TC02427

Appeal number: TC/2011/3854

IMPORT DUTIES - Community Customs Code - Generalised System of Preferences – Council Regulation 2913/92/EEC - Commission Regulation 2454/93/EEC - time limits – necessary documentation – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LANE FOURACRES ASSOCIATES (a firm) **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER

Sitting in public at Nottingham on 10 September 2012

Mr Peter Lane (partner) for the Appellant

Mr Vinesh Mandalia of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against a decision by the Respondents ("HMRC") to refuse to repay import duties of almost £49,000 paid by the Appellant on imports from India of leather handbags in the period July 2005 to September 2009.

Facts

2. I find the facts in this case (most of which were not in dispute) to be as follows.

3. The Appellant is a partnership that has traded since 2001 importing footwear from Italy for sale to high street retailers and, since 2005, importing leather handbags from India for sale to the same customers. The Appellant has been hard hit by the insolvencies of Dolcis and Stead & Simpson – its two largest customers.

4. Between 12 July 2005 and 8 September 2009 the Appellant made 200 imports of leather handbags from India. It used a professional import agent (SBS Worldwide) ("the Agent"). The entries declared the goods to free circulation in the EU and the appropriate duties were accounted for on import.

5. In February 2009 HMRC Officer Ashif Kanji telephoned the Appellant to discuss those imports. A meeting scheduled for March was cancelled but rearranged and held on 16 July 2009. Mr Kanji expressed the view that the handbags should not attract import duties, and suggested a reclaim be submitted.

6. A formal reclaim was submitted by the Appellant on 25 September 2009. Although HMRC have no record of receipt (the Appellant accepts that the claim was originally sent to the wrong HMRC office), HMRC have agreed to accept that the date of the claim was 25 September 2009.

7. By a formal decision dated 17 February 2011 HMRC rejected the claim. HMRC's reasons are set out in detail below in the description of their case, but in summary they considered:

(1) part of the claim (relating to imports pre-26 November 2008) to be out-of-time; and

(2) the rest was inadmissible because of inadequate paperwork – in that the relevant GSP Form A's were apparently not available. Although, as will be seen, HMRC were entitled to require the original Form A's, they did agree that exceptionally they would in this case accept sight of photocopies.

8. The Appellant requested an internal review of the disputed decision, stating that it had not kept copies of the Form A's. The review upheld the original refusal and the Appellant appealed to this Tribunal.

Legislation

9. All legislation is cited as in force at the relevant times.

10. Council Regulation 2913/92/EEC ("the Community Customs Code") includes the following relevant provisions:

> "**Article 20**
>
> 1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.
>
> 2. The other measures prescribed by Community provisions governing specific fields relating to trade in goods shall, where appropriate, be applied according to the tariff classification of those goods.
>
> 3. The Customs Tariff of the European Communities shall comprise:
>
> …
>
> (e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories; …
>
> **Article 27**
>
> The rules on preferential origin shall lay down the conditions governing acquisition of origin which goods must fulfill in order to benefit from the measures referred to in Article 20 (3) (d) or (e).
>
> Those rules shall:
>
> …
>
> (b) in the case of goods benefiting from the preferential tariff measures referred to in Article 20 (3) (e), be determined in accordance with the Committee procedure.
>
> **Article 236**
>
> 1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220 (2).
>
> Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220 (2).
>
> No repayment or remission shall be granted when the facts, which led to the payment or entry in the accounts of an amount, which was not legally owed, are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative."

11. Commission Regulation 2454/93/EEC ("the Implementing Regulation") makes provision for implementation of the Community Customs Code and includes the following relevant provisions:

"**Article 80**

Products originating in the beneficiary country shall benefit from the tariff preferences referred to in Article 67, on submission of either:

(a) a certificate of origin Form A, a specimen of which appears in Annex 17; or

(b) in the cases specified in Article 89(1), a declaration, the text of which appears in Annex 18, given by the exporter on an invoice, a delivery note or any other commercial document which describes the products concerned in sufficient detail to enable them to be identified (hereinafter referred to as the 'invoice declaration').

Article 81

1. Originating products within the meaning of this section shall be eligible, on importation into the Community, to benefit from the tariff preferences referred to in Article 67, provided that they have been transported directly within the meaning of Article 78, on submission of a certificate of origin Form A, issued by the customs authorities or by other competent governmental authorities of the beneficiary country, provided that the latter country:

— has communicated to the Commission the information required by Article 93, and

— assists the Community by allowing the customs authorities of Member States to verify the authenticity of the document or the accuracy of the information regarding the true origin of the products in question.

Article 86

1. In the event of the theft, loss or destruction of a certificate of origin Form A, the exporter may apply, to the competent governmental

authorities which issued it, for a duplicate to be made out on the basis of the export documents in their possession. Box 4 of a duplicate Form A issued in this way must be endorsed with the word 'Duplicate' or 'Duplicata', together with the date of issue and the serial number of the original certificate.

2. For the purposes of Article 90b, the duplicate shall take effect from the date of the original.

Article 90(b)

1. A proof of origin shall be valid for 10 months from the date of issue in the exporting country, and shall be submitted within the said period to the customs authorities of the importing country.

2. Proofs of origin which are submitted to the customs authorities of the importing country after the final date for presentation specified in paragraph 1 may be accepted for the purpose of applying the tariff preferences referred to in Article 67, where the failure to submit these documents by the final date set is due to exceptional circumstances.

3. In other cases of belated presentation, the customs authorities of the importing country may accept the proofs of origin where the products have been submitted before the said final date."

HMRC's case

12. Mr Mandalia for HMRC submitted as follows.

13. Goods originating in India are subject to the normal rates of duty when imported into the EU unless the goods qualify for preferential tariff treatment in accordance with the Generalised System of Preference ("GSP") in the Community Customs Code, and the Implementing Regulation. The availability of such preferential treatment is subject to compliance with strict conditions. The Implementing Regulation provides for the subsequent verification of proofs of origin and for the refusal of preferential treatment if such verification does not confirm the declared origin of the goods.

14. The preference provisions are designed to help the economies of developing countries. The strict conditions imposed are intended to prevent abuse of the system. The purpose of GSP is to enable exports of developing countries to be competitive in the markets of developed countries. Abuse of the system of preferences would mean that goods originating in other countries would enjoy the same preferential treatment and that would reduce the competitive advantage of the developing countries.

15. Article 236 of the Community Customs Code allows import duties to be repaid when it is established that, when they were paid, the amount of duty was not legally owed. If all the conditions of the GSP have been met, and there is an entitlement to preference, but preference was not claimed on importation, then repayment would be appropriate under Art 236 of the Community Customs Code. It is right that Art 236 allows for the repayment or remission upon submission of an application within a period of three years. However, it should be noted that Art 236 allows repayment and

remission for all circumstances where duties were not legally due and is not confined to cases where preference has not been claimed.

16. Article 27 of the Community Customs Code provides that "the rules on preferential origin shall lay down the conditions governing acquisition of origin which goods must fulfil in order to benefit from measures referred to in Article 20(3)(d) or (e)". The Implementing Regulation makes provision for the GSP at Articles 67 whereby products originating in a beneficiary country obtain the benefit of tariff preferences. Articles 68-79 define the concept of originating products. Articles 80-92 deal with proof of origin. Articles 93-95 deal with administrative cooperation between beneficiary countries and the Commission.

17. Any repayment where preferential treatment of the goods is claimed is subject to compliance with the appropriate preferential rules. Article 80 requires submission of a certificate of origin Form A if the products are to benefit from tariff preferences. In this case HMRC have agreed, exceptionally, to accept copies. An importer should hold copies of such documentation.

18. Preferential treatment of goods is subject to strict rules and Art 90b of the Implementing Regulation operates such that in order to claim GSP the Form A must be submitted to the Commissioners within ten months of the date of issue. Under Art 90b(2), the Form A can be submitted after the final date for presentation where failure to submit the document was due to exceptional circumstances. However, the Appellant has not submitted any evidence to suggest that the failure to submit the Form As was due to exceptional circumstances.

19. Article 90(b)(3) of the Implementing Regulation operates such that HMRC may accept a belated proof of origin where the products have been submitted before the said final date. Thus, the importer must make it known to HMRC within the period of validity that the goods are being imported under preferential arrangements. In practice, this would be by indicating (in Box 36) on the import declaration that the goods are being imported as preference goods. To accept a belated proof of origin without a provisional claim to preference (submitted as preference goods within the validity period) being required, would deprive Arts 90b (1) and (2) of effective force - see *DSG Retail Ltd v HMRC* (LON/2007/7071) [2010] UKFTT 13 (TC).

20. Some of the import entries covered by the Appellant's claim are dated before 25 September 2006 - that is, over three years before the repayment claim was submitted. Therefore those claims fall outside the scope of Art 236 of the Community Customs Code in any event.

21. Only those claims arising from a GSP Form A post-dating 26 November 2008 are valid (being the ten months preceding 25 September 2009). In respect of such claims, HMRC have agreed, exceptionally, to accept copies of the GSP Form A certificates to support the Appellant's claim for repayment of duty.

22. HMRC are entitled to reject the Appellants claims for all entries prior to 26 November 2008. Examination of the Appellant's import documents (Forms C88) has

shown that the code used for Box 36 declared that normal tariff arrangements applied (no claim to preference).

23. It was not correct that HMRC should have known that the goods qualified for preferential duties. The requirements were strict and the forms submitted by the Appellant gave no indication to HMRC that preferential duties might apply - on the contrary, professional import Agents had completed the forms (in Box 36) with a duty code of 100 rather than a preferential duty code of 400. These goods followed the automatic clearance route and, having been declared dutiable, would require no post-clearance action from HMRC.

The Appellant's case

24. Mr Lane for the Appellant submitted as follows.

25. This matter had been dealt with by Mr Lane's partner Mr Fouracres until Mr Fouracres' death in 2011. It had not proved possible to locate copies of the relevant documentation. Mr Lane did not consider it a realistic proposition to attempt to obtain duplicate documentation from the Indian Customs authorities.

26. The purpose of the Implementing Regulation was to implement the Community Customs Code. Article 236 of the Community Customs Code provided for a three year time limit. Article 90(b) of the Implementing Regulation could not have intended to replace the three year time limit with a ten month deadline for submission of the certificates. The ten month deadline should be ignored and one should revert to the three year time limit.

27. The normal practice of HMRC was not to require submission of the certificates in order for importers to benefit from preferential duties. HMRC were content to disapply part of the legislation when it suited them but were insisting on paperwork in the case of the Appellant. The Appellant should be treated the same as all other importers. HMRC's intransigence in the dispute was driven by their debt collection system. Following an earlier bankruptcy petition HMRC had accepted counterclaims reducing the amounts due to them down to £48,000, which was entirely accounted for by the current matter. HMRC's conduct constituted persecution.

28. HMRC must have known that no duty was payable on these goods. Mr Kanji clearly knew it when he telephoned in February 2009 – and Mr Lane suspected that someone at HMRC had known this since at least November 2006. *DSG Retail Limited* could be distinguished on the grounds that in that case the goods imported were televisions from Turkey – so it would not have been obvious that preferential duties applied. In the current case as the goods were leather handbags from India it was obvious to HMRC that the goods were eligible for preferential duties but for some reason, despite the large number of officers they employed, they failed to do so. Eligibility for preferential duties should have been noticed by HMRC even though the Agents continued to enter code 100 on the forms. HMRC should have scrutinised the forms and seen that the information on the forms was not consistent with the code 100

entry. The form C88 should ask if GSP certificates were available and collect the details. Article 236 specifically requires HMRC to repay on their own initiative.

29. Genuine errors should not be penalised. The claim should be allowed on a concessionary basis. The certificates were available to the Agents making the import declarations but somehow had been ignored. The invoices clearly showed that certificates were available and Box 36 on the C88 should have been completed with code 400 rather than code 100.

Consideration and conclusions

30. The goods were imported using the Route 6 simplified system, with the forms C88 being completed and submitted by professional import agents appointed by the Appellant. The C88s showed normal duty rates as applying, despite the Agents holding certificates of origin. I do not accept the Appellant's contention that HMRC should have audited the C88s and identified that preferential duty rates may have been available. HMRC would have been spotted this only if they performed post-clearance checks on the particular consignments; there was nothing to alert HMRC that the C88s prepared and submitted by professional import agents should be elected for post-clearance checks. I also do not accept the Appellant's contention that HMRC were aware of the mistake but deliberately chose not to question it for some reason (possibly nefarious). Further, I do not accept the Appellant's contention that HMRC should have ignored the legal time limits (discussed below) by concession.

31. I consider there is no contradiction between the three year time limit imposed by Art 236 of the Community Customs Code and the ten month time limit imposed by Art 90b of the Implementing Regulation. The three year time limit applies to *all* customs duty reclaims. The ten month time limit is a further, more stringent requirement imposed *only* on claims for preferential rates of duty (tariff preferences pursuant to Art 80 of the Implementing Regulation). The ten month time limit can be extended only where:

(a) there are "exceptional circumstances"; or

(b) the products have been "submitted" within the ten month period.

32. The phrase "exceptional circumstances" must be interpreted narrowly (per CJEU in *Firma Söhl & Söhlke* C-48/98, [2000] 1 CMLR 351 at ¶ 77) and there is no evidence of such circumstances in the current appeal.

33. The meaning of the word "submitted" in very similar legislation was considered by this Tribunal in *DSG Retail Limited* and held to mean the submission of the documents necessary to evidence the entitlement to preferential treatment in relation to the goods (here, the certificates of origin Forms A) – see ¶¶ 52-57 of *DSG Retail Limited*.

34. HMRC have accepted that the date of submission of the certificates of origin Forms A was 25 September 2009. I agree with HMRC's interpretation of the

legislation that the ten month time limit imposed by Art 90b precludes any refund in relation to imports prior to 26 November 2008.

35. In relation to imports in the period from 26 November 2008 to 25 September 2009, HMRC have accepted that exceptionally they will accept photocopies of the certificates of origin Forms A, rather than official duplicates as provided for by Art 86 of Regs 2454/93. By Directions issued on 6 August 2012 the Tribunal set a deadline of 31 August 2012 for submission of such paperwork in evidence, subject to leave of the Tribunal. I understood from Mr Lane that he has been unable to produce such photocopies, and in the summary decision notice issued to the parties on 17 September 2012 I granted an extension of time for production to HMRC of such documents until 31 October 2012 – after which date HMRC were entitled to assume that no such documents can be produced.

36. In the absence of the Forms A or (by concession by HMRC) photocopies thereof, no refund is due for the imports in the period from 26 November 2008 to 25 September 2009.

Decision

37. The Tribunal decided that the appeal is DISMISSED.

38. This document contains full findings of fact and reasons for the decision and replaces the summary decision notice issued to the parties on 17 September 2012. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 8 December 2012