



TC02511

Appeal number: TC/2012/05404

CUSTOMS DUTIES – End Use Relief – refusal to grant authorisation for end use relief for goods equipping ships – whether goods in “a finished state” or “finished components for further shipwork assembly” – Yes – extent of Tribunal jurisdiction – whether ancillary matter and jurisdiction restricted – No – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAITHNESS CREELS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
CHARLOTTE BARBOUR, CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on
15 January 2013**

The Appellant was not represented

**Ian Mowat, Solicitor, Office of the Advocate General for Scotland, for the
Respondents**

DECISION

Introduction

1. The Tribunal exercised its case management powers under Rules 5 and 15 of
5 the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) to permit the Respondent to rely on the evidence of George Laing (“GL”) and his witness statement which was lodged on 8 January 2013.
2. The Tribunal further exercised its powers under Rule 33 of the Rules to proceed
10 with the hearing in the absence of the Appellant or any representative from the Appellant.
3. This is an appeal by Caithness Creels Limited (“CC”) against the decision by
HM Customs and Revenue (“HMRC”) for an application to obtain End Use Relief
15 (“EUR”) by the refusal of authorisation of CC’s application dated 3 October 2011.
4. CC manufactures lobster pots and fish baskets (“creels”) used by fishermen to
15 catch crustaceans and it imports material such as net and rope to manufacture the creel pots. They intend these for end use by equipping fishing vessels and ships.
5. The issue before the Tribunal was whether the goods imported were in “a
finished state” or “finished components for further assembly” and met the prescribed
end use in order to qualify for EUR.

20 Case

Commissioners of HM Revenue and Customs v Hok Ltd [2012] UKUT363

The Facts

6. CC operates from Wick in Caithness and had been authorised, prior to 20
25 November 2011, for EUR for a period of 12 years in the manufacture and supply of creels.
7. During that time, CC had applied and had been granted EUR on at least two
occasions thought to have been at five year intervals.
8. In 2005, an inspection of CC took place and a “Sift Recommendation and
30 Assurance Event Report” was issued which mentioned that there was “a soupcon of doubt as to whether the traders should have been approved in the first place” for EUR.
9. The report identified action to be taken and issues to be addressed, accepted the
end use status, but reminded CC that its end use authorisation must be quoted on
invoices and required them to ensure they sold the goods to an entitled vessel.
10. The most recent application was by HMRC form “Application for End Use
35 Relief” (“the Application Form”), dated 3 October 2011.

11. The Application Form is set out in the prescribed form, to conform with Commission Regulation 2454/93, Annex 67, and CC completed it stating that the relevant type of authorisation was for “shipwork goods”:-

5 (1) in Box 7, entitled “Details of goods you wish to place under end-use relief”, a number of CN codes and the description of the products including nylon twine and nylon netting had been entered,

(2) in Box 8, entitled “Details of goods processed under end-use relief as stated in Box 7” there is a subsidiary heading “Description of goods to be manufactured” which has been completed with the words “Lobster Pots” and the CN code, and

10 (3) in Box 9, entitled “Details of planned activities” with the sub-heading – “How will the goods be used?” the following words have been inserted “in the manufacture of lobster pots”.

12. It became clear during the hearing that in relation to shipwork, EUR does not have a definitive list but allows goods to be imported from a tariff heading (apart from food and drink) as long as they fulfil the prescribed end use and are used on qualifying ships. Consequently, CC had completed the Application Form incorrectly because it need not have listed the products in Box 7.

13. As part of the HMRC reviews, it was noted that some of the codes used in the Application Form were out of date which seemed indicative that the information had been copied from a previous application form for prior applications, given that it was thought that the scheme had been in place for over ten years.

14. EUR allows traders to import goods with a reduced or nil rate of duty if the conditions set out in law are met.

15. The Council Regulation 2658/87/EEC on the tariff and statistical nomenclature, Annex 1, Section II Special Provisions A headed ‘Goods for certain categories of ships, boats and other vessels and for drilling or production platforms’ in paragraph 1 states “Customs duties shall be suspended in respect of goods intended for incorporation in the ships, boats or other vessels listed in the following schedule, for the purposes of their construction, repair, maintenance or conversion, and in respect of goods intended for fitting to or equipping such ships, boats or other vessels”. Fishing vessels are listed in the accompanying schedule.

16. Annex 1, Section 1, A.2(a) of the Council Regulation 2658/87/EEC headed “General rules for the interpretation of the Combined nomenclature”; states “Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled”.

17. HMRC Note 770, being the "Guidance on imported goods: End User Relief", explains at chapter 3 that "to obtain relief a trader requires to hold an authorisation from the relevant customs authorities to import the goods to end use relief or receive end use goods on transfer from another end use authorised party. The goods must then be put to a prescribed end use within a certain period and records kept about the goods and their treatment. If the goods are not put to the prescribed use, duty will be due".

18. The matter was referred to GL, a Higher Compliance Officer at the Respondents' Aberdeen office, to undertake an assurance visit to CC to further investigate.

19. On 20 December 2011, GL visited CC's premises and was given a tour of them where the process of making creels and the various commodities consumed in production were explained.

20. He noted that steel rods are straightened or bent and cut to the appropriate length using specialised machinery, that the metal rods are spot welded to form the frame, that the frame is plastic coated using a specialist oven, that netting is attached to the creel, that there are at least six different types of netting and, not only that, the bait bag, may be of a different smaller mesh size.

21. Protection from the seabed is provided by rubber protection, ropes are attached to the creel and as an alternative to sewing on bait bags, bags may be attached by stainless steel clips known as "hog rings".

22. The Application Form was considered by Chris Birch ("CB") of HMRC's CITEX Operations, Authorisation and Returns Office. He considered that the end use stated for the material; the manufacture of lobster pots, did not attract shipwork end use relief.

23. CB advised CC that the application was refused; that whereas lobster pots and creels themselves might be classed as "equipping" a fishing boat if such a pot or creel became a permanent equipment on a particular boat, EUR on shipwork goods was "only available on goods imported in a finished state or finished components for further assembly. It was not for raw materials for the manufacture of shipwork goods". He further stated that previous authorisation had wrongly been granted.

24. By letter dated 22 February 2012, CC requested a statutory review which was carried out and responded to on 5 April 2012. This letter confirmed that the previous decision was upheld because "although the lobster pots and the like do qualify for end use as a finished product, the components and processes involved in producing them did not. Officer Birch subsequently rejected your application as the items were not imported in a finished or semi finished state." The review said that "creels would be classified as equipping a fishing vessel, if the pot or creel in question became part of the permanent equipment on the vessel in question." EUR "is not available for the raw materials for the manufacture of Shipworks goods".

25. The Review Officer continued “in order to qualify for the relief the imported goods need to be either in their finished state, or finished components for further assembly. In your case various components are imported (net, twine, rope etc) and manufactured into completely different products, lobster and creel pots.
5 Unfortunately, lobster pots and creels would only be eligible for end use relief if they were imported and recognisable as the manufactured product”.

26. In order to assist the taxpayer, HMRC pointed out that there was another customs duty relief applicable to the CC’s operation which was explained as Processing under Customs Control (“PCC”) and an explanation was given to the
10 Tribunal.

27. The net effect of PCC would allow the customs duties on the components used by CC to be suspended and then, if CC applied for EUR on the completed lobster pots and creels, CC would be in the same position as they had been in when they had received EUR and were, accordingly, in receipt of authorisation.

15 28. It was unclear to the Tribunal whether or not this recommendation and reference to HMRC Public Notice 237 had been investigated or taken up by CC.

29. CC appealed to the Tribunal.

CC’s Submissions

20 30. CC provided leaflets taken from the Sea Fish Industry Authority website which illustrated there were at least six different types of fishing net; including creels, of different designs used in sea fishing.

31. Descriptions were then given of how these different types of net were used by fishing boats and based on these illustrations, the nets all appeared to be manufactured by the use of netting, ropes and fixings.

25 32. CC stated that they disagreed with HMRC’s description of the components they used to make the lobster pots and creels as “raw materials”.

30 33. CC maintained that the raw materials of the plastic netting were the plastic granules the net was made off. CC say that “the net is a manufactured product that serves a purpose and, therefore, has to be classed as component. A creel pot is assembled using a steel frame and net which is attached with twine and rope”.

34. In their letter to HMRC dated 12 September 2012, CC stated that “there are three components which make up a creel, the steel frame, the net and twine. As we are allowed to bring components in through end-use they fail to see their (HMRC’s) argument. To make things more confusing, Revenue and Customs allow trawl net
35 manufacturers to bring net into the country through ‘end use’. They then cut the net to shape, sew it together with twine and it catches fish, the same as we do. Where is the difference?”.

HMRC's Submissions

35. HMRC's opening submission was in relation to the jurisdiction of the Tribunal and this is dealt with later.

5 36. In relation to the facts in the case and CC's submissions, HMRC say that the Application Form for EUR was completed incorrectly, that the previous decision to grant EUR was an error but in any event had no bearing on the subsequent decision to refuse authorisation and, therefore, relief.

10 37. HMRC accept that creels may qualify as goods for equipping such ships as fishing vessels and that sufficient records had been kept by CC about the goods and their treatment.

38. HMRC refused the application because EUR for shipwork goods is only available on goods imported "in a finished state" or "finished components for further assembly" – not raw materials for the manufacture of shipwork goods.

15 39. HMRC say that various components are imported by CC and manufactured into completely different products. They say that the lobster pots and creels would only be eligible for EUR if they were imported and recognisable as the manufactured product.

40. HMRC made reference to the statutory provisions being Council Regulation EEC 2913/92 establishing the Community Customs Code and, in particular, referred to Articles 21 and 82.

20 41. Further reference was made to Commission Regulation 2454/93, Articles 291 to 300, which set out the details of the End Use Scheme and, in particular, to Article 292, the Granting of Favourable Tariff Treatment and made reference to the application using the model set out in Annex 67 to Council Regulation 2658/87 EEC, as amended on the Tariff and Nomenclature, set out at Annex 1, Section 2, under
25 Special Provision, the provisions which include ships and equipping such ships.

42. HMRC say that CC must satisfy the conditions of Article 293 of the Commission's Regulation 2454/93(1)(a):

30 "The activities envisaged are consistent with the prescribed end-use and with the provisions of the transfer of goods in accordance with Article 296 and the proper conduct of operation is ensured."

43. HMRC say that the activity envisaged – the manufacture of lobster pots – is not consistent with the prescribed end-use which CC is claiming for shipwork EUR.

35 44. HMRC refer to Council Regulation 2658/87, Annex 1, Section 1 A.2 (a) and say that an incomplete or unfinished article requires to have the essential character of the complete or finished article whether presented unassembled or disassembled.

45. HMRC say that prescribed end use is to equip fishing vessels, that the intended use of the imported items by CC for the manufacture of lobster pots is not intended for equipping such ships nor does it fit the other allowable category of incorporation

in certain categories of ships, and is not consistent with the prescribed end use and, therefore, does not meet with the required conditions. HMRC say that the import of finished creels intended for equipping a fishing vessel would qualify for EUR but that the items used to manufacture the lobster pots are not and the end use is at one stage removed from the shipwork EUR.

46. HMRC say that as the previous authorisation for 12 years of end use was granted in error they contacted an official in the European Commission who suggested an alternative means by which CC might obtain the same level of relief.

47. HMRC say that they cannot comment on CC's submission that HMRC allow trawl net manufacturers to bring net into the country through end use, then cut the net to shape, sew it together with twine and use it to equip fishing vessels because to do so would put them in breach of their requirements not to disclose information about taxpayers contained in the Commissioners for Revenue and Customs Acts 2005, Sections 18 and 19.

15 **Jurisdiction**

48. HMRC say that the Tribunal has no jurisdiction to quash or vary HMRC's decision on the basis that there is a perception that the Appellants have been treated less fairly in comparison with other traders and cited the decision in *Hok Limited*.

49. HMRC say that because the Tribunal does not have a judicial review function, the Commissioners treatment of other traders is irrelevant to the question to be determined by the Tribunal.

50. HMRC said that the authorisation of the application was an ancillary matter. In terms of the Finance Act 1994, Section 16, in any decision as to an "ancillary matter", or any decision on review of such a decision, "the powers of an Appeal Tribunal and an appeal under this section shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other persons making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

- (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the Tribunal may direct;
- (b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, [a review or further review as appropriate] of the original decision; and
- (c) in the case of a decision that has already been acted upon or taken effect and cannot be remedied by [a review or further review as appropriate], to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future".

51. By virtue of section 16(8), ancillary matters are defined in Schedule 5; and Schedule 5, paragraph 1(f) defines an ‘ancillary matter’ as “any decision, in any particular case, as to whether or not the carrying out of any processing or other operations or the use of any procedures to be or continue to be authorised are approved”.

52. In the absence of any representation or presence of CC, HMRC correctly drew the Tribunal’s attention to Section 13(A) of the Finance Act 1994 which defines "relevant decisions" at Paragraph 2(A)(4) as “whether or not any person is entitled in any case to relief or to any repayment, remission or drawback or any such duty or levy the amount of the relief, repayment, remission or drawback to which any person is entitled”.

Decision

53. The Tribunal noted that CC had been granted authorisation for EUR for 12 years for the manufacture of creels.

54. The Tribunal considered that a creel is simply a different configuration of the various parts or components making up a type of fishing net; that the imported goods although not in a finished state were the “finished components for further assembly” albeit that they appeared to be assembled in a more intricate way.

55. The Tribunal do not accept that the various components, net, twine and rope are manufactured into completely different products as creel pots. They are simply an assembly of those components to create a type of fishing net suitable for a particular type of creature that lives in the sea, a crustacean. Accordingly, they have the essential character of the complete or finished article; a creel, and are suitable for the prescribed end use of equipping fishing boats.

56. The Tribunal note that within Council Regulation 2913/92 at Article 84(3) there is a definition of “goods in an unaltered state” which means import goods which under inward processing procedures or other procedures for processing under customs control have undergone no form of processing. If the legislation so wished there was a precise definition which could be used which would not allow CC to deal with the goods as they did but this was not used for shipwork EUR.

57. The Tribunal considered whether the issue in this case was an ‘ancillary matter’ and although EUR can only be obtained if authorisation is given, the Application Form, based on Annex 67, is titled “Application for End Use Relief”.

58. The Tribunal did not accept that the issue was an ancillary matter as the principal issue concerned the entitlement to a relief, EUR. Accordingly, this fell within the Finance Act 1994, Section 13A(2)(a)(iv).

59. The Appeal is allowed.

60. 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

5 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.

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**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

RELEASE DATE: 1 February 2013

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