TC04131

Appeal number: TC/2012/09056

Customs Duty and VAT - Inward Processing relief - failure to lodge bill of discharge within the relevant time limit - whether obvious negligence - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HITACHI KOKUSAI ELECTRIC EUROPE GmbH **Appellant**

- and -

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN
MRS CAROLINE de ALBUQUERQUE

Sitting in public at 45 Bedford Square in London on 24 October 2014

The Appellant was neither present nor represented

Marika Lemos, counsel, on behalf of the Respondents

DECISION

1. This was a relatively simple Customs Duty and VAT appeal, in which the Appellant was disputing its liability to pay Customs Duty and VAT in respect of a camera and lenses imported into the UK on 19 October 2011. At the point of importation, a relief from Duty and VAT available where products are imported and it is expected that they will shortly be re-exported, known as "inward processing relief", was claimed. Under this relief the Duty and the VAT have to be paid if the relevant products are not re-exported within a six-month period, and a particular discharge form then filed with HMRC within 30 days of the expiry of that six-month period. Although the products had in fact been re-exported on two different dates within the six-month period, the Appellant had failed to file the required discharge form within the period of 30 days following the expiry of the six-month period. HMRC had accordingly levied a post clearance demand for the Customs Duty and the VAT in the respective amounts of £1,041.36 and £3,588.19.

2. While the Appellant had appealed against the resultant liabilities for Duty and VAT, the Appellant had written to the Respondents and the Tribunal shortly before the hearing, indicating that it now realised that its case was hopeless and accordingly the Appellant indicated that nobody would be appearing at the hearing to advance its case. It indicated that any grounds that it might have advanced were clear from the written material, and that it was therefore not worth appearing. The Appeal had not been withdrawn, however, and in fairness to the Respondents, their counsel went scrupulously through any arguments that might have been advanced on behalf of the Appellant, before contending that we should nevertheless dismiss the Appeal.

3. Our conclusion is that this Appeal is dismissed, and we will explain our reasons for that conclusion below. We were told that the Duty and VAT had in fact already been paid. In the light of this, we raised the issue with the Respondents as to whether although the following point would not have any bearing on the liability to pay the Duty and VAT so far as this Appeal was concerned, it nevertheless seemed likely that as the goods had been re-exported, since the VAT had now been paid on the importation of the goods, the VAT should nevertheless have been repaid (or indeed it may already have been repaid) on the exportation of the goods. Had the VAT not yet been reclaimed, it would appear that the Appellant would still be within the four-year period for making a claim for the repayment of the VAT. This is of course a matter that has no direct bearing on the matter that we were required to decide, and we were entirely ignorant of whether the camera and lenses had been transferred to, or simply lent to, the Appellant at the point of importation. Accordingly whether the VAT has already in fact been re-claimed at the point of exportation or whether it could now retrospectively be so reclaimed is entirely a matter for the Appellant. It did, however, appear that the only likely net cost to the Appellant in respect of the presently disputed matter was the relatively modest amount of £1,041.36, owed in Customs Duty.

4. We will deal now with the points that were material to our actual decision.

5. While no points had been raised in correspondence by the Appellant along the lines that the obligation to file the relevant notice of discharge had not been its liability, or for instance that it had been extremely difficult to obtain the relevant information from the shipper in order to present the relevant notice in due time, the Respondents' counsel went carefully through these issues and established that the relevant liability to file the notice within the 30-

day period was indeed plainly the Appellant's liability, and that it had been extremely easy to obtain the relevant information from the shipper. The only point in dispute, accordingly, was whether the Appellant had advanced, or indeed could have advanced, any point to dispute the forfeiture of inward processing relief resulting from its failure to file the relevant notice.

6. The Respondents indicated that there had been an earlier failure by the Appellant to file the same notice within the 30-day period, in respect of a different temporary importation, and on that occasion, HMRC had waived the Appellant's liability to pay the Duty and VAT, following re-export within the six-month period, since the relevant failure had been the first such failure to file the notice in the 30-day period. Article 859 of the European Commission Regulation 2454/93 does enable HMRC to waive delays in meeting the various conditions for matters such as the filing of the discharge notice evidencing re-exportation of goods that have qualified for inward processing relief within the 30-day period of the end of the six-month period, and HMRC relied on that provision on the occasion of the first failure to waive the liability. They did indicate, however, that having made it clear that the notice did need to be filed within the stated period, if there were later failures to file the notice within the requisite period, the liability would not be waived because the Appellant would be taken to have been negligent.

7. In the situation with which we are concerned, HMRC wrote to the Appellant on the expiry of the six-month period and specifically drew to the Appellant's attention the fact that if the goods had been re-exported (as in fact they had been), then the Appellant had 30 days in which to file the discharge notice. None was filed in the period.

8. The terms of Article 859 that enable HMRC to disregard failures to meet the more technical conditions for the various reliefs makes it clear that the reliefs cannot be waived if the failure to comply with the conditions implies "obvious negligence" on the part of the claimant, and in relation to the particular obligation to file the discharge notice following a re-exportation of goods within the six-month period, the 30-day period for filing the discharge notice can only be waived if "the limit would have been extended had an extension been applied for in time".

9. In the Appellant's Notice of Appeal, in a barely legible hand-written summary of the grounds of appeal, the Appellant had stated that it knew that it had made mistakes in administration, but that changes had been made and the same mistakes would not be made in future. Furthermore, since the goods had been re-exported it was thought unfair to be penalised by having to pay the duty.

10. In the only letter that advanced any further grounds to enable us to allow the appeal, it was stated that:

> *"We have taken this course of action on a number of occasions, and thought it was acceptable. It was only in the last customs letter that it was put down as "obvious negligence" by yourselves. Unfortunately, this section of the letter was missed by my colleagues, which is why this carried on.*
>
> *The products have been sent out of the country. I know we were late in filing this, and informing you, but that doesn't change the fact that we do not owe this money."*

11. In the light of the that on the occasion of the previous failure to file the notice in time HMRC had indicated that later failures would be assumed to involve negligence, and secondly of the fact that HMRC indicated to the Appellant at the end of the six-month period in relation to the camera and lenses in the present case, and thus the beginning of the 30-day period that the Appellant had 30 days in which to file the form, we conclude that the Appellant was negligent in not filing the form in the requisite period. Had the Appellant been able to claim something along the lines that the person who had received the two previous letters had left the company or was away ill, we and HMRC might well have been able to conclude that there had been no negligence. Where, however, it is simply conceded that someone had just missed a perfectly clear statement in a letter (or rather in two letters) we consider that the ground advanced for disputing negligence actually suggests that indeed there was negligence.

12. The Respondents asked us to decide the appeal on the basis that there had been negligence, and we do so. It did, however, strike us that it was far from clear that the Appellant would have been able to satisfy the other requirement for justifying the failure to make the filing within the relevant period that we mentioned in paragraph 8 above. For, had the Appellant asked for an extension of time in which to file the form, and had this request been accompanied by a statement (i.e. before the expiry of the 30-day period) that the only reason for not having filed the form by the date of the request for an extension had been that the Appellant had failed to read the letter indicating the time period, and could in fact (had it wished) have filed the notice immediately, it seems improbable that HMRC would have granted an extension of time in which to file the form. On the basis, however, that the Respondents asked us to decide this issue solely on the basis of negligence we do decide the issue on that basis alone.

13. The Respondents requested that we address the complaint advanced by the Appellant to the effect that a penalty was being imposed for failure to file the notice in due time. As has been made clear by the ECJ, and as is obvious from the structure of the legislation, the liability in this case results from the fact that the liability for Duty and VAT arises because there is a relief from the Duty and the VAT, but that relief is only available where certain conditions have been complied with. Where they are not complied with, the relief is forfeited and it is the Duty and the VAT that must be paid. There is no penalty as such.

Right of Appeal

14. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASED DATE: 12 November 2014