant.

14. First, Article 12(1) of the Customs Code provides that "the customs authorities shall issue binding tariff information or binding origin information on written request, acting in accordance with the committee procedure". I accept the observation by Mr Owain Thomas on behalf of HMRC but this provides the method by which BTIs applied for and issued throughout the EC by the various customs authorities are consistent and uniformly apply the provisions of the CN in the light of the CNENs.

15. Second, with the wording of Article 12(5) of the Customs Code in mind, HMRC had taken the position that, acting as the designated customs authority for the UK, they were bound to apply the provisions of the (allegedly offending) CNEN unless and until that measure had been declared to have been adopted in circumstances where the Commission exceeded the limits of its power. Regarding BTIs, HMRC had submitted to the CJEU that that factor was further reinforced in respect of BTIs by the provisions of Article 12(5)(a)(ii) of the Customs Code which specifically provides that they "shall" cease to be valid where they are no longer compatible with the interpretation of the Nomenclature "at Community level, by reason of amendments to the Explanatory Notes to the Combined Nomenclature …". That, HMRC had observed, was supported by Article 12 of Commission Regulation 2454/93/EEC (the Implementing Regulation). This provides that where a measure has been adopted pursuant to Article 12(5) of the Customs Code (i.e. including a CNEN) the customs authorities shall take the necessary steps to ensure that binding information shall thenceforth be issued "only in conformity with the act or measure in question".

The position of the parties

16. The situation confronted by both HMRC and the Appellants was the obvious incompatibility between (i) a BTI classifying goods to subheading 8528 or any 5 customs declaration to the same effect and (ii) a CNEN specifically relating to a settop box with communication function but also containing a hard drive and providing for classification to subheading 8521.

17. In the course of argument before the CJEU, HMRC had observed that if individual customs authorities were to fail to apply particular 5 provisions such as a specific CNEN adopted by the Commission in accordance with the procedure in Article 10 of the Combined Nomenclature Regulation on the grounds that they did not agree with them or considered them not to be valid, then that would leave the status of measures

adopted to achieve uniformity to be determined at the discretion of individual Member States' administrations. It would produce the risk of lack of uniformity. The ruling of the CJEU in the present appeals has removed that risk. It has removed the obligation that HMRC had previously been under to disregard BTIs issued before the offending CNEN insofar as those classified in the set-top boxes to subheading 8528 and to BTIs in conformity with the CNEN.

18. Moreover, until the CJEU had ruled otherwise, HMRC had been obliged to collect customs duties on behalf of the EU in a manner that conformed with the offending CNEN. In that connection HMRC had had to address the problem of importers (such as BSkyB) which had count BTIs invalidated by the offending CNEN and those who did not. HMRC were not free to ignore the disparity of treatment that that involved.

19. A reference to the CJEU was therefore required to resolve the predicament in which HMRC found itself by operation of the Community customs system. A reference was also required to resolve the Appellants' claims to have duty charged on the basis that the set-top boxes in question should be classified under subheading 8528. The CJEU observed in paragraph 93 of the judgment that it was (as already observed) "incumbent on economic operators to bring proceedings before the competent authority." It followed that the Appellants had no choice but to ask for a reference; and HMRC were bound to participate in the references and had no option to extricate themselves by, for example, conceding that the Appellants had been in the right all along.

20. With those points in mind I turn now to the question whether I should direct that HMRC should pay the costs of both Appellants.

21. Both The Appellants submit that HMRC should pay the costs of their appeals. Both had been subject to the BTIs that they had considered to be wrong. Had those BTIs been allowed to stand, they would both have been required to pay substantial amounts of customs duty which on a correct view of the law they were not obliged to pay. There was, as already noted, no other course open to them save to bring the appeals and ask for a reference to the CJEU. In appealing, the Appellants had, they submitted, served an important public interest by clarifying a point of law of general application throughout the EU thereby ensuring that customs duties were collected on a correct and uniform basis. They should not, they pleaded, be treated as "sacrificial lambs", to use Moses LJ's expression in *HMRC v Blue Sphere Global Ltd* [2010] EWCA 1448 paragraph 11 (a case in which a taxpayer succeeded on appeal but where a dispute arose, as here, whether customs should pay the costs, as well as to the effect of a Part 36 offer).

Discretion to award costs

22. Section 29(1) of the Tribunals Courts and Enforcement Act 2007 provides that costs of all proceedings in the First-tier Tribunal and Upper Tribunal 5 are in the discretion of the Tribunal. Section 29(2) provides that the Tribunal has "full power to determine by whom and to what extent the costs are to be paid", subject to the Tribunal Procedure Rules: section 29(3). Neither the Act nor the Tribunal Rules materially specify the principles on which that discretion is to be exercised: the position is much the same as under rule 29 of the VAT Tribunal Rules 1986. The

Upper Tribunal has explained that the costs regime under the Civil Procedure Rule differs from that in the Tribunal, in that the former expressly provides for the normal rule to be that costs follow the event: see Capital Air Services Ltd v Commissioners [2010] UKUT 377 (TCC) para 39. In Commissioners v Taylor and Haimendoif (FTC/43/2010), para 13, the Upper Tribunal referred to "the usual practice that the losing party should pay the other side's costs".

23. The discretion therefore lies with the Tribunal and here, HMRC has offered a reason why they should not be ordered to pay the costs of the Appellants. This was not, they say, a case where it was they (HMRC) who had put the Appellants to the expense of incurring the costs of these appeals. HMRC were bound, as the CJEU had recognised in paragraph 93, "to comply with the ENs to the CN in order to ensure the uniform application of customs law in the EU". HMRC were bound to "disagree" with the Appellants and the only course was to do what they did here, namely to accede without demur to the Tribunal making the references that were made at the hearing on 6 July 2009. In the circumstances, I have decided that I should exercise my discretion and make no order as to costs.

24. In reaching that conclusion I have addressed the fact that while Pace succeeded on the two points where it made common cause with BSkyB, it failed on the two other questions that were referred by it alone. Thus, looking at Pace in isolation, it did not have to expose HMRC to the risk of the second set of costs (over and above those BSkyB). It could have allowed BSkyB to go it alone. Pace further argue that, because its appeal was lodged when the VAT rules were in force, it had a legitimate expectation of recovering its costs on succeeding in the appeal. Apart from the fact that it is not within the (current) authority of this Tribunal to give effect to legitimate expectations of that nature, I would not see this as a case where costs would necessarily have had to have followed the event. As I have just explained, Pace could have allowed their case to be stayed while BSkyB's reference proceeded. Moreover, as I understand the position, nothing was said or done on the part of HMRC that led either party to expect that HMRC would in any event carry the Appellants' costs were their appeals to succeed.

25. Then it was argued for Pace that HMRC should be regarded as the authors of their own misfortune. They could have referred the construction of the relevant provisions of the CN and the CNEN to the Customs Code Committee under Article 87 of Regulation EEC No.2658/87. Bearing in mind that the offending CNEN had been published in May 2008 it seems unlikely to me that HMRC would have made much impression on the Committee had they referred the matter back so soon in response to the Appellants' objections to the BTIs issued to them. In any event, HMRC's hands were tied by the Appellants' quite proper action in appealing to 5 this Tribunal; HMRC had to participate in the appeal procedure.

26. Pace based another argument on the "commitology" procedures under Regulation 2658/87 Articles 9(1)(a) and 10 and Council Decision 1999/468 EC Articles 5 and 7. Those provisions require Member State experts to assist the Committee in drafting CNENs. As such, HMRC is, so the argument runs, jointly responsible for deficiencies in the CNEN and cannot now seek to avoid responsibility for the costs of having drafted and promulgated a CNEN that is ruled to have been inappropriate as a matter of law. It may be a fact that HMRC did provide experts to assist the Committee in

drafting CNENs. I do not however accept that there is any guarantee that the UK influence in that connection would have changed the decision of the Committee and so prevented the issue of the offending CNEN.

27. For all those reasons I do not think it will be fair to direct that the costs of the present appeals should be borne at the public expense. HMRC were constrained by the rules and regulations governing the Community Customs system. They were obliged to act as they did and in my view they took a responsible course of action in seeking the payment of duty on the basis of the offending CNEN. The Appellants duly displaced the offending CNEN and established a proper classification for their imported set-top boxes. I do not think that either BSkyB or Pace are appropriately to be regarded as "sacrificial lambs".

28. Application dismissed.

29. 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.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE
RELEASE DATE: 12 JUNE 2012