



TC03434

Appeal number: TC/2012/00414

PROCEDURE – locus standi – customer of importer appealing against Binding Tariff Information issued to importer – whether customer a competent appellant – no - Tribunal Procedure Rule 9 – whether importer can be substituted for customer – yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIQUID INVESTMENTS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS GILL HUNTER**

Sitting in public at Bedford Square, London on 24 January 2014

**Mr Matthew Collings QC (instructed by Goodman Derrick LLP) for the
Appellant**

**Mr Mark Fell of counsel (instructed by the General Counsel and Solicitor to HM
Revenue and Customs) for the Respondents**

DECISION

1. The Tribunal directed this hearing of the preliminary issue in these proceedings
5 of whether the Tribunal had jurisdiction to entertain the appeal of the Appellant
("Liquid") against a Binding Tariff Information ("BTI") issued by the Respondents
("HMRC") to C.A.R.S United Kingdom Limited ("CARS").

Facts

2. The facts, which are not in dispute, may be summarised briefly. Liquid
10 acquired abroad a valuable car ("the McLaren"). Liquid appointed CARS to import
the McLaren into the UK. CARS applied to HMRC for a BTI; the application was
made in the name of CARS and did not declare that CARS was making the
application on behalf of Liquid. HMRC issued a BTI to CARS; the duty
15 classification given in the BTI is the subject of the substantive proceedings and for
present purposes it is sufficient to note that HMRC consider the applicable rate of
import duty is higher than that anticipated by Liquid and CARS, hence the dispute.
CARS requested a formal internal review of the decision (again, in its own name
without mentioning Liquid); the review upheld the original decision. Liquid appealed
20 to the Tribunal against the original and review decisions. In their statement of case
HMRC raised as a preliminary issue whether Liquid had *locus standi* in the dispute
and, therefore, whether the Tribunal had jurisdiction to hear the appeal.

3. This decision notice first deals with the *locus standi* issue, and subsequently
(from [31]) with the matter of substitution of parties.

THE LOCUS STANDI ISSUE

25 Law

4. Articles 11 & 12 Council Regulation 2913/92/EEC ("the Community Customs
Code") concern BTIs and provide (so far as relevant):

"Article 11

1. Any person may request information concerning the application
30 of customs legislation from the customs authorities.

...

Article 12

1. The customs authorities shall issue binding tariff information or
binding origin information on written request, acting in accordance
35 with the committee procedure.

2. Binding tariff information or binding origin information shall be
binding on the customs authorities as against the holder of the
information only in respect of the tariff classification or determination
of the origin of goods.

...

7. The classification or determination of origin in binding information may be applied, on the conditions laid down in paragraph 6, solely for the purpose of—

5 — determining import or export duties, ...”

5. Articles 5 & 6 Council Regulation 2454/93/EEC (“the Implementing Regulation”) also concern BTIs and provide (so far as relevant):

“Article 5

For the purpose of this Title—

10 1. binding information—

means tariff information or origin information binding on the administrations of all Community Member States when the conditions laid down in Articles 6 and 7 are fulfilled;

2. applicant—

15 — tariff matters: means a person who has applied to the customs authorities for binding tariff information,

...

3. holder—

means the person in whose name the binding information is issued.

20

Article 6

1. Applications for binding information shall be made in writing, either to the competent customs authorities in the Member State or Member States in which the information is to be used, or to the
25 competent customs authorities in the Member State in which the applicant is established. ...”

6. Article 5 Community Customs Code concerns representatives and provides (so far as relevant):

“Article 5

30 1. Under the conditions set out in Article 64(2) and subject to the provisions adopted within the framework of Article 243(2)(b), any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

35 2. Such representation may be—

— direct, in which case the representative shall act in the name of and on behalf of another person, or

— indirect, in which case the representatives shall act in his own name but on behalf of another person.

40

...

4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.

5 A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.”

7. Article 243 Community Customs Code concerns appeals and provides (so far as relevant):

10 “Article 243

1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

15 Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

20 2. The right of appeal may be exercised—

(a) initially, before the customs authorities designated for that purpose by the Member States;

25 (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.”

8. Sections 15 & 16 Finance Act 1994 also concern appeals and provide (so far as relevant):

“15 Review procedure

30 (1) Where the Commissioners are required in accordance with [section 14 or 14A] to review any decision, it shall be their duty to do so and they may, on that review, either—

(a) confirm the decision; or

35 (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

...

16 Appeals to a tribunal

40 (1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

...

(2) An appeal under this section with respect to a decision falling within subsection (1) or (1A) shall not be entertained unless the appellant is the person who required the review in question.

5 (2A) An appeal under this section with respect to a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) shall not be entertained unless the appellant is—

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by the relevant decision,

10 (b) a person in relation to whom, or on whose application, the relevant decision has been made, or

(c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied.

15 ...”

9. The Customs Reviews and Appeals (Tariff and Origin) Regulations 1997 (SI 1997/534) provide (so far as relevant):

“2. In these Regulations—

20 “the Act” means the Finance Act 1994;

“the Commissioners” means the Commissioners of Customs and Excise.

25 3. (1) Sections 13A to 16 of the Act, as they apply to the decisions mentioned in section 13A(2) of the Act, shall apply to the following decisions of the Commissioners, so far as they are made for the purposes of the EU provisions relating to binding tariff information or the EU provisions relating to binding origin information—

(a) any decision as to the tariff classification or determination of the origin of any goods;

30 (b) any decision as to whether or not binding tariff information or binding origin information is to be supplied;

(c) any decision as to whether or not any binding tariff information or binding origin information is to be annulled, withdrawn or revoked.

35 (2) In this regulation—

“binding tariff information” and “tariff classification” have the same meaning as in the EU provisions relating to binding tariff information;

40 “binding origin information” and “determination of the origin” have the same meanings as in the EU provisions relating to binding origin information;

“the EU provisions relating to binding tariff information” and “the EU provisions relating to binding origin information” mean Article 12 of Council Regulation (EEC) No 2913/92 establishing the Community

Customs Code and Title II of Part I of Commission Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92.

5 4. Section 16(4) of the Act (review jurisdiction) shall have effect as if decisions (b) and (c) mentioned in regulation 3(1) above were of a description specified in paragraph 1 of Schedule 5 to the Act and as if any decision mentioned in (a) of that regulation were mentioned in section 13A(2)(a) to (h) of that Act.”

Respondents' Case

10 10. Mr Fell for HMRC submitted as follows.

11. Liquid has no legal status whatever in relation to the BTI.

15 (1) The purpose of a BTI is to provide a trader with legal certainty where there is doubt as to the tariff classification of goods: see paragraph 27 of *Sony Supply Chain Solutions (Europe) BV* (Case C-153/10). However, the BTI will only provide certainty to the trader who holds it. Article 5(2) and (3) of the Implementing Regulation defines the “applicant” as “a person who applies for a [BTI]” and the “holder” as “the person in whose name the [BTI] is issued”. Article 12(2) of the Community Customs Code limits the binding effects of BTIs on customs authorities to the “holders” of the BTIs.

20 (2) The ECJ has confirmed that a BTI only creates rights for its holder (*Intermodal Transports* (Case C-495/03), paragraph 27) and that a BTI may be relied on only by its holder (*Sony*, paragraphs 25, 33, 34 and 35). Liquid is not the holder of the disputed BTI, with the result that it has no rights under that BTI and cannot rely on it.

25 (3) Liquid had suggested that CARS acts as some form of agent or representative of Liquid. However, when applying for a BTI (and when seeking a review of the decision), CARS failed to state that it was acting in the name of or on behalf of another person. It is clear from Article 5 of the Community Customs Code that, for the purposes of EU customs law, CARS is to be regarded as acting in its own name and on its own behalf.

30 (4) It follows that Liquid has no legal status whatever in relation to the BTI, in the sense that that BTI does not confer any right, power or immunity on Liquid and does not impose any duty or liability on Liquid.

35 12. Liquid has no standing to bring the appeal before the Tribunal, and the Tribunal has no jurisdiction to entertain such an appeal.

(1) Liquid will not have standing and the Tribunal will not have jurisdiction in relation to the appeal unless Liquid falls within one or other of sub-sections 16(2A)(a) to (c).

40 (2) As regards sub-section 16(2A)(a):

(a) There is no “relevant duty”, as the decision in question relates to a BTI.

(b) Because Liquid has no legal status in relation to the BTI, no liability on the part of Liquid to pay duty will be “determined by”, “result from” or be “affected by” the BTI.

(c) The premise that because it owns the McLaren Liquid will be liable for any duty payable in respect of the McLaren, is false. As provided in article 201(3) of the Community Customs Code, the debtor (defined in article 4(12) as “any person liable for payment of a customs debt”) in respect of a customs debt (defined in article 4(9) as “the obligation on a person to pay an amount of import duties ... or export duties ... which apply to the specific goods under the Community provisions in force”) is the declarant (defined in article 4(18) of the Community Customs Code as “the person making the customs declaration in his own name or the person in whose name the customs declaration is made”) – and the declarant will not necessarily be the owner of the goods subject to the customs debt.

(3) As regards sub-section 16(2A)(b), the decision to issue the BTI and the review decision were made in relation to and on the application of CARS, not Liquid.

(4) As regards sub-section 16(2A)(c), the two decisions under appeal do not impose or apply any “conditions”, “limitations”, “restrictions”, “prohibitions”, or “other requirements” on or to Liquid.

(5) Since none of sub-sections 16(2A)(a) to (c) applies to Liquid, it has no standing to bring the appeal and the Tribunal has no jurisdiction. This is borne out by *Portable Multimedia Limited* [2012] UKFTT 725 (TC) (see paragraphs 1 to 3), although the facts of that case were significantly different to those in the present case.

(6) Article 243(1) of the Community Customs Code does not assist Liquid. The provisions for the implementation of the appeals procedure referred to in the Code are to be determined by Member States: see article 245 of the Code, commented on in paragraph 65 of *Firma Söhl & Söhlke* (Case C-48/98). The relevant appeals procedure in the UK is provided for in sections 13A to 16 of FA 1994, which, as submitted above, does not confer a right of appeal on Liquid in the present case. Further, because Liquid is not the holder of the BTI the decision to issue the BTI does not concern Liquid “directly and individually” within the meaning of article 243(1).

13. Although Liquid placed much emphasis on purportedly having what it described as “a sufficient interest” in the disputed BTI, that was not a concept provided for in any of the EU or UK legislation, and was simply not applicable. To give third parties any rights in relation to BTIs would be counter to *Intermodal Transports* and *Sony*.

14. There was no jurisdiction for the Tribunal to hear any argument advanced on the basis of “legitimate expectation”. Liquid had submitted a witness statement from Jeremy Barker of CARS in which he suggested that CARS has regularly submitted applications for BTIs “on behalf of its clients” in other cases and no difficulties have

arisen. It appears that Liquid considers that the evidence of Mr Barker provides a basis for arguing that Liquid has a “legitimate expectation” that Liquid should have standing and that the procedure adopted by CARS should not result in HMRC taking the point that Liquid has no *locus standi*. The factual basis for such an argument is not
5 accepted by HMRC, and it is well established that the First-tier Tribunal has no jurisdiction to entertain a legitimate expectation argument of this sort: see *Noor v Revenue & Customs* [2013] UKUT 71 (TCC) and *Europlus Trading Limited v Revenue & Customs* [2013] UKUT 108 (TCC).

Appellant’s Case

10 15. Mr Collings for Liquid submitted as follows.

16. It was accepted that Liquid could not rely on any argument as to “legitimate expectation” in relation to other transactions by CARS.

17. It was accepted that Liquid could not rely on the terms of the BTI. However, the decision in *Sony* did not make the BTI irrelevant so far as Liquid was concerned.
15 For example, the BTI was admissible as evidence in proceedings brought by a person other than the holder of the BTI – *Sony* paragraph 43:

“... a BTI issued to a third party may be taken into consideration as evidence by a court seised of a dispute relating to the classification of goods and the subsequent payment of customs duties.”

20 18. Liquid’s right to bring the appeal was founded on s 16(2A)(a) and (b) FA 1994. Those provisions were wide and inclusionary, and should be given effect accordingly.

19. In relation to s 16(2A)(a), the definition of “relevant duty” in s 17(2) was very wide. Liquid was the owner of the McLaren and would ultimately be liable for the customs duty when the McLaren was imported. When importing the McLaren Liquid
25 would be the “declarant” and thus Liquid was the person whose liability to pay the duty is or will be affected by the BTI. HMRC’s assessment of the duty will be determined by the BTI and, as acknowledged in *Sony*, the BTI must have an evidential impact. As owner of the McLaren Liquid must have a sufficient interest in the BTI to be able to mount a legitimate challenge to the BTI. Section 16(2A)(a)
30 expressly had in mind a future liability (“... or will be affected ...”) and the person clearly so affected was Liquid.

20. In relation to s 16(2A)(b), it was accepted that the deeming provisions in art 5(4) Community Customs Code resulted in the “person in relation to whom ... the relevant decision has been made” being CARS, not Liquid. But it was a fact that
35 CARS had acted throughout as agent of Liquid and so, despite the formalities of art 5(4), Liquid was still a “person ... on whose application the relevant decision has been made”.

Consideration and Conclusions

21. As communicated to the parties at the conclusion of the hearing, we agree with HMRC (for the reasons set out below) that Liquid does not have *locus standi* in these proceedings.

5 22. As accepted by Liquid, *Sony Supply Chain Solutions (Europe) BV* is clear authority that the only person who may rely on a BTI is the “holder” of the BTI – see paragraphs 25 & 26 of *Sony* - and that is the person in whose name the BTI is issued (per Article 5 of the Implementing Regulation). Where the application for the BTI is made by a representative (here, CARS) who fails to state that it is acting on behalf of another person (here, Liquid) then the applicant is deemed to be acting on its own behalf (per Article 5 of the Community Customs Code). Thus in the current case the only person who may rely on the disputed BTI is CARS. We note that the outcome in *Sony* was that one company in the Sony group could not rely on a BTI issued to one of its sister group companies; thus even a close economic connection and involvement between the BTI holder and the trader seeking to rely on the BTI is insufficient to allow such reliance. We also note that, provided the potential problem is identified in advance, there is no bar to the other trader making its own application for a BTI, on which BTI it *would* be able to rely as it would then be the “holder” of its own BTI.

23. In relation to whether Article 243 of the Community Customs Code gives any appeal rights to Liquid, we consider the point is put beyond doubt by *Sony* in the ECJ’s conclusions (on what the ECJ termed “the first question” put to it there) at paragraphs 36 to 44. Liquid has no such rights in relation to the disputed BTI.

24. Turning to s 16 FA 1994, we agree with the parties that for Liquid to have a right of appeal to this Tribunal, Liquid must establish that it falls within one of the subsections of s 16(2A). There is no right of appeal under s 16(2) because it was CARS who “required the review”, and thus it is s 16(2A) that is in point.

25. The purpose and effect of a BTI is to determine the “tariff classification ... of goods” (art 12 Community Customs Code). It does not determine (let alone charge) the duty payable in relation to those goods; the rate of duty applicable to the stated tariff classification may (and frequently does) vary over time as the rules are amended. Thus the duty chargeable can only be computed (ie determined) if and when the goods are imported. The BTI determines the tariff classification, not the customs duty. Although that may seem a fine distinction, we consider it is an important one in relation to the effect of s 16 (2A).

35 26. In relation to s 16(2A)(a), we agree with HMRC that Liquid does not fall within this provision. We consider (2A)(a) can only apply to a person with a demonstrable present or future “liability to pay any relevant duty”. At present there is no such liability, for the reason stated in the preceding paragraph. On any future liability the person with the liability will be the “declarant” as defined in the Community Customs Code. As things stand at present, that person appears to be CARS. We consider that to read (2A)(a) any wider, to include any person with a potential contingent future liability if they happened to import the goods described in the BTI, would run counter to the thinking of the ECJ in *Intermodal Transports* and *Sony* – the only person with

any rights or obligations in relation to a BTI is its “holder” (here, CARS). HMRC would challenge that even CARS is not within (2A)(a) but we do not need to consider that extension.

27. In relation to s 16(2A)(b), the applicant for the BTI was CARS not Liquid.
5 Further, any argument that Liquid stands in CARS’s shoes as its principal is ruled out by the express provisions of art 5(4) Community Customs Code concerning agents acting for an undisclosed principal.

28. In relation to s 16(2A)(c), we do not consider that the tariff classification stated in the BTI is “imposed or applied” on or to Liquid. Again, that follows from
10 *Intermodal Transports* and *Sony*. The only person in that position is CARS.

29. Accordingly, Liquid does not fall within any of the subsections of s 16(2A) and has no right of appeal before this Tribunal against the BTI.

30. Absent any further action the Tribunal would be obliged to strike out the proceedings – see Tribunal Procedure Rule 8(2). However, we now consider whether
15 the situation can be remedied under Rule 9.

ADDITION OR SUBSTITUTION OF PARTIES

31. Tribunal Procedure Rule 9 provides:

“Substitution and addition of parties

- (1) The Tribunal may give a direction substituting a party if—
20 (a) the wrong person has been named as a party; or
(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.
- (2) The Tribunal may give a direction adding a person to the proceedings as a respondent.
- 25 (3) A person who is not a party to proceedings may make an application to be added as a party under this rule.
- (4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.
- 30 (5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.”

32. There was handed up to the Tribunal a letter from CARS to the Tribunal dated 23 January 2014 which stated, “... I am happy to confirm that [CARS] would be prepared to be substituted as the appellant in this case in place of [Liquid].”

35 33. Mr Collings for Liquid submitted as follows.

- (1) Tribunal Procedure Rule 7 provided that “An irregularity resulting from a failure to comply with any requirement in these Rules ... does not of itself

render void the proceedings or any step taken in the proceedings.” Accordingly, the fact that the notice of appeal had been filed in the wrong name did not render the appeal void.

5 (2) Rule 9 allowed the Tribunal to substitute CARS in place of Liquid as the appellant in the proceedings. CARS had now consented to being substituted. There was no change to the underlying proceedings and it would be in the best interests of justice to direct accordingly.

10 34. Mr Fell for HMRC confirmed that HMRC had no objection to the substitution direction sought by Liquid. HMRC would like the opportunity to ensure their statement of case addressed the change in party.

Consideration and Conclusions

15 35. As to the interpretation of Rule 9 generally we adopt the conclusions of the Tribunal in *New Miles Limited* [2012] SFTD 695 at [32-33]. We agree with Liquid that, CARS having so consented, it would be in accordance with the overriding objective (Rule 2: to deal with cases fairly and justly) to substitute CARS as the appellant going forward.

36. A formal Direction will be issued separately directing the substitution and also giving both parties an opportunity to review their grounds of appeal and statement of case for any necessary consequential amendments.

20 Appeal rights

25 37. 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 25 March 2014

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