[2017] UKFTT 0393 (TC)

TC05857

Appeal number: TC/2010/05088 and TC/2010/06103

PROCEDURE – Application for a preliminary hearing - jurisdiction of the FTT in relation to excise duty

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASIANA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT

Sitting in public at Royal Courts of Justice on 20 March 2017 and with further submissions on 30 March 2017.

Andrew Trollope QC, instructed by Mavin and Co., for the Appellant

David Yates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. This is an application for the listing of a preliminary issue under rule 5(3)(e) of the Tribunal Procedures (First Tier Tribunal) (Tax Chamber) Rules 2009.

2. The relevant preliminary issue is "Does the Tribunal have jurisdiction to hear argument in respect of the Appellant's complaint that it was mislead by HMRC in respect of excise duty on the basis that (a) excise duty is an "import duty" for the purposes of Article 220 and 239 of the Community Customs Code or (b) s.16(5) of the Finance Act 1994 permits the Tribunal to adjudicate on such a complaint?"

3. The substantive appeal concerns two assessments dated 16 December 2009 and 9 March 2010 for customs and excise duty in respect of imports of Shaoxing cooking wine. The amount of customs duty assessed is £21,758.04. The amount of excise duty is £852,902.89.

4. This dispute already has a long history. Although it relates to assessments made in 2010, the substantive hearing has not yet begun. In 2013 the First Tier Tribunal granted permission to the Appellant to add further grounds of appeal. HMRC appealed this decision to the Upper Tribunal and in 2014 the Upper Tribunal quashed the decision allowing the further grounds of appeal.

5. In answer to a question from the Tribunal, it appears that Alternative Dispute Resolution has been tried and failed in this instance.

6. The background, briefly set out by the Appellant and not investigated at this hearing, is as follows:

7. As of April 2006, the Appellant sought and received advice HMRC multiple times as to which commodity code should be used to import its Shaoxing cooking wine. The code repeatedly indicated to the Appellant was 2103901000. The Appellant was told that the product could be imported duty free. During a visit by the Customs and Excise Alcohol Strategy Team, a sample of the wine was taken, and the Appellant company was advised that it would be informed in writing should there be a problem with the classification of the product. No such indication was received.

8. 11 import entries were made under that code between 14 May 2008 and 10 July 2009. A number of imports were cleared by HMRC under that code before April 2009. HMRC cancelled clearance of an import in April 2009. Subsequent to this date, further confirmation was given to the Appellant that the correct code had been entered and that no excise duty would be payable.

9. HMRC later contended that the correct code was not 2103901000, but 2103909080. A formal Departmental review was requested by the Appellant. The review upheld the decision by HMRC to charge duty on the imports under code

2103909080. The code classification starting with 2103 is described in the UK Customs Tariff as “sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard”. Code 2103909080 is described in the UK Customs Tariff as “other”.

The law on preliminary issues

10. It clear that the Tribunal has a discretion, as a matter of case management, to direct that an issue be determined as a preliminary issue., as set out clearly in rule 5(3)(e) of the Tribunal Procedures (First Tier Tribunal) (Tax Chamber) Rules 2009.

11. The Upper Tribunal has, in Wrottesley v Revenue and Customs Commissioners [2016] STC 1123 given guidance as to how this Tribunal should exercise its case management discretion in paragraph [28] of the decision which reads as follows:

12. We think that the key principles to consider can be summarised as follows:

(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way—see (3)(a), above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

The law covering the specific points requested to be covered at a preliminary hearing

13. The Appellant wishes to rely, for both customs duty and excise duty, on Article 220 (2)(b) or on Article 239 of the Community Customs Code (Regulation 2913/92). These provisions are as follows:

> Article 220(2)(b)"..subsequent entry in the accounts shall not occur where-..the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration."
>
> Article 239 " Import duties..may be.. remitted in situations..resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions."

14. This clearly applies for customs duty, and HMRC does not dispute this. The Appellant contends that excise duty is an 'import duty' for the purposes of Articles 220 and 239. HMRC dispute this and wish to have this matter considered at a preliminary hearing.

15. Alternatively, the Appellant wishes to have HMRC's conduct considered under the exercise of its jurisdiction set out in Finance Act 1994 section 16.

16. Section 16 gives the Tribunal different powers depending on the decision under appeal. HMRC contend that the decision under appeal in this instance is a decision set out in section 13A(2)(b) of the Finance Act 1994 'so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability as is contained in any assessment under section 12 above [section 12 being assessments to excise duty]...'. HMRC contend that as the decision under review is 'whether a person is liable, and to what amount' and not 'whether to assess' that the conduct of HMRC is irrelevant to the appeal.

Discussion

17. This Tribunal does not need to consider in depth the issues that are to be covered by the substantive appeal, whether or not that appeal is to be by way of a preliminary hearing. However the issues applied to be covered by the preliminary appeal are relevant, insofar as what they are and how they are to be determined may make their consideration at a preliminary appeal suitable or not.

18. Accordingly I turn to consider each of the points summarised in Wrottesley and set out above, with discussion of the specific matters to be considered where relevant.

19. Point 1 needs no further discussion; obviously it needs appropriate weight in the balance of the overall decision.

20. Point 2 is whether there is a succinct, knockout point.

21. It is clear that should a preliminary hearing go ahead, this would not dispose of the case, as the points to be considered at a preliminary hearing relate only to excise duty. The customs duty part of the case would still need to be heard. However, the points to be considered at any preliminary hearing are clearly separate issues (and relate only to excise duty) and a preliminary hearing may deal with this aspect fully.

22. Point 3 is whether the point at issue is capable of being decided after a relatively short hearing and whether the issue can or cannot be divorced from the rest of the case. The Tribunal should be particularly cautious on matters of mixed fact and law.

23. This point is particularly contentious between the two parties. HMRC contends that there is a clear point of law (or points of law) to be considered, and no facts need to be considered. The Appellant contends that to examine the law, the relevant facts will need to be considered.

24. In relation to the first part of the preliminary issue applied for 'is excise duty an import duty for the purposes of Articles 220 and 229?', this appears to the Tribunal to be entirely a point of law.

25. HMRC referred to the case of Outokumpu Oy (C-213/96) [1998] ECR-1802 and also to the case of Bloomsbury International Ltd and others v Defra [2011] UKSC25. Both cases made it clear that an import duty or a 'charge having equivalent effect' is something levied solely or exclusively by reason of goods crossing the frontier, whereas domestic products are excluded from similar charge. The Appellant makes the point that all Shaoxing cooking wine is imported. HMRC makes the point that excise duty is levied on alcohol, and applies regardless of import.

26. Without going to far into issues that need to be decided at a hearing, this seems to be a discrete point.

27. In relation to the second part of the preliminary issue applied for 'does the Tribunal have jurisdiction to adjudicate on the complaint in relation to HMRC's conduct?' this may require some consideration of the facts, as an understanding of what the conduct was, and the timeline, may be necessary for full consideration of

this. Mr Trollope for the Appellant contends that here the 'facts and strands of law are inextricably linked'.

28. I have been referred to the cases of Oxfam v HMRC [2009] EWHC 3078, HMRC v Noor [2013] UKUT 071 (TCC) and HMRC v Europlus Trading Ltd [2013] UKUT 0108 (TCC) which relate to the Tribunal's jurisdiction in this or similar matters. On review of these cases and again without 'pre-hearing' matter to be decided at a later date, it would appear again that this is broadly a point of law.

29. Point 4 is whether the determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing. This is clearly more likely if the issues overlap.

30. The main point at issue is (broadly) whether the conduct of HMRC in misleading the appellant (which I am assuming for this analysis is not wholly disputed by HMRC) should be thoroughly examined in relation to excise duty as well as in relation to customs duty. The excise duty assessment is overwhelmingly the largest amount under appeal.

31. Were the preliminary hearing not to go ahead, the conduct of HMRC would be brought up in the same hearing as the excise duty assessment. Were the preliminary hearing to go ahead, the decision on excise duty *may* be disposed of without full examination of HMRC's conduct, because it *may* be determined to be irrelevant .Mr Trollope for the Appellant drew this out stating 'HMRC will lose no opportunity to prevent this Tribunal from hearing the facts'.

32. However, whether matters are to be dealt with in a preliminary hearing or not, the same matters will be decided by the Tribunal either way. Firstly, can HMRC's conduct be taken into account for excise duty? Secondly, (because it clearly is relevant for customs duty) what was the conduct? Thirdly, what should the outcome of the appeal be in relation to both customs duty and excise duty considering all relevant matters (and no irrelevant matters) relating to each, bearing in mind the matters to be considered may be different.

33. Point 4 is therefore in this matter more clearly understood, from the Appellants point of view, as whether determination of the preliminary issue as a preliminary issue may hinder the tribunal at arriving at a just result on that preliminary issue

34. As I consider the issues in this instance to be substantially, and possibly entirely, points of law, I do not consider that the consideration of these discrete issues as a preliminary hearing would hinder a just result in the overall case.

35. Point 5 is the potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

36. This point carries great weight. I bear in mind that these assessments are from 2010, and that the appeal has already gone, on a case management point, to the Upper Tribunal. There is clearly the potential for significant delay caused by an appeal either of the decision on whether or not to have a preliminary hearing, and/or, if a

preliminary hearing goes ahead, an appeal of that issue. Mr Trollope for the Appellant made the point that this 'introduces a separate and wholly unnecessary extra hearing on this protracted litigation.

37. Point 6 is whether determination of the preliminary hearing may result in there being no need for a further hearing.

38. HMRC contend that if the excise duty assessment was disposed of in the preliminary hearing, settlement is much more likely on the customs duty point which is for a much smaller amount. The Appellant contends that as the preliminary hearing deals only with excise duty, there will clearly be a need for a further hearing to deal with the customs duty assessment. It is unclear from HMRCs argument (which stated 'resolution of this [excise duty] dispute may well trigger settlement') which side they expect a settlement offer to come from. I will give this point a small amount of weight in favour of the possibility of there being no need for a further hearing.

39. Point 7 is whether the determination of the preliminary issue would significantly cut down the costs, or whether it would increase the costs overall.

40. HMRC contend that the preliminary issue would cut down costs, as the facts to be considered at any preliminary hearing would be limited, and therefore witness time and Tribunal time would be reduced. They contend that *if* the excise duty point were to be resolved in their favour, this may result in some witnesses not being needed at all. They also reiterate the point that settlement may well be reached after a preliminary hearing. The Appellant contends that a preliminary hearing would add extra cost, and as some facts will need to be investigated even at a preliminary hearing, this may increase time for witnesses. I understand there are at least 11 witnesses in total. It is entirely possible that were at least some of these witnesses to be needed for both hearings this would lengthen the overall time for the process. The Appellant states that it cannot bear the extra cost and the application for a preliminary hearing is 'trying to disable the Appellant [by way of cost] in advance of the hearing'. HMRC state that a large part of the costs are already sunk (a point borne out by the large bundles prepared for this case management hearing).

41. I also bear in mind point 5 above, whereby as I attach weight to the possibility of further appeals on the preliminary issue, I must attach weight to the possibility of costs for those appeals as well. Therefore although I favour HMRCs position about the cost of the preliminary hearing, this is balanced out by the possibility of increased costs overall.

42. Point 8 is the overall objective to deal with matters fairly and justly. This point naturally carries great weight. Here I balance the desire of the Appellants to have all matters of the case dealt with together, which they see would be the most just way, with the desire of HMRC to deal with succinct discrete points which may be a catalyst to an overall resolution, which they see as the most just way. The Appellant sees the effect of a preliminary hearing as 'flying in the face of rule 2' [the overall objective to deal with matters fairly].

43. In the overall balancing exercise I have to perform, I judge that therefore points 1 (caution) and 5 (possibility of delay) weigh against having a preliminary hearing. Points 2 and 3 (succinct points divorced from the other issues) weigh strongly in favour of having a preliminary hearing, together with point 6 (no need of a further hearing), which carries a small amount of weight only.

44. Point 4 is 'would a preliminary hearing hinder a just result'. I decided it would not. If I had decided it would, it would be a clear weight against such a hearing. Deciding that it would not hinder a just result does not necessarily weigh in favour of having such a hearing in all cases, but in this case I have attached a small amount of weight in favour of a preliminary hearing.

45. Point 7 is 'would costs increase or reduce'. I have given this point a neutral weighting as I consider there is an equal chance costs may go up or down as a result of such a hearing.

46. Point 8 is clearly important. I think the case will be dealt with fairly and justly by either route. It is clear that the Appellants wish HMRC's conduct to be given sufficient court time. However as explained in paragraphs 32 and 33 above, where it is relevant, it will be, and if it is not relevant, it can't be taken into account whether it has been put before the Tribunal or not.

47. Given the clear nature of the succinct points that can be put to a preliminary hearing, I therefore direct that such a preliminary hearing will be listed.

48. 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.

TRIBUNAL JUDGE
SARAH ALLATT
RELEASE DATE: 12 MAY 2017