TC02277

Appeal number: TC/2011/4327

EXCISE DUTY – drawback – whether Commissioners' decision to return drawback reasonable - on facts yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE CO-OPERATIVE GROUP LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
ALBAN HOLDEN

Sitting in public at Manchester on 29 and 30 August 2012.

Alan Powell, tax consultant, for the Appellant

Simon Charles of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant company, The Co-Operative Group Ltd ("the Co-Op"), appeals against a decision on review by the Commissioners given by letter of 10 May 2011 to refuse five claims for drawback of excise duty totalling £83,259.61 because it had failed to comply with all the conditions for the purpose contained in the Excise Goods (Drawback) Regulations 1995 (SI 1995/1046) ("the Regulations") and Public Notice 207 Excise Duty Drawback. That Notice, being tertiary legislation, has the force of law. The claims related to the export of consignments of excise goods to the Co-Operative Company of Guernsey, Guernsey as part of the Channel Islands being outside the European Customs Union.

2. The Co-Op appealed the decision by notice of 9 June 2011 claiming:

    a. That it had been subjected to a de facto penalty for a minor infringement of a relevant condition;
    b. Despite having made over 1000 such claims, the Commissioners had never examined any goods the subject of a Notice of Intention of Shipment ("NOI") prior to shipment;

    c. That its overall compliance rate with the regulation in point exceeded 99%;

    d. That the withholding of the drawback effectively imposed a duty on the exported goods that they should not bear when exported;

    e. That the Commissioners should consider marking the breach in a way other than by refusing the drawback claim.

3. Before us the Co-Op was represented by Mr Alan Powell, a tax consultant, and the Commissioners by Mr Simon Charles of counsel. They provided us with two bundles of copy documents and a bundle of authorities.

4. The underlying facts, about which there was no dispute, were essentially contained in a witness statement of Mr Christopher Lonergan, who was until his retirement on 30 September 2011 the Co-Op's duty manager. In oral evidence to us Mr Lonergan added to his statement. Mr Charles called two witnesses. They were Mrs Anne Fitzcharles, the Commissioners' officer responsible for the original decision to deny the drawback claims, and Mr Charles Henry Dunn, the officer who made the decision on review.

5. Whilst the statement of case referred to the Co-Op as a retailer, mainly of food and drink, the transactions with which we are concerned were wholesale ones. The Co-Op provides goods to co-operative societies throughout England and Wales and the Channel Islands. It pays excise duty on excise goods it purchases for onward transmission to the Channel Islands and since, as we mentioned earlier, those Islands are not part of the European Customs Union, it is entitled to reclaim the excise duty it has paid by way of drawback.

6. An application to recover duty on exported goods must meet the requirements of the Regulations and Notice 207. Included in the Notice at para.7 is a requirement that the exporter give the Commissioners "at least 2 business days notice between the

day on which the NOI is received at the Drawback Centre ("DC") and the day you intend to …export goods to a destination outside the EC". Para 7.5 contains a note in the following terms: "Where we have agreed to accept NOIs via fax, then any received at the DC on or after 16:00 on any day will be deemed 'received' for drawback purposes on the next business day". The Commissioners agreed to accept NOIs by fax in the Co-Op's case.

7. At 16:32 on 28 September 2010 the Commissioners received at the DC a fax from Ferryspeed (CI) Ltd ("Ferryspeed"), the Co-Op's agent, containing two NOIs to claim drawback. Ferryspeed declared that excise goods it held in its warehouse for the Co-Op intended for export to Guernsey were available for inspection at Ferryspeed's premises in Portsmouth, and indicated that the Co-Op intended to claim drawback on them. In response the DC sent the Co-Op two uniquely numbered forms CE1178 'Claim for Drawback of Excise Duty'. The Co-Op was to complete the forms after the goods had been exported and they had to be returned with certain supporting documents and evidence of dispatch.

8. At 16:09 on 12 October 2010, the Commissioners received at the DC another fax from Ferryspeed containing three NOIs, again declaring that warehoused goods were available at its premises prior to export to the Channel Islands. As on the 28 September the DC sent forms CE1178 to the Co-Op for completion.In each case the NOI informed the Commissioners that the goods had been sold to the Co-Op Channel Islands, and that the Co-Op intended to claim drawback on them.

9. Each NOI was signed by one Chantelle Hill of Ferryspeed, and indicated, inter alia, that the NOI complied with the conditions laid down in the Regulations, that she had read and understood Notice 207, and that she understood the information on the NOI would form part of the claim for drawback.
10. The Forms CE1178 drawback claims were returned to the Commissioners on various dates between 27 January 2011 and 8 February 2011. They were signed by Mr Lonergan, who confirmed that:

    a. The information was true and complete;

    b. The goods were eligible goods as per reg.5 of the Regulations;

    c. He was an eligible claimant as per reg.6 of the Regulations;

    d. The claim complied with the conditions laid down in the Regulations;

    e. No other claim had been submitted in respect of the goods; and

    f. He had read and understood Notice 207.
    The Forms CE 1178 were accompanied by documents supporting the claim, including evidence of payment of UK excise duty and the export of each consignment.

11. The export evidence showed that the goods comprised in the NOIs of 28 September 2010 were exported on 1 October 2010, and those comprised in the NOIs of 12 October 2010 were exported on 15 October 2010.

12. As the NOIs had been received by the Commissioners after 16:00 on the days they were faxed to them, they were deemed to have been received on 29 September and

13 October respectively. In each case that meant that the two day period of availability for inspection was not met.

13. Consequently, on 1, 9 and 10 February 2011 Mrs Fitzcharles wrote to the Co-Op rejecting its drawback claims because the requirement to give two days notice of availability for inspection had not been met. She added that faxes arriving at the Commissioners after 16:00 were deemed to have been received the following day.

14. On 28 February 2011, Mr Lonergan wrote to the DC inviting the Commissioners to reconsider their decision. He requested that they exercise their power to allow a departure from the requirement in Notice 207 that two days notice of availability of the goods for inspection be given, and waive its non-compliance with the requirements of the Regulations and Notice 207. The reasons for the request were given as follows:

    a. The Co-Op submitted many drawback claims, the overwhelming majority of which complied with the requirements;

    b. The loss of duty of £83,259.61 was disproportionate to the infringement that had occurred;

    c. The application of the regulation (sic) was harsh in the particular case as the risk to the revenue was low. That was reflected in the fact that no pre-approval inspections of goods had been carried out by the Commissioners at Ferryspeed between 2005 and 2011;

    d. Ferryspeed was an approved excise warehouse, and "whilst the duty paid goods are outside the scope of that operation the fact that HMRC have approved the company should reinforce the fact that their systems are reliable and that the non-compliance is an unfortunate oversight by us which they (sic) have put right since October 2011".

    e. All other conditions had been met; and

    f. The goods were destined, as was usual, to the co-operative societies on the Channel Islands, further reducing the risk to the revenue.

15. In the letter Mr Lonergan also said, "I have written to Ferryspeed about this matter and after making enquiries the company has stated that they faxed all details for these claims between 16:09 and 16:32 on the NOI dates. The company has also claimed that it was not their responsibility to be aware of changes to drawback rules, in particular that by which the time limit of 16:00 was implemented. A copy of their response is enclosed." We were not provided with a copy of Ferryspeed's letter.
16. Mrs Fitzcharles replied to Mr Lonergan's letter on 9 March 2011, addressing each claim separately. She repeated that the claims were rejected, noting that, as a regular claimant, the Co-Op should have been aware of the requirements of the drawback scheme, and that the duty in point was the subject of five separate occurrences of non-compliance. She added that neither the fact that the Commissioners had not examined warehoused excise goods nor the status of Ferryspeed negated the need to comply with all the requirements of the drawback scheme. Mrs Fitzcharles acknowledged that all the requirements of the scheme, other than that of the giving of the requisite notice of availability of goods for

inspection, had been met, and added that, in making her decision, she had taken account of the fact that an earlier claim by the Co-Op made in circumstances identical to those with which we are dealing had exceptionally been allowed. Mrs Fitzcharles indicated that if the Co-Op disagreed with her decision it had 30 days in which to supply any further information it wanted her to consider.

17. It is convenient for us to deal with the earlier claim at this point. By email of 7 July 2010 the Commissioners informed the Co-Op:

> *"I refer to the above drawback claim totalling £4,375.57 for goods exported to Jersey. Your references for this claim are … and…*
>
> *From 18/05/2010, any Notice of Intentions (NOIs) received after 16:00 are counted as being received the next day, as out cut-off time for receiving NOIs is 16:00. To give an example; an NOI is received today (07/07/2010) at 16:30, so this is classed as being received and date stamped on 08/07/2010, and the 2 clear working days notice would start from this date, with the date of export being 13/07/2010 at the earliest. The Public Notice [207] was updated on 18/05/2010 to reflect this. For claim…, the NOI was received on 25/05/2010 at 16:10, so this was date stamped as being received on 26/05/2010. The date of export was 28/05/2010, so this does not meet the 2 clear working days criteria before the goods are exported. As an exception, we will process this claim in full, but any future claims not providing the full 2 clear days notice will be rejected."*

18. On 23 March 2011 Mr Lonergan requested the Commissioners to review Mrs Fitzcharles' decision, and it was as a result that the Commissioners made the decision under appeal. He did not provide any further information for her to consider, but simply said that he did not think her adequately to have addressed the issues of reasonableness and the exercise of discretion.

19. We observe that the Co-op did not provide the Commissioners with any information about its contract with Ferryspeed or about its instructions to that company in dealing with excise goods exported to the Channel Islands. Nor did it adduce any evidence as to those matters before us.

20. Another important factual matter with which Mr Lonergan ought to have dealt in evidence but did not was what steps he took before signing and submitting the Forms CE 1178 claims for drawback to satisfy himself that the Co-Op's drawback claims complied with the conditions laid down in the Regulations and Notice 207, and particularly that in the Notice requiring two days notice of the availability of the goods for inspection.

21. It is against that factual background that we are required to make our decision. We observe that it is common ground that our jurisdiction is that provided by s.16(4) of the Finance Act 1994. That subsection provides that, in relation to any decision as to an ancillary matter, such as the present one, the tribunal is confined to a power, where it is satisfied that the Commissioners making that decision could not reasonably have arrived at it, to do one of three things. Only one of those things is relevant in the instant case, namely to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision.

22. In *CEC v J H Corbitt (Numismatists) Ltd* [1980] STC 231, at 239 Lord Lane LCJ expressed the principle of reasonableness in the present context in the following way:

> "Assume for the moment that the tribunal has power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

23. Mr Powell presented the Co-Op's case on the basis of two principal claims; first, that a mistake had been made in submitting the NOIs late and arose as a result of nothing more serious than human error, so that it should be excused and, secondly, that since the Co-Op was a large, long established and highly reputable company, the risk to the revenue its non-compliance resulted in was either minimal or non-existent so that it should be ignored.

24. As to the second of those claims, we would merely say that the Commissioners regard all drawback claims as arising in an area of high risk to the revenue, and do not differentiate in their treatment of traders between those large and highly reputable and all the others. In our judgment, they cannot be faulted for doing so.

25. As to the first claim, we observe that despite being asked to provide information to enable the Commissioners properly to consider exercising their discretion to allow the claim, the Co-Op never provided any information to support its claim that a mistake arose as the result of a simple human error. It did not identify the person said to have been responsible for any such error, or proffer any reason as to why it occurred. And as we mentioned earlier, neither the Commissioners nor we were provided with any information about the Co-Op's contract with Ferryspeed, or its instructions to that company with regard to the export of excise goods. Without that information the Commissioners were in no position to judge whether the mistake claim was justified and, not surprisingly, were not prepared to accept it. Nor are we prepared to accept it.

26. Coupled with that matter is the question of what steps Mr Lonergan took to ensure that all the regulatory conditions had been met. The indications are, but we are not prepared to find, that he assumed that they had been met and that he took no active steps to check the position. Again, not surprisingly, the Commissioners were not prepared to accept that adequate checks had been made.

27. However, there is a more serious matter that in our judgment is conclusive of the reasonableness of the Commissioners' decision to refuse the drawback claims. In his letter to the Commissioners of 28 February 2011, Mr Lonergan said that Ferryspeed claimed that it was not its business to be aware of changes to the drawback rules, i.e. in particular those in Notice 207. Ferryspeed was required by the Co-Op to deal with the latter's export of dutiable goods to the Channel Islands, and in that connection would have had to be fully conversant with the Regulations and Notice 207. Its claim completely nullifies the Co-Op's own claim that what happened was a mistake due to nothing more than simple human error.

28. As a result we find it unnecessary to deal with the submissions of Mr Charles, and need merely say that we dismiss the appeal.

29. 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.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 24 September 2012