[2017] UKFTT 0156 (TC)

TC05649

Appeal number: TC/2014/06606

VAT – IMPORT DUTY – samples relief – European Council Regulation 1186/2009, Article 86

FIRST-TIER TRIBUNAL
TAX CHAMBER

M & M MANAGEMENT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Mr John Woodman

Sitting in public at The Royal Courts of Justice, London on 19th April 2016

The Appellant was represented by its director, Mr Martyn Creed.

Ms Laura McNair-Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Background

2. The Appellant is a PR company based on London. In February 2013, the Appellant received a shipment of jewellery ('**the Jewellery**') from its client, Sydney Evan (a jewellery designer based in California). The Jewellery was valued at £18,842.42. Import duties were not paid and a relief from duty for commercial samples was claimed.

3. On 21 June 2013, Officer McAnneny of the National Import Reliefs Unit (NIRU) wrote to the Appellant requesting further information about the Jewellery in the form of a questionnaire. The questionnaire was completed and returned by an employee of the Appellant, Yumi Futatsuka, on 8 July 2013.

4. On 11 July 2013, Officer McAnneny wrote to the Appellant stating that relief from duty was not available for the Jewellery and that duty of £753.69 and Import VAT of £3,919.22 were payable.

5. There followed a series of letters and emails between HMRC, the Appellant and Sydney Evan, which concluded with a letter from HMRC to the Appellant dated 21 August 2013, notifying the Appellant of the decision not to allow commercial samples relief and to raise a post clearance demand notice (C18) for £4,672.91 ('**the Decision**').

6. The Appellant requested a review of the Decision on 26 November 2014, which HMRC refused on the basis that it was out of time on 3 December 2014.

7. The Appellant appealed to the Tribunal on 10 December 2014. HMRC informed the Tribunal that the appeal could not progress while the amounts in dispute remained unpaid. An agreement on payment was reached between HMRC and the Appellant and the Appellant paid the disputed sums by March 2015.

8. At a hearing on 7 May 2015, the Tribunal decided that the Appellant's appeal should be heard notwithstanding that it was brought out of time.

Relevant law

9. European Council Regulation 2913/92 – Article 201 states that:

> (1) A customs debt on importation shall be incurred through the release for free circulation of goods liable to import duties.
>
> (2) A customs debt shall be incurred at the time of acceptance of the customs declaration in question.
>
> (3) The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

10. European Council Regulation 1186/2009 – Article 23 states that:

> (1) Subject to Article 24, any consignments made up of goods of negligible value dispatched direct from a third country to a consignee in the Community shall be admitted free of import duties.
>
> (2) For the purposes of paragraph 1, 'goods of negligible value' means goods the intrinsic value of which does not exceed a total of €150 per consignment.

11. European Council Regulation 1186/2009 – Article 86 states that:

> (1) Without prejudice to Article 90(1)(a), samples of goods which are of negligible value and can be used only to solicit orders for goods of the type they represent with a view to their being imported into the customs territory of the Community shall be admitted free of import duties.
>
> (2) The competent authorities may require that certain articles, to qualify for relief, be rendered permanently unusable by being torn, perforated, or clearly and indelibly marked, or by any other process, provided such operation does not destroy their character as samples.
>
> (3) For the purposes of paragraph 1, 'samples of goods' means any article representing a type of goods whose manner and presentation and quantity, for goods of the same type or quality, rule out its use for any purpose other than that of seeking orders.

12. The relevant parts of Public Notice 367 'Importing Commercial Samples of Negligible Value free of Duty and VAT' (August 2004) read as follows:

> "2.1 What are the conditions for the relief?
>
> You can get relief on samples of goods of any kind if, when imported, they:
>
> - can only be used as samples
> - are of negligible value and
> - are intended to obtain orders for the type of goods they represent.
>
> 2.2 How do I ensure the goods can only be used as samples?
>
> There are many ways for you and your supplier to do this, for example by:
>
> - tearing, perforating, slashing or defacing
> - indelible marking
> - limiting quantities or size or
> - method of presentation.
>
> We may ask for one or more of these methods to be used before we will allow relief on the goods you are importing.
>
> 2.3 What is negligible value?

Although the law requires the samples to be of negligible value, it does not define the meaning.

In practice, once we are satisfied the goods can only be used as samples, we regard them as being of negligible value.

2.4 Are there any goods excluded from relief?

Yes, we will not allow this relief on goods:

Imported without the intention of obtaining further orders

Not presented as samples at import, but intended for subsequently making into samples which can be used other than as samples or intended for consumption, destruction or distribution free of charge to the public at a trade fair or exhibition. Such goods may qualify for the alternative relief explained in the Tariff, Volume 3 under Customs Procedure Code 40 00 44 or 49 00 44, as appropriate…

3.4 Can I claim relief after the goods have been imported and customs charges paid?

Yes. Normally, you should claim relief at the time of import. If you fail to do this, we may accept a belated claim and repay the appropriate charges subject to certain conditions. See our Notice 199 imported goods: Customs procedures and Customs debt for further details: the section and paragraphs on repayment and remission under Code Article 236 refer.

13. The Value Added Tax (Imported Goods) Relief Order 1984, Regulation 5 states:

"(1) Subject to the provisions of this Order, no tax shall be payable on the importation of goods of a description specified in any item in Schedule 2 to this Order…

Schedule 2 Relief for goods of other descriptions

GROUP 3 PROMOTION OF TRADE

Item no.

1. Articles of no intrinsic value sent free of charge by suppliers of goods and services for the sole purpose of advertising.

2. Samples of negligible value of a kind and in quantities capable of being used solely for soliciting orders for gods of the same kind.

3. Printed advertising matter, including catalogues, price lists, directions for use or brochures, which relate to goods for sale or hire, or to transport, commercial insurance or banking services, and which clearly display the name of a person established abroad by whom such goods or services are offered."

Evidence

14. Mr Martyn Creed gave oral evidence on behalf of the Appellant.

15. Both parties referred us to various documents and items of correspondence in the hearing bundle.

Submissions

16. The Appellant submitted that the Jewellery was shipped by its client, Sydney Evan, not by the Appellant. The Appellant was not engaged in the business of importing, trading or selling goods; it was a PR agency. When clients sent sample items for the Appellant to use for promotional purposes, it was the clients, not the Appellant, who dealt with the shipping requirements. The Appellant had never had an issue before.

17. The Appellant submitted that the Jewellery consisted solely of samples intended for use in promotional materials such as magazine features. It argued that the guidance on samples in Public Notice 367 listed various ways to ensure items could only be used as samples, referring us to section 2.2:

> "How do I ensure the goods can only be used as samples?
>
> There are many ways for you and your supplier to do this, for example by:
>
> - tearing, perforating, slashing or defacing
> - indelible marking
> - limiting quantities or size
> - method of presentation
>
> We may ask for one or more of these methods to be used before we will allow relief on the goods you are importing."

18. The Appellant argued that the first two examples in this list could not apply to items of jewellery such as those in question without rendering them unsuitable for use as samples in magazines etc. However, both of the other examples applied in this case: the items were limited in quantity as shipment included only one example of each item and they were presented as samples in clear plastic bags and labelled samples, rather than in the presentation boxes they would usually be sold in.

19. The Appellant submitted that not all of the requirements could be imposed as this would mean items of jewellery could never be samples and it did not appear in the list of such items excluded from the relief in Public Notice 367 (section 2.4). The Appellant noted that the current version of Public Notice 367 does list jewellery under goods excluded from relief, but not the version in force at the time when the Jewellery was shipped.

20. The Appellant argued:

> (1) that HMRC were wrong in their conclusion that the items of Jewellery were not samples
>
> (2) that HMRC had not adhered to its customer charter in it treatment of the Appellant; and

(3) that if samples relief was not available HMRC should have allowed them to obtain a carnet retrospectively as Mr Caruso of Sydney Evan had suggested.

21. The Appellant argued that HMRC's decision not to allow samples relief was unreasonable, citing *Sabine Smouha v The Director of Border Revenue* which in turn cited *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

22. The Appellant submitted that the Jewellery had at all times remained the property of Sydney Evan and had since been returned. The Jewellery had at no point been available for sale in the UK.

23. The Appellant submitted that if duty were payable, it should be the responsibility of Sydney Evan, not the Appellant.

24. The Appellant submitted that if samples relief were not available, HMRC should have allowed the Appellant and/or Sydney Evan (as the exporter) to apply for an alternative relief, for example under the US Carnet system. The Appellant referred us to correspondence in which Mr Caruso of Sydney Evan made this suggestion to Officer McAnneny of HMRC, having apparently first obtained confirmation from the US authority that it would be willing to issue a carnet retrospectively.

25. HMRC referred us to the schedule of the Jewellery shipped to the Appellant, which showed the total value of the items as $29,850, with individual items ranging from $200 to $2,440. HMRC submitted that based on this evidence, the goods were not, as a matter of fact 'of negligible value'.

26. HMRC referred us to a schedule of all items imported by the Appellant during the period from 26th March 2012 to 28th January 2016 and pointed out that the Sydney Evan Jewellery, with a stated value of £18,842 (sterling equivalent of $29,850) was the most valuable consignment imported by the Appellant in a period of approximately four years. Excluding a ring with a customs value of £8,858, the value of the Jewellery was around ten times higher than all other consignments listed. HMRC submitted this was further evidence that the value of the Jewellery was not negligible.

27. HMRC referred us to the Appellant's assertion in its skeleton argument of 10th December 2015 that ownership of the Jewellery did not pass from Sydney Evan to the Appellant and that the Jewellery had since been returned to Sydney Evan. HMRC stated that no evidence had been presented in support of this assertion.

28. HMRC referred us to print outs of screen shots showing the Appellant's consignor number and to a search it had undertaken under that consignor number for the period 20th February 2013 to 6th March, which revealed only one export by the Appellant, which was not to Sydney Evan. HMRC also referred to a further search undertaken, with 'Sydney' as the search criteria, which revealed no shipments to Sydney Evan during the same period.

29. HMRC referred us to a fax signed by Shaughna McNamara, an employee of the Appellant, on 15th February 2013. The fax had been sent to the Appellant by UPS and stated:

> "In order for UPS to apply the correct Customs Procedure Code to the above shipment we require clarification from yourselves as to the regime you require to be applied to this shipment. It is our understanding that the above shipment may be capable of being entered as Samples.
>
> For us to correctly complete the Customs entry we would ask that you confirm you have read Public Notice 367 and the goods applicable to this shipment comply with the regulations laid out in this notice. Please sign below and fax back to UPS this form if you comply with these regulations.
>
> If you are unable to make this declaration please inform us and consider other procedures such as…".

30. The fax referred to other customs procedures and stated that all Public Notices could be found on HMRC's website, following the link for Forms. Leaflets and Booklets, and also gave the telephone number of the Customs advice line.

31. HMRC submitted that the fax demonstrated that the Appellant had been made aware of the procedures by UPS on or before 15th February 2013.

32. Mr Creed explained that Shaughna McNamara was employed by the Appellant as a secretary. He did not believe she would have read the Public Notice, but instead would have assumed signature of the fax was an administrative matter. Ms McNamara was not present to give evidence. Mr Creed stated that this fax/form had not been brought to his attention.

33. HMRC stated that by signing and returning the fax to UPS, the Appellant had confirmed it had read and accepted that the provisions of Public Notice 36, including the requirements for relief, applied to the shipment of the Jewellery.

34. HMRC referred to Officer McAnneny's letter to the Appellant of 21st August 2013, which concluded that the items were not eligible for relief as samples. Officer McAnneny stated his conclusion stood notwithstanding correspondence with Mr Caruso of Sydney Evan, who explained the items were limited in quantity and shipped in plastic bags rather than in the presentation boxes which would be used were they intended for sale. Officer McAnneny concluded these steps were insufficient to render the items of 'negligible value'.

35. HMRC stated that the Appellant's argument appeared to be that the Jewellery should be treated as samples because of the limited quantity and method of presentation. Whilst these are factors listed in Public Notice 367, HMRC submitted they do not carry the same weight as other factors such as indelible marking.

36. HMRC referred again to the list of consignments received by the Appellant over approximately four years, pointing out the Customs Procedure Code (CPC) used. The

CPC for the Jewellery was 4000C30. Other consignments listed had different codes, including the code for importation for the purpose of exhibition, another relief. HMRC noted that some consignments other than that of the Jewellery had 'C30' codes, meaning they were imported as samples and suggested this showed the Appellant had some experience of importing items under this code (i.e. subject to samples relief). Finally, HMRC noted that some of the consignments had CPC '4000000', which is the code used where goods are imported subject to duty and pointed out duty had been paid on consignments imported by the Appellant under this 'standard' code. These consignments included those where the goods imported were described as 'samples not for sale'. HMRC submitted that this indicated that the Appellant had some understanding of customs codes and that samples relief was not always available for goods intended to be used as samples.

37. HMRC referred us to a document headed 'UPS Customs Entry Advice' relating to the Jewellery and showing the CPC 4000C30. They submitted that UPS had entered this code on the basis of the fax signed by Ms McNamara.

38. Mr Creed stated that the customs authorities use different codes but that he had no knowledge of them himself. He had previously stated that the Appellant's clients usually dealt with the shipment of samples, including payment of duty where applicable.

39. HMRC referred us to Article 199, Title VII, Commission Regulation (EEC) No. 2454/93 which states that "the lodging of a declaration by the declarant or his representative…shall render the declarant or his representative responsible under the provisions in force for: the accuracy of the information given in the declaration, the authenticity of the documents presented, and compliance with all obligations relating to the entry of the goods in question under the procedure concerned".

40. HMRC stated that UPS were acting as agent for the Appellant in this matter. The Appellant instructed UPS to import the Jewellery claiming samples relief. The Appellant had been instructed to read Public Notice 367 before confirming this instruction by fax. The effect was the designation of CPC 4000C30.

41. Article 86 states that "samples of goods which are of negligible value and can be used only to solicit orders for goods of the type they represent with a view to their being imported into the customs territory of the Community shall be admitted free of import duties".

42. HMRC stated that, to qualify for samples relief, goods must be (i) of negligible value and (ii) only capable of being used to solicit orders for goods of the type they represent. HMRC stated that the focus of Article 86 was on the physical characteristics of the goods, which must be such as to avoid any possibility of sale for final consumption. In this case, HMRC submitted that the presentation of the Jewellery and the addition of a removable tag marked 'SAMPLE' was insufficient to render the items incapable of sale. HMRC submitted that it was the physical characteristics of the goods themselves, not whether they were intended for sale, that was relevant for the test in Article 86.

43. HMRC submitted that action could have been taken to render the Jewellery unsaleable whilst still enabling it to be used for promotional purposes, but that this had not been done. However, if it was not possible to take such action in relation to an item of jewellery, this did not mean duty would waived, but rather than samples relief could not apply to that item.

44. HMRC stated that in order to avoid duty being payable on the Jewellery, either steps should have been taken to render the items suitable only for use as samples or a different customs procedure should have been followed, for example, Temporary Importation or the carnet system. The retrospective application for the carnet in this case was immaterial. At that stage the goods had already been entered into free circulation within the EU.

45. HMRC did not believe that the quantity of the goods imported indicated they were samples, citing the fact that this was by far the largest consignment received by the Appellant in four years as evidence that the Jewellery was not 'limited in quantity'. HMRC believed that the method of presentation, in plastic bags rather than presentation boxes, was insufficient to render the items only suitable for use as samples. The method of presentation did nothing to alter the physical characteristics of the items themselves.

46. In respect of the appeal itself, HMRC stated that whether items were in fact samples of negligible value and so qualified for the relief was a matter for HMRC to determine. As such, the Tribunal had no jurisdiction to make a contrary finding on the point. Nor did the Tribunal have any jurisdiction in relation to the application of the Public Notice. HMRC cited *Anna Scholz Ltd v HMRC* TC/2012/06578, *Prince v CRC* [2012] UKFTT 157, *CRC vNoor* [2013] UKUT 071 and *CRC v Hok Ltd* [2012] UKUT 363 in support of this.

47. In response to the question of why the Appellant be liable for the duty should, HMRC stated:

> (1) The relevant import duties are governed by European Council Regulation 2913/93 and European Commission Regulation 2454/93.
>
> (2) Where conditions for relief are not complied with, a customs debt may be incurred.
>
> (3) Article 78 of the Customs Code gives HMRC the right to inspect documents and information relating to imports and exports after goods have been released. Where such examination indicates the customs procedure is incorrect of incomplete, HMRC is required to take the necessary measures including issuing a C18 demand notice where HMRC considers conditions for relief have not been met.
>
> (4) Under Article 199, the declarant is responsible for the accuracy of the information given in the customs declaration and compliance with all obligations relating to entry of the goods in question under the customs procedure concerned.

(5) Under European Council regulation 2913/92, Article 204(3) the debtor is the person who is required to fulfil the obligations under the customs procedure used.

(6) The Appellant authorised the use of the customs procedure in this case by signing and returning the UPS fax, is the declarant for the purposes of Article 199 and the debtor under Article 204(3).

(7) Under Article 201:

(a) the declarant was responsible for ensuring that all relevant import duties and VAT were paid; and

(b) the Import Entry form reference 760 223 708 G of 20 February 2013 showed that the declarant in this case was the Appellant.

48. HMRC maintained that whether or not the goods could have been modified so as to render their value negligible is a question of fact and, under Public Notice 367, a matter for HMRC's jurisdiction. The Tribunal had no jurisdiction to interfere with this discretion.

49. HMRC concluded that the Jewellery did not qualify for commercial samples relief because it was not in and of itself of negligible value (the value being £18,842.24) and did not meet the requirements set out in Public Notice 367 and that the duty was therefore payable.

Findings of fact

50. The Jewellery was shipped to the UK under CPC 4000C30 meaning that it entered into free circulation in the EU and samples relief was claimed so that no import duty was paid.

51. The Appellant authorised this when its employee signed and returned the fax dated 15th February 2013 to UPS.

52. The Jewellery had not been torn, perforated, slashed, defaced or indelibly marked.

53. The Jewellery was limited in quantity to a single example of each type of item and was presented in clear plastic bags rather than the presentation boxes that would be used for commercial sales.

54. The Jewellery was intended for promotional uses by the Appellant, not for commercial sale.

Discussion and conclusions

55. The Tribunal had some sympathy for the Appellant, a small business, which had not intended to import the Jewellery incorrectly and had taken some steps to try to resolve the situation, for example by seeking to adopt an alternative method of importation under the carnet. We believed Mr Creed's assertions that the Jewellery

was not intended for commercial sale but for use in promotional materials and that he believed the items to be samples.

56. We found Mr Creed's reading of section 2.2 of Public Notice 367 as listing various alternative ways in which goods could be shown to be samples to be reasonable. We accept that items of fine jewellery could not be defaced etc and still be used as samples for promotional purposes in magazine features as described by Mr Creed. We found Mr Creed to be a credible witness.

57. However, we are obliged to apply the law within the jurisdiction granted to us.

58. The Tribunal has no jurisdiction to deal with complaints about the behaviour of HMRC in relation to taxpayers. Neither does the Tribunal have power to interfere with HMRC's discretion.

59. In this case, the Jewellery was imported to the UK by the Appellant on whose authority relief under Article 86 was claimed on the basis that the items were samples. Article 86 grants relief from import duty for "samples of goods which are of negligible value and can be used only to solicit orders for goods of the type they represent". It also provides that "the competent authorities" i.e. HMRC "may require that certain articles, to qualify for the relief, be rendered permanently unusable by being torn, perforated or clearly and indelibly marked, or by any other process, provided such operation does not destroy their character as samples". Finally, it clarifies that "'samples of goods' means any article representing a type of goods whose manner of presentation and quantity, for goods of the same type or quality, rule out its use or any purpose other than that of seeking orders".

60. The Jewellery may fall within this definition of 'samples of goods' based on its limited quantity and presentation. However, being 'samples of goods' is not enough to secure the relief. Samples must also be "of negligible value" and capable of use "only to solicit orders…".

61. In this case, the Jewellery was, as a matter of fact, not of negligible value, so it does not appear to meet the requirements of Article 86.

62. Public Notice 367 may appear to offer a further concession in this regard and the Appellant directed us to section 2.3 which states: "Although the law requires the samples to be of negligible value, it does not define the meaning. In practice, once we are satisfied the goods can only be used as samples, we regard them as being of negligible value". The Appellant viewed this as meaning that if the goods were samples then they were deemed to be of negligible value. However, the Notice is guidance, not law. The law is contained in Article 86 and is clear.

63. The Appellant suggested that HMRC had been unreasonable in refusing the relief, citing the *Wednesbury* test for unreasonableness. Having found that the Jewellery did not meet the conditions for the relief, we cannot conclude that HMRC were unreasonable in refusing it.

64. Accordingly, the appeal is dismissed.

65. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 9 FEBRUARY 2017