Neutral Citation: [2024] UKFTT 001074 (TC)

Case Number: TC09365

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2023/09176

Post Clearance Demand – Customs Declaration – Claim for Preferential Tariff Treatment on importation – Statement on Origin – No Customs Duty paid - Whether Statement on Origin had to exist at the time of the claim for Preferential Tariff Treatment – Yes – Whether Statement on origin could be provided retrospectively where Preferential Tariff Treatment claimed on importation – No.

Heard on: 5 November 2024 pre-reading,
6 - 7 November 2024 hearing.
Judgment date: 28 November 2024

Before

TRIBUNAL JUDGE JENNIFER NEWSTEAD TAYLOR
MISS SUSAN STOTT

Between

PRINCES LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jeremy Barnett of Counsel.

For the Respondents: Mrs Charlotte Brown of Counsel.

DECISION

Introduction

1. On 31 March 2023, the Respondents issued a Post Clearance Demand for Customs Duty in the sum of £205,160.02 regarding three imports of tinned tomatoes ("the Tomatoes") by the Appellant from an Italian based company called Calispa SPA, in respect of each import the Appellant had claimed Preferential Tariff Treatment ("PTT") on the basis of a statement on origin and, consequently, had not paid Customs Duty, without, in fact, having a statement on origin in place at the time of any of the claims ("the Decision").

Import	**EPU**	**Customs Entry No.**	**Import Date**	**Product Code**	**Supplier**
Import 1	155	010936N	05/02/2021	67317BR	Calispa SPA
Import 2	155	035169N	19/03/2021	67317BR	Calispa SPA
Import 3	155	008723D	06/06/2021	67722	Calispa SPA

2. The Appellant appeals the Decision, contending that the Respondents have incorrectly interpreted the Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland of the one part, and the European Union and the European Atomic Energy Community, of the other part ("TCA") and its Guidance. The Appellant's Notice of Appeal raises four Grounds of Appeal. In summary, (i) that the Tomatoes qualify to enter the UK without payment of any tariff under the terms of the TCA, (ii) that Articles 54-57 of the TCA permit retrospective corrections of Customs Declarations, (iii) that the term "European Origin" on the Retrospective Statements on Origin dated 31 March 2021 and 11 April 2023 was permissible and (iv) that the legislative position and its practical implementation lacked clarity in the immediate aftermath of Brexit.

3. The Respondents dispute the appeal, noting that the Tribunal is required to interpret the relevant domestic legislation, namely The Customs Tariff (Preferential Trade Arrangements) (EU Exit) Regulations 2020 ("the Preference Regulations") and the Origin Reference Document implementing the TCA between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed on 30 December 2020 ("the European Union Origin Reference Document"), Version 1.0, dated 30 December 2020 ("Origin Reference Document"), and arguing that the Decision is in accordance with that legislation.

The Evidence

4. Prior to the hearing, we were provided with a skeleton argument from each party, a Hearing Bundle comprising 1077 pages, and an Authorities Bundle comprising 249 pages. During the hearing and with the Appellant's consent, the Respondents provided four further documents, being (i) HMRC Guidance titled *'Check if you can claim a preferential rate of duty'* published 1 December 2020, (ii) a European Commission document titled *"REX –*

Registered Exporter System', (iii) a document titled *'The Registered Exporter System (the REX system)'* and (iv) a document titled *'ISO and agriculture'*.

5. At the outset of the hearing, the Appellant made an application for specific disclosure of an HMRC file note. We heard submissions from both parties, deliberated and refused the Application, giving a fully reasoned oral decision. Pursuant to Rule 39 (2A) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") the 56 days within which a party may send or deliver an application for permission to appeal against our decision on the specific disclosure application shall run from the date of this written decision.

6. The Appellant adduced two witness statements. One from Mr Paul Howe, the Appellant's Group Corporate Development Director. One from Ms Catherine Greenough, the Appellant's Customs Compliance Manager. Both witnesses were cross-examined and answered questions from the Tribunal. We find both Mr Howe and Ms Greenough to be honest, credible witnesses with significant experience and expertise in their fields who were doing their best to assist the Tribunal. As to Ms Greenough's evidence, we note that she was not employed by the Appellant until 2 May 2022, being after each of the imports, and, accordingly, she could not give any primary evidence as to events in 2021. In general, her evidence comprised an overview of current practices and procedures along with her understanding of events in 2021 which she had obtained through a combination of reviewing documentation and talking to others.

7. The Respondents adduced one witness statement from Officer Sheenagh McQuade , the decision maker. She was cross examined. We also find her to be an honest and credible witness who was doing her best to assist the Tribunal.

8. Based on the evidence provided, we make the following findings of fact on the balance of probabilities. Some of the facts were in dispute and we also make further findings later in our decision.

The Facts

9. The Appellant is a food manufacturing company owned by the Mitsubishi Corporation. It produces food and drink products in UK factories with raw materials that may have been sourced from the European Union and it procures food and drink items from suppliers in the European Union which it may further package and sell to customers including high street retailers in the UK. It is one of the largest food and drink groups in Europe and has a turnover of (approximately) £1.8 billion.

10. At all material times, Zeta Shipping UK Ltd ("Zeta") was the Appellant's agent. Zeta, working alongside Zeta Systems SPA, provided a package of services including collating documentation, completing Customs Declarations and organising transportation. In short, Zeta had ownership of the export/import process on the Appellant's behalf.

11. In or around 2013/14, HMRC started to replace CHIEF, its custom system, with the Customs Declaration Service ("CDS") following changes to EU legislation. In 2017, the National Audit office reported a risk that CDS would not have full functionality and scope in place for the planned departure of the UK from the EU.

12. On 1 December 2020, HMRC issued the following guidance:

(1) **'Check if you can claim a preferential rate of duty'** stating:

*"**Retrospective claims***

If you paid the full Customs Duty and were then able to get valid proof of origin, you may be able to apply for a repayment or remission of the duty …

Records you must keep

If you've made an origin declaration … you must keep a copy of the:

- *Declaration or statement*
- *Supporting documents including details of the:*
    - o *Processes carried out on originating goods or materials*
    - o *Purchase, cost, value and payment for the goods*
    - o *Originating status of the purchase, cost, value and payment for all materials*

You must keep these records for at least 4 years, as HMRC may carry out checks on your goods." (Emphasis added)

(2) **'Get proof of origin for your goods'** stating:

*"**Check which type of proof you need***

The type of proof needed depends on the type of goods imported and where they're being imported from or exported to.

You should check the preference agreement …. or the Generalised Scheme of Preferences…

- *…*
- *Origin declaration*
- *Importer's knowledge*
- *…*

The length of time a proof of origin will be valid for depends on the agreement and the type of proof.

You need to note your proof of origin on your declaration into free circulation …

If HMRC conduct a verification you will need supporting evidence that you were correct when making out a proof of origin. This evidence could be production records, invoices, accounting details and supplier's declarations." (Emphasis added)

13. On 28 December 2020, HMRC issued guidance called **Claiming preferential rates of duty between the UK and EU**. It stated:

*"**Proof of origin***

To benefit from preferential tariffs when importing into the UK from the EU … the importer will be required to declare they hold proof that the goods comply with the rules of origin.

- A statement on origin that the product is originating made out by the exporter

- The importer's knowledge that the product is originating…" (Emphasis added)

14. On 30 December 2020:

(1) The TCA was signed, following the end of the EU Exit transition period

(2) The Origin Reference Document was signed.

15. On 31 December 2020, the Preference Regulations came into force.

16. Prior to 31 December 2020, the Appellant imported as much product as possible due to concerns about both the very significant tariffs and an expected lack of clarity in UK ports following the end of the EU Exit transition period. Consequently, the Appellant sought to avoid importing in early January 2021.

17. From 1 January 2021, the TCA was applied provisionally.

18. On 5 February 2021:

(1) The Appellant imported tinned tomatoes from Calispa SPA, Italy weighing 500g under Entry Number 010936N ("Import 1"). The Appellant did not provide any instructions to Zeta as to how to complete the Customs Declarations. Zeta completed the Customs Declaration choosing code N864 which means *"Invoice declaration or origin declaration made out by any exporter on the invoice or any other commercial document (excluding the Bill of Lading) for originating goods where the total value exceeds €6000."* Accordingly, PTT was claimed on the basis that there was a statement on origin and no Customs Duty was paid.

(2) The EU-UK Trade and Cooperation Agreement, Guidance on *"Section 2: Origin procedures"* was published stating:

(a) At page 13 next to a heading *'Validity of that statement'* that *"The statement on origin must be valid at the time when the claim for preferential tariff treatment is made. This can be the time at which the import declaration in respect of the originating products is accepted by the customs, or the moment when a retrospective claim (for repayment or remission, see Article ORIG.18a) is submitted."* (Emphasis added)

(b) At page 16 next to a heading *'No retroactive use'* that *"Given that a claim for preferential treatment must be based on a valid statement on origin it is not possible to make out this statement retroactively (i.e. after the claim) and give it a start date before the date of issue. This could potentially lead to a situation that preferential treatment is claimed on the basis of a statement which isn't yet issued and therefore does not exist at that time."* (Emphasis added)

(c) At page 19 next to a heading *'Retrospective claim based on the importer's knowledge'* that *"In the case that the importer did not claim the preference at the moment of import, he may claim the preference retrospectively based on his knowledge when he has the information relating to the origin of the product and to the other requirements provided in Chapter 2 Rules of Origin."* (Emphasis added)

19. On 5 March 2021, the European Commission put together a compendium of questions and answers for the application of the TCA called the **EU:UK Trade and Cooperation Agreement Rules of Origin Q&A**.

20. On 19 March 2021, the Appellant imported tinned tomatoes from Calispa SPA, Italy weighing 500g under Entry Number 035169N ("Import 2"). The Appellant did not provide any instructions to Zeta as to how to complete the Customs Declaration. Zeta completed the Customs Declaration choosing code N864, thereby claiming PTT on the basis that there was a statement on origin. The Appellant did not pay Customs Duty on Import 2.

21. On 1 May 2021, the TCA came into force.

22. On 6 June 2021, the Appellant imported tinned tomatoes from Calispa SPA, Italy weighing 1000g under Entry Number 008723D ("Import 3"). The Appellant did not provide any instructions to Zeta as to how to complete the Customs Declaration. Zeta completed the Customs Declaration choosing code N864, thereby claiming PTT on the basis that there was a statement on origin. The Appellant did not pay Customs Duty on Import 3.

23. In evidence both Mr Howe and Ms Greenough sought to suggest that Zeta made an error when completing the Customs Declaration on each of the three imports. Specifically, they suggested that Zeta's error was choosing code N864 for statement on origin when they should have chosen code U112 for importer's knowledge. It is notable that this evidence is inconsistent with the position adopted in the Appellant's letter dated 12 April 2023 where the error was said to be the failure to attach a statement on origin not the use of code N864 itself, see paragraph 36 below. It is also, potentially, inconsistent with the position adopted in the Appellant's letter dated 18 October 2022 where the Appellant stated that on some occasions agents had wrongly used code U112, see paragraph 28 below. There was no evidence from Zeta as to this alleged 'error'. This omission is significant given that the Appellant remains in contact with Zeta. Further, we note that the Appellant did not provide any instructions to Zeta as to how to complete the Customs Declarations. In short, save for Mr Howe and Ms Greenough's personal assessment of the situation there is no evidence that Zeta made the alleged error, i.e. that they chose code N864 but should have chosen code U112. The Appellant had not instructed Zeta to select code U112. In the circumstances, we do not accept that Zeta made this alleged error on any of the three imports at issue in this appeal, whether or not the required statements on origin existed at the time the claim for PTT was made is a separate point to whether or not Zeta intended to choose code N864.

24. On 6 October 2021, HMRC issued guidance called **Proving originating status and claiming a reduced rate of Customs Duty for trade between the UK and EU**.

25. On 1 July 2022, Officer McQuade emailed the Appellant advising that she needed to conduct a check for customs and international trade in respect of imports listed on the attached schedule. She requested documentation referable to the scheduled imports, which included Import 2, by 15 July 2022.

26. On 15 July 2022, the Appellant provided the requested documents in a zip file which was opened on 25 July 2022.

27. On 3 October 2022, having assessed the documentation provided, Officer McQuade wrote to the Appellant requesting missing information and clarification by 11 October 2022. Thereafter, she agreed to the Appellant's request for an extension of time to enable the Appellant to produce and catalogue the documentation, granting an extension until 18 October 2022.

28. On 18 October 2022, the Appellant sent Officer McQuade 16 emails with attached documentation including a Retrospective statement on origin ("RSoO1") dated 31 March 2021. The Appellant stated:

"…through the process of gathering the supporting documents and assessing information, we noticed that, in some samples, the suppliers' origin invoice statements do not fully correspond to the appropriate EU-UK TCA wording. <u>On some occasions, customs agents incorrectly stated that we used importers' knowledge by using code U112.</u> We believe this is the outcome of the early post-Brexit months when suppliers and customs agents struggled to understand the EU-UK TCA requirements

To resolve the situation, we have requested yearly retrospective statements from our leading suppliers for 2021 and 2022. Hopefully, this will provide you with complete evidence to support the claim of preference against entries on the schedule.

Please find the yearly retrospective statements attached separately from the bundle of each entry.'' (Emphasis added)

29. RSoO1 purported to cover the period from 1 April 2020 to 31 March 2021, thereby excluding Import 3 which occurred on 6 June 2021. RSoO1 referred to 5 different products, being (i) 310684 Napolina Plum Tomatoes 2x12x400g, (ii) 310685 Napolina Plum Tomatoes 2x6x800g, (iii) 310689 Napolina Chopped Tomatoes 2x6x800g, (iv) 405160 Napolina Plum Tomatoes 6x2.5kg and (v) 405161 Napolina Chopped Tomatoes 6x2.5kg. It also stated that the products were of *"EU preferential origin"*. At first glance, the weights, names and product codes do not correlate with the Tomatoes imported under Import 1 or 2 which refer to 67317BR Pomodori Pelati 500g. In evidence, Mr Howe and Ms Greenough explained that the Appellant provided the wording within the body of the RSoO1 to Calispa SPA who then produced this document. Accordingly, the product codes, names and weights were the Appellant's codes for the Tomatoes not Calispa SPA's codes which, they said, explained the differences. Unfortunately, no supporting evidence was provided to prove the link between 67317BR Pomodori Pelati 500g and any of the products listed on RSoO1. Further, they explained that the difference in weights was due to the gross v net weights. Once again, however, no supporting evidence was provided to address this point.

30. On 19 December 2022, Officer McQuade sought advice from HMRC's Unit of Expertise on both the wording of and the retrospective nature of RSoO1, receiving that advice on 10 January 2023.

31. On 9 February 2023, Officer McQuade sent a Right to Be Heard ("RTBH") letter along with a calculation schedule to the Appellant informing it that £205,160.02 was due in respect of Customs Duty, reflecting a rate of 14%. She stated that RSoO1 could not be accepted as it was a retrospective correction. She requested a response by 11 March 2023.

32. On 10 February 2023, the Appellant asked Officer McQuade to identify the relevant Article in the TCA that precluded retrospective corrections. On 17 February 2023, Officer McQuade responded stating that the TCA provided for retrospective claims where no claim for PTT had been made on import, but not for retrospective corrections.

33. On 7 March 2023, the Appellant responded to the RTBH letter. Thereafter, on 9 March 2023 the parties had a call to discuss their respective positions. On 14 March 2023, Officer McQuade wrote to the Appellant summarising and responding to points made in that call.

34. On 31 March 2023, the Decision was issued.

35. On 12 April 2023, a C18 was raised for £205,160.02 in respect of Imports 1, 2 and 3. Thereafter, the parties agreed an extension of time for the Review and Appeals Process to 22 May 2023 as the Appellant was awaiting new information.

36. On 19 May 2023, the Appellant requested a review stating:

"<u>Whilst Princes acknowledge there was a processing error made by our agent when declaring the goods, as there was a failure to attach the statement of origin on the commercial documents at the time of import,</u> the goods in question adhered to the origin requirements which would allow the goods to enter the UK without payment of any traffic (sic) under the terms of the Trade and Cooperation Agreement (TCA). Therefore, Princes are appealing this decision on the basis that as these goods were eligible to enter the UK without payment of any tariff under the terms of the TCA and were imported on that basis. No

commercial or financial gain was sought or made by Princes Group. The goods were legitimately entitled to tariff-free access ...

Days after the entry was submitted on 19 March 2021, Princes discovered that a processing error was made by the agent when declaring the goods. At the time of import, the agent used code N864 on all three import entries, which means "Invoice declaration or origin declaration made out by any exporter on the invoice or any other commercial document (excluding the Bill of Lading) for originating goods . where the total value exceeds €6000" . This seems to be an agent error, as there is no statement of origin on the commercial documents at the time of import. Clearance instructions was not provided to the agent during this period; the agent used the commercial documents to process the import entries. The agent should have used code U112 for importers knowledge as they were aware that the goods are wholly originating meaning that they have been entirely produced in Italy." (Emphasis added)

37. On 30 June 2023, the Decision was upheld on review.

38. On 28 July 2023, the Appellant issued their Notice of Appeal.

39. On 3 November 2023, the Respondents' Solicitors Office wrote to the Appellant seeking to clarify the position as understood and asking whether the Appellant had any proof of origin for each of the three imports respectively at the time it made its claims for PTT.

40. On 7 November 2023, the Appellant provided a second Retrospective statement on origin ("RSoO2") dated 11 April 2023. Once again, the Appellant provided the wording within the body of the RSoO2 to Calispa SPA who then produced this document. The RSoO2 purported to cover the period from 1 January 2021 to 31 January 2022. RSoO2 referred to 1 product, namely 67317BR Pomodori Pelati 500g IT (EU). Notably, RSoO2 omits the product code for the tomatoes imported in Import 3, being 67722, and does not correspond to the weight of the Tomatoes in Import 3, being 1000g. It also stated that the products were of *"EU preferential origin"*.

41. Between 25 April 2024 and 10 May 2024, the partes entered into inter partes correspondence. Specifically, the Respondents, once again, requested any contemporaneous statements on origin. None were provided. In this appeal, the Appellant accepted that there were no valid statements on origin in place at the time of any of the imports.

The Issues & The Parties' Positions

42. The parties agreed that the issues before the Tribunal were:

(1) Whether the Appellant may make a retrospective claim for PTT ("the Retrospective Issue");

(2) If so, whether the purported Retrospective Statements on Origin provided are sufficient to claim PTT ("the Retrospective Statements on Origin Issue"); and/or

(3) Whether the Appellant may now rely upon importer's knowledge in order to claim PTT ("the Importer's Knowledge Issue").

43. Further, the parties were agreed that the second and third issues were each contingent on the first issue, meaning that we need only consider the Retrospective Statements on Origin Issue and the Importer's Knowledge Issue if we find that the Appellant may make a retrospective claim for PTT.

The Law

44. PTT enables importers to pay less or no Customs Duty on items they import if they originate in a country that has a Trade and Co-operation Agreement or a Free Trade

Agreement with the UK, provided that the origin of the goods can be proved in accordance with the conditions of the agreement. The TCA provides the framework for the trade relationship between the UK and the EU following the end of the EU Exit transition period. It provides for PTT. It was signed on 30 December 2020, was applied provisionally from 1 January 2021, and entered into force on 1 May 2021. The TCA was implemented into domestic legislation by the Preference Regulations and the Origin Reference Document. We agree with the Respondents, albeit we understood that this was ultimately accepted by the Appellant, that we must interpret the domestic legislation and that the TCA and the TCA Guidance, which are not binding on us, may assist as sources of guidance in that process.

45. The **Preference Regulations** provide, so far as relevant, as follows:

(1) Regulation 3(1) provides that preferential duty rates may be claimed on the Customs Declaration on import where the conditions in Regulation 3(3) are met.

(2) The conditions in Regulation 3(3) are that subject to Regulation 18 (which is not applicable) the importer or importer's representative must on receipt of a request from HMRC (a) provide (i) A valid proof of origin under regulation 14; or (ii) Such other information or documents as are requested by HMRC under regulation 19; or (b) (which is not applicable as it relates to transport through a third country) present to HMRC the documents required under regulation 17.

(3) Regulation 6 *("Preferential origin goods")* provides that *"Goods qualify as originating goods if they meet the conditions to qualify as originating goods as set out in the relevant origin reference document to an Agreement for the purposes of that Agreement",* namely the Origin Reference Document.

(4) Regulation 14 *("Proof of Origin")* provides that *"(1) Proof that goods qualify as originating goods must be provided by a proof of origin that meets the conditions set out in the relevant origin reference document to an Agreement for the purposes of that Agreement. (2) On presentation of the goods on importation into the United Kingdom, the importer or the importer's representative must, on receipt of a request from HMRC, present to HMRC the proof of origin described in paragraph (1) relating to the goods."*

(5) Regulation 16 *("Backdated Claims for the Preferential Rate")* establishes the law on retrospective claims as follows:

"16.—(1) Where originating goods are imported into the United Kingdom and, <u>at the time of their importation</u>, the importer or the importer's representative—

(a) does not have—

(i) the proof of origin as required by regulation 14(1); or

(ii) such information or documents as are requested by HMRC under regulation 18 in order to verify the originating status of those goods; and

(b) <u>pays the applicable standard rate of import duty in respect of those goods</u>, the importer, or the person who paid the import duty, may make a claim for partial repayment of the import duty on presentation to HMRC of a valid proof of origin relating to the goods or such information or documents as are required by HMRC to verify the originating status of the goods after their importation.

[...]

(3) A repayment of import duty under this regulation must only be granted where HMRC is satisfied that—

(a) the claim for repayment is made within a period of three years from the date of importation;

(b) the declaration presented after importation is genuine; and

(c) the originating status of the goods to which the declaration relates can still be verified.

(4) For the purposes of this regulation, "the date of importation" is the date of acceptance by HMRC of the declaration for free circulation or authorised use into the United Kingdom relating to the relevant goods…" (Emphasis added)

(6) Regulation 19 *("Verification of Originating Status")* provides for a claim for PTT based upon importer's knowledge. Pursuant to Regulation 19(1) HMRC may request such information or documents from the importer or importer's representative as are necessary to verify the originating status of any goods at the time those goods were presented to HMRC.

46. As to the **Origin Reference Document**, the parties agree that it implements and mirrors the TCA. It provides, so far as relevant, as follows:

(1) Article ORIG 3 (1), which mirrors Article 39 of the TCA, states that *"For the purposes of applying the preferential tariff treatment by a Party to the originating good of the other Party in accordance with the United Kingdom-EU Agreement, provided that the products satisfy all other applicable requirements of this Origin Reference Document, the following products shall be considered as originating in the other Party:…"*

(2) Article ORIG 18 states:

*"**Claim for Preferential Tariff Treatment***

1. The importing Party, on importation, shall grant preferential tariff treatment to a product originating in the other Party within the meaning of this Origin Reference Document on the basis of a claim by the importer for preferential tariff treatment. The importer shall be responsible for the correctness of the claim for preferential tariff treatment and for compliance with the requirements provided for in this Origin Reference Document.

2. A claim for preferential tariff treatment shall be based on:

(a) a statement on origin that the product is originating made out by the exporter;

(b) the importer's knowledge that the product is originating.

3. The importer making the claim for preferential tariff treatment based on a statement on origin as referred to in point (a) of paragraph 2 shall keep the statement on origin and, when required by the customs authority of the importing Party, shall provide a copy thereof to that customs authority." (Emphasis added)

(3) Article ORIG 18a, which mirrors Article 55 of the TCA, states:

"1. A claim for preferential tariff treatment and the basis for that claim as referred to in Article ORIG.18(2) shall be included in the customs import declaration in accordance with the laws and regulations of the importing Party.

2. By way of derogation from paragraph 1 of this Article, if the importer did not make a claim for preferential tariff treatment at the time of importation, the

importing Party shall grant preferential tariff treatment and repay or remit any excess customs duty paid provided that:

(a) the claim for preferential tariff treatment is made no later than three years after the date of importation, or such longer time period as specified in the laws and regulations of the importing Party;

(b) the importer provides the basis for the claim as referred to in Article ORIG.18(2); and

(c) the product would have been considered originating and would have satisfied all other applicable requirements within the meaning of Section 1 of this Origin Reference Document if it had been claimed by the importer at the time of importation.

The other obligations applicable to the importer under Article ORIG.18 remain unchanged."

(4) Article ORIG 19(1) states that *"(1). A statement on origin shall be made out by an exporter of a product on the basis of information demonstrating that the product is originating, including information on the originating status of materials used in the production of the product. The exporter shall be responsible for the correctness of the statement on origin and the information provided…"*

(5) Article ORIG 20, which mirrors Article 57 of the TCA, states that *"The customs authority of the importing Party shall not reject a claim for preferential tariff treatment due to minor errors or discrepancies in the statement on origin, or for the sole reason that an invoice was issued in a third country."*

47. S.4 (1) (a-b) of **The Taxation (Cross Border Trade) Act 2018** ("T(CBT)A") provides that a liability to import duty is incurred if *"… (a) chargeable goods are declared for the free-circulation procedure, and (b) HMRC accept the declaration,…"* and that liability is incurred at the time of the acceptance. Further, S.6 (1) T(CBT)A provides that the person liable to import duty in respect of the goods is the person in whose name the declaration is made.

48. Paragraphs 15 – 16 of Schedule 1 to **The Taxation (Cross Border Trade) Act 2018** provide for the amendment or withdrawal of a Customs Declaration in specified circumstances and specified time limits.

(1) Paragraph 15 states that:

"(1) A person who has made a Customs declaration is entitled to amend or withdraw it at any time before a relevant event occurs.

(2) For this purpose "a relevant event occurs" on the first occurrence of any of the following

(a) an HMRC officer indicating to the person that the officer intends to take steps to verify the declaration,

(b) an HMRC officer taking steps to verify the declaration, and

(c) HMRC accepting the declaration."

(2) Paragraph 16 states that:

"Once a relevant event occurs, the person making the declaration may amend or withdraw it only if—

(a) a notification to amend or withdraw the declaration is given to an HMRC officer before the end of a period specified in a public notice given by HMRC Commissioners, and

(b) an HMRC officer consents to the making of the amendment or the withdrawal."

49. As to the Tribunal's Jurisdiction and the Burden of Proof, the Decision is a relevant decision pursuant to section 13A(2)(a) of the Finance Act 1994 ("FA94"). Therefore, s.16 FA94 provides that we have an appellate jurisdiction in this appeal and s.16(6) FA94 confirms that the burden of proof is on the Appellant. The standard of proof is the balance of probabilities.

Analysis

i) The Retrospective Issue

50. The parties were agreed that the first issue for determination was whether the Appellant may make a retrospective claim for PTT ("the Retrospective Issue").

51. As to the parties' positions on the Retrospective Issue, we took trouble during Mr Barnett's closing submissions to ensure that we fully understood the Appellant's submissions. He confirmed that we had. In short, the Appellant's position was that the requirement for a valid statement on origin at the date of the claim for PTT was merely an implied requirement, not an express requirement, and that it was not a requirement that was necessary to be implied. In contrast, the Respondents argued that the requirement for a valid statement on origin at the date of the claim for PTT was provided for in the relevant legislation. For the avoidance of doubt, whilst the Appellant's Skeleton Argument referred to three authorities we were not taken to these during the course of the hearing or, more particularly, during closing submissions.

52. We find that, in the circumstances of this appeal, the Appellant cannot make a retrospective claim for PTT or retrospectively correct the Customs Declarations in issue. In reaching this decision we refer to and rely on the following points.

53. First, the Appellant, not Zeta, was responsible for the correctness of the three claims for PTT and compliance with the requirements of the Origin Reference Document, see Article ORIG 18 (1). Accordingly, if, which we do not accept, Zeta made an error then the Appellant bears responsibility for that error, subject to any civil claim it may have against Zeta.

54. Second, Zeta, on behalf of the Appellant, claimed PTT on the basis of a statement on origin on each of the Customs Declarations for Imports 1, 2 and 3 in accordance with Regulation 3(1) of the Preference Regulations and Article ORIG 18a(1) of the Origin Reference Document. Consequently, the Appellant did not pay any Customs Duty on Imports 1, 2 and 3.

55. Third, pursuant to Regulation 3(3) of the Preference Regulations the Appellant was required, on request, to provide to the Respondents a valid statement on origin under Regulation 14 of the Preference Regulations. Regulation 14 stipulates that proof of origin must meet the conditions in the Origin Reference Document. Article ORIG 18 (2) (a-b) provides that a claim for PTT shall be based on (a) a statement on origin or (b) importer's knowledge. Further, Article ORIG 18(3) provides that if PTT is claimed on the basis of a statement on origin then *"The importer making the claim for preferential tariff treatment based on a statement on origin as referred to in point (a) of paragraph 2 shall keep the statement on origin…"* and, on request, provide a copy to the customs authority. We consider that it is clear from the wording of Article ORIG 18(3) that the statement of origin must be in

existence at the time of the claim for PTT otherwise there would be nothing to *"...keep..."* Therefore, we have decided that the legislation requires the statement on origin to exist at the time the claim for PTT is made. Further, we have concluded that the absence of a statement on origin at the time the claim for PTT is made cannot be retrospectively corrected by producing a Retrospective statement on origin that was neither issued nor in existence at the time of the claim. To allow otherwise, would potentially open the system to abuse, albeit we wish to make clear that there is no suggestion of abuse in this appeal. We note that the TCA Guidance at page 13, set out in paragraph 18(2)(a) above, supports our conclusion that the statement on origin must exist at the time the claim for PTT is made and that PTT cannot be claimed on the basis of a statement of origin that is not yet issued and does not exist. We also note, albeit we have placed no weight on it as it is our role to interpret legislation not HMRC's Guidance, that HMRC's Guidance, detailed at paragraphs 12 to 13 above, reflect HMRC's view that the statement on origin must exist at the time the claim for PTT is made. In this case, there were no statements on origin at the time the claims for PTT were made.

56. Fourth, an importer can make a retrospective claim for PTT if (i) no claim for PTT was made on importation, (ii) if the Customs Duty was paid on importation and (iii) if the conditions in Regulation 16(3)(a-c) are met, see Regulation 16 of the Preference Regulations and Article ORIG 18a (2) (a-c) of the Origin Reference Document. The Appellant was, via Mr Howe, aware of the relevant legislation and guidance and, accordingly, was alert to the possibility of making retrospective claims but elected not to do so considering that the number of imports per week would mean that retrospective claims would be impractical and administratively unworkable. The Appellant is unable now to avail itself of the retrospective claim procedure because it does not satisfy the criteria as (i) claims for PTT were made on importation and (ii) no Customs Duty was paid. The correct approach was either for the Appellant to claim PTT on the basis of a statement on origin and possess such a statement at the time of making the claim or not claim PTT, pay the Customs Duty and make a retrospective claim under Regulation 16 of the Preference Regulations and Article ORIG 18a (2) (a-c) of the Origin Reference Document. In summary, the retrospective claim procedure under Regulation 16 of the Preference Regulations and Article ORIG 18a (2) (a-c) of the Origin Reference Document is not applicable to the circumstances of this appeal.

57. Fifth, Article 18 (2) (a-b) of the Origin Reference Documents provides that PTT can be claimed on the basis of either a statement on origin or importer's knowledge. If, which we do not accept, Zeta made a mistake in claiming PTT based on a statement on origin then it was open to the Appellant to apply to amend or withdraw the three Customs Declarations in accordance with Regulation 16[1], Schedule 1 of the T(CBT)A. The Appellant did not do so. The time-period for doing so, three years from the date of the importations, has elapsed. Accordingly, the Custom Declarations have not been amended or withdrawn, PTT was claimed on each Customs Declaration on the basis of a statement on origin not on the basis of importer's knowledge. In the circumstances, it is not now possible to allege that PTT was or ought to have been claimed on the basis of importer's knowledge instead of a statement on origin.

58. Sixth, the Tomatoes were declared and accepted for the free circulation procedure and, consequently, a liability was incurred in accordance with s.4 (1) (a-b) T(CBT)A for which the Appellant is liable under s.6(1) T(CBT)A.

59. Seventh, Article ORIG 20 does not assist the Appellant as it deals with *"... minor errors or discrepancies <u>in</u> the statement on origin...."* (Emphasis added) In this appeal, there

[1] For the avoidance of doubt, Paragraph 15 of Schedule 1 to the T(CBT)A does not apply because the Customs Declarations had each been accepted.

are no valid statements on origin to which Article ORIG 20 can be applied. For the avoidance of doubt, the omission of a statement of origin is not a minor issue.

Conclusion

60. In all the circumstances, we find that, regardless of whether the Tomatoes are of Italian origin, the Appellant failed to follow the correct customs procedures. PTT was claimed on the basis of statements on origin and no Customs Duty was paid. No statements on origin existed at the times the claims for PTT were made. The Appellant did not apply to amend or withdraw the Customs Declarations. The Appellant cannot make a retrospective claim for PTT as the conditions in Regulation 16(3)(a-c) are not met, see Regulation 16 of the Preference Regulations and Article ORIG 18a (2) (a-c) of the Origin Reference Document. Accordingly, the Appellant is liable for Customs Duty of £205,160.02. The appeal is dismissed.

61. In light of our decision on the Retrospective Issue, it is not necessary for us to consider the Retrospective Statements of Origin Issue or the Importer’s Knowledge Issue and we do not do so.

62. 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.

JENNIFER NEWSTEAD TAYLOR
TRIBUNAL JUDGE

Release date: 28th NOVEMBER 2024