



TC01263

Appeal number LON/2008/7115

Appeal against the imposition of a C18 customs debt for the late submission of a C99 – whether the Appellant who claimed it had been sent to NIRU should have checked that it had safely arrived having previously been warned by them on a previous late submission that should it happen again the debt would not be cancelled - despite Appellant receiving a reminder C99 still not sent - appeal dismissed on basis that the Appellant's conduct amounted to obvious negligence under Article 859 of the Customs Code

FIRST-TIER TRIBUNAL

TAX

WESTLAND GEOPROJECTS (HOLDINGS) LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
C.S DE ALBUQUERQUE**

Sitting in public at 45 Bedford Square, London WC1 on 9 June 2011

Mr Black of PBS International Freight Limited shipping agent for the Appellant

Miss Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision not to cancel a C18 customs debt which arose in relation to an import of ship spares ("the goods") which entered the country on 22 June 2007.
2. The debt consists of VAT and customs duties totalling £1,707.02, which is the sum of £220.21 ad valorem duty and £1,486.81 import duty.
3. The C18 was issued because the Appellant had failed, in relation to the goods imported on 22 June 2007 on which the Appellant claimed Inward Processing Relief (IPR"), to comply with certain requirements in relation to the use of that procedure.
4. On 31 March 2008, the Appellant appealed the issue of the C18 and requested a review of HMRC's decision.
5. On 13 May 2008, the Appellant was notified that the original decision had been upheld and that the C18 debt remained in place.
6. On 17 June 2008, the Appellant filed its notice of appeal with the Tribunal. HMRC did not object to the Appellant's application for an extension of time.

Background and facts

7. The Appellant has been represented throughout by its shipping agents, PBS International Freight Limited ("PBS").
8. The Appellant imported the goods on 22 June 2007 under Customs Procedure Code 5100001. Use of this code indicated that the Appellant intended to use the IPR procedure.
9. The IPR procedure suspends VAT and customs duties at the time of import. It provides relief to promote exports from the European Community (EC) and assist Community processors to compete on an equal footing in the world market. Duty is relieved on imports of non-EC goods which are processed in the Community and re-exported provided the trade does not harm the essential interests of Community producers of similar goods. It can provide relief from customs duty, specific customs duty (previously CAP charges), anti-dumping duty and countervailing duty.
10. The duties payable on goods which have been imported from non-EC countries and are intended for re-export are only suspended providing that certain conditions are met.
11. The non-EC goods intended for re-export must be re-exported from the Community within a time limit agreed within HMRC. This is known as the 'period of discharge' or 'throughput period'. In the present case, the throughput period was six months.

12. Records must be kept for all operations carried out. Users of the suspension method are also required to submit the bill of discharge, a completed form C99, detailing receipts and disposals. If any of the requirements are not met then depending on the circumstances, the duties in question may not be suspended.
- 5 13. The amounts which fall payable in the case of non-compliance with the suspension method requirements are not penalties as such. These sums are simply the suspended duties that would otherwise be due and payable, had the IPR procedure not been used.
- 10 14. The National Import Relief Unit (NIRU) is responsible for monitoring traders who use the IPR system. There are two IPR systems which are the fully authorised procedure and the simplified procedure.
- 15 15. To be able to use the fully authorised procedure, an application must be made to HMRC, who will decide if it is appropriate to issue a full authorisation. However, if a trader only intends to use the relief occasionally and the processing of the goods imported into the EC only takes place in the UK, traders may choose to use the simplified procedure. The simplified procedure can be used by anyone who is not in possession of a full authorisation. NIRU has responsibility for monitoring the simplified procedure. At all material times, the Appellant was using the simplified procedure.
- 20 16. Although PBS was a frequent user of IPR, comparatively speaking the Appellant was not. Suitability is measured by reference to the Appellant's circumstances. Accordingly, it was suitable for the Appellant to use simplified authorisation.
17. The Appellant used the simplified authorisation procedure for IPR for the first time on or around 3 May 2007.
- 25 18. On 9 May 2007 NIRU sent an introductory letter to the Appellant, explaining the requirements that needed to be met in order for duties to be suspended under IPR and pointing the Appellant to Customs Notice 221A for further information.
- 30 19. In particular NIRU drew attention to two requirements. Firstly that form CPC 31 51 00 must be used when the goods were re-exported from the EC and secondly that a bill of discharge, a C99, must be sent to the NIRU within 30 days of the end of the throughput period.
- 35 20. NIRU also pointed out that the throughput period was normally six months unless a written request for extension was forwarded to NIRU. The Appellant was informed that if this action was not completed it would automatically be charged the duties and taxes suspended.
21. The Appellant imported the goods from the US (Houston, Texas) on 21 June 2007. The goods arrived at London Gatwick on 22 June 2007. The goods were imported under Customs Procedure Code 5100001. Use of this code indicated that the Appellant intended to use the IPR procedure.

22. The throughput period expired within 6 months from the date of import on 22 December 2007. The C99 was due within 30 days from the expiry of the throughput period that is by no later than 22 January 2008.

5 23. On 22 December 2007, NIRU wrote to the Appellant warning that no C99 had been received in respect of the goods imported by the Appellant on 22 June 2007, the throughput period had now expired and that if no C99 was received within 30 days the customs duty and taxes suspended on import would be demanded.

10 24. Notwithstanding NIRU's warning letter, no C99 had been received by NIRU by 22 January 2008. Accordingly, on 10 March 2008, HMRC issued the C18 Post Clearance Demand Notice presently under appeal.

25. On 14 March 2008 NIRU received a letter from Miss Claire Tubb of PBS which enclosed supporting evidence showing that the goods in question had been re-exported to Azerbaijan from London Heathrow on 23 June 2007 under Customs Procedure Code 315100.

15 26. This was not the first time that the Appellant had failed to submit a C99 within the requisite time limit. Late C99 Bills of Discharge had been submitted on three previous and one subsequent occasion. On appeal HMRC had previously cancelled two C18 Post Clearance Demand Notices.

The Legislation

20 27. The Appellant's circumstances were governed by a mixture of European Council Regulation 2913/92 ("the Customs Code") and European Commission Regulation 2454/93 ("the Implementing Regulations").

25 28. Article 59 of the Customs Code provides that a declaration is required for goods placed under certain customs procedures and that customs supervision shall apply to goods under specified procedures. It states:

1. All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure.
2. Community goods declared for an export, outward processing, transit or customs warehousing procedure shall be subject to customs supervision from the
30 time of acceptance of the customs declaration until such time as they leave the customs territory of the Community or are destroyed or the customs declaration is invalidated.

29. Article 118 states :

- 35 1. The customs authorities shall specify the period within which the compensating products must have been exported or re-exported or assigned another customs-approved treatment or use. That period shall take account of the time required to carry out the processing operations and dispose of the compensating products.
- 40 2. The period shall run from the date on which the non-Community goods are placed under the inward processing procedure. The customs authorities may grant

an extension on submission of a duly substantiated request by the holder of the authorization.

5 For reasons of simplification, it may be decided that a period which commences in the course of a calendar month or quarter shall end on the last day of a subsequent calendar month or quarter respectively.

30. Article 182(3) states:

10 Re-exportation or destruction shall be the subject of prior notification of the customs authorities. The customs authorities shall prohibit re-exportation should the formalities or measures referred to in the first subparagraph of paragraph 2 so provide. Where goods placed under an economic customs procedure when on Community customs territory are intended for re-exportation, a customs declaration within the meaning of Articles 59 to 78 shall be lodged. In such cases, Article 161 (4) and (5) shall apply.

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31. Article 204 states:

1. A customs debt on importation shall be incurred through:

20 (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

25 in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

30 2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

35 3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.

32. Article 199 of the Implementing Regulations states:

40 Without prejudice to the possible application of penal provisions, the lodging with a customs office of a declaration signed by the declarant or his representative shall render him responsible under the provisions in force for:

- the accuracy of the information given in the declaration,

- the authenticity of the documents attached,

45 and

compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.

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33. Article 521 states in the relevant part:

- 5 At least upon the expiry of the period of discharge, irrespective of whether aggregation in accordance with Article 118(2), second subparagraph, of the Code is used or not:
- in the case of inward processing (suspension system) or processing under customs control, the bill of discharge shall be supplied to the supervising office within 30 days;
- ...
- 10 Where special circumstances so warrant, the customs authorities may extend the period even if it has expired.

34. Article 859 states in the relevant part

- 15 The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204 (1) of the Code, provided:
- they do not constitute an attempt to remove the goods unlawfully from customs supervision,
 - they do not imply obvious negligence on the part of the person concerned, and
- 20 - all the formalities necessary to regularize the situation of the goods are subsequently carried out:

35. Article 859(9) states:

- 25 In the framework of inward processing and processing under customs control, exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time.

36. Article 860 states:

- 30 The customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled.

Appellant's Submissions

- 35 37. Mr Black contended on behalf of the Appellant that the correct procedures were followed. The goods were hand carried from the UK to Azerbaijan leaving from London Heathrow Terminal 3 on 23 June 2007 and a representative from PBS accompanied the Appellant to make sure that the export paperwork was stamped at the time of exportation.

38. Mr Black contended that the C99 was sent to NIRU at the usual address once the goods had left the country.

39. Mr Black submitted that at no time was there any attempt to defraud HMRC of any taxes due. The documentation submitted showed that every effort was made to ensure that the correct import and export procedures were adhered to by the Appellant.

5 40. Mr Black submitted that the review decision had not noted that the C99 was posted right away to the usual address and because it had not been received by NIRU and on previous occasions the Appellant had failed to send the C99s, both the Appellant and PBS were being punished by HMRC.

10 41. On cross-examination Mr Black confirmed that the reminder letter had been received by the Appellant and passed to PBS. At PBS it was dealt with by Miss Claire Tubb. Mr Black said however that she did not know what to do and only took action when NIRU issued the C18 demand notice.

HMRC's Submissions

15 42. Miss McCarthy submitted on behalf of HMRC that although Mr Black had contended that a C99 had been submitted to NIRU on time, NIRU had not received it and even now had still not received a copy of it although included in the Appellant's list of documents was "copy C99 dated 27/06/07.

43. Miss McCarthy submitted that HMRC contended that the C18 debt was due for a number of reasons.

20 44. The Appellant and its agent PBS were fully aware of the need to send the C99 within 30 days of the expiry of the throughput period. This had been made clear to the Appellant in NIRU's introductory letter dated 9 May 2007.

25 45. Moreover NIRU had sent a specific reminder to the Appellant on 22 December 2007 in relation to the shipment under appeal. Despite the warning contained in this letter, the Appellant did not provide NIRU with the C99 within the 30 days of the end of the throughput period, nor did the Appellant contact NIRU to request an extension of time, whether by letter, telephone, fax, email or otherwise.

30 46. By letter dated 4 March 2008 the Appellant was warned that "any future belated returns will not result in cancellation of the debt as you have been made fully aware of your responsibilities and any further breaches will be classed as negligence".

35 47. Miss McCarthy submitted that in such circumstances the Appellant's conduct amounted to "obvious negligence" within the meaning of art.859. She submitted that it was reasonable for NIRU not to cancel the debt for a third time. She also noted that the Appellant had subsequently failed to submit a C99 for a fourth time in relation to import entry 099142H on 24 September 2007.

48. She submitted that the assertion made by PBS in its letter of 31 March 2008 that the C99 had in fact been delivered appeared to be contradicted by PBS's earlier reply on behalf of the Appellant in correspondence. In the undated letter from Ms. Claire Tubb to NIRU responding to the C18 Demand Notice issued on 10 March 2008 and

which was received by NIRU on 14 March 2008, PBS enclosed “copies of the original import entry, import awb and export entry stamped by customs”. However no reference at all was made to a C99 previously submitted, nor was a copy enclosed.

5 49. Neither the Appellant nor its representatives at any stage provided proof of postage and neither the Appellant nor its representatives contacted NIRU when the Appellant received NIRU’s reminder letter of 22 December 2007 which notified it that the C99 for the entry in dispute had not been received.

50. In the circumstances, HMRC asked the Tribunal to find that on the balance of probabilities the Appellant had failed to prove that the C99 was sent.

10 51. Miss Mc Carthy submitted that as the Tribunal had recently held in *Euro Trading Limited v HMRC* [2011] UKFTT 56 (TC) at [39], the legislation in respect of the IPR was clear. In this case, the Appellant was well aware of its obligations, having been reminded of them on previous occasions. Despite NIRU’s warnings about the consequences of late submission of the C99, the Appellant and its representatives
15 failed to make absolutely certain that its C99 had been received by the NIRU.

52. Miss McCarthy referred to the case of *Firma Sohl & Sohike Case C-48/98* in which the ECJ stated that :

20 “The repayment or remission of import and export duties which may be made only under certain conditions and in cases specifically provided for constitutes an exception to the normal import and export procedure and consequently the provisions which provide for such repayment are to be interpreted strictly. Since a lack of ‘obvious negligence’ is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited.”

25 53. Miss McCarthy submitted that in this case the Appellant’s conduct amounted to obvious negligence for the purposes of Article 859 and the appeal should be dismissed.

Findings

30 54. We find that neither the Appellant nor its agent was able to produce any evidence that the C99 had been sent. Despite having been previously warned about the late submission of a C99 and therefore knowing of the potential liability which could arise, they made no attempt to make absolutely sure that its C99 had been received by NIRU.

35 55. We find that even after the reminder sent by NIRU nothing was immediately done by the Appellant or its agent to correct the apparent omission.

56. We find that the Appellant’s conduct amounted to an obvious negligence for the purposes of Article 859.

Decision

57. The appeal is dismissed and the C18 customs debt of £1,707.02 is hereby confirmed.

58. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 23 June 2011

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