Appeal number: FTC/18/2011

NCN 2012 UKUT 49 TCC

CUSTOMS DUTIES — post-clearance demand — goods imported using simplified inward processing relief system — appellant acting as importer's, or purported importer's, agent — import declarations submitted by appellant incorrect by reason of importer providing false identity— no bills of discharge provided — Customs Code arts 5, 204 — whether appellant liable for payment of duty and VAT — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TNT (UK) LIMITED **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp
Judge Edward Sadler

Sitting in public in London on 10 November 2011

Mr Timothy Brown, counsel, instructed by the Appellant's legal department, for the Appellant

Mr Alan Bates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal against a decision of the First-tier Tribunal (Judge Walters QC and Ms Newns) ("the tribunal") by which it dismissed the appeal of TNT (UK) Limited ("TNT") against a post-clearance demand (commonly known as a C18) amounting to £264,993.20, and representing the customs duty and VAT due on the importation in 2007 and 2008 of various goods. The goods were entered under the Simplified Inward Processing Relief ("SIPR") procedure, a procedure which, subject to the satisfaction of a number of conditions, relieves the importer from the payment of customs duty and VAT on importation. The duty and VAT were later demanded by HMRC by reason of non-compliance with one of those conditions, namely the failure to submit a timely bill of discharge.

2. TNT is a well-known company, carrying on business primarily as an express carrier, but it also acts as a freight agent for some of its customers. The tribunal recorded (as was undisputed) that it was in the latter capacity that it made 52 import declarations in respect of computer components, manufactured by Cisco Systems in the USA, but imported into the United Kingdom via the Netherlands. Although there was no finding to this effect, it seems that they had been held in a customs warehouse while they were in the Netherlands, and it was common ground that they had not been released to free circulation there. In each case, as the tribunal found, the declaration (in form C88) showed the intended recipient of the goods as ITECO Nigeria Limited, a Nigerian company whose UK address was shown as "Bola Travel and Freight Limited, Unit 11, Eurolink Business Centre, London SW2 1BZ". In fact, as the tribunal found and as TNT now accepts, there was no company with the name Bola Travel and Freight Limited ("BTFL"): a company of that name had previously been in existence, but had been dissolved in 2006.

3. The unchallenged evidence before the tribunal, which it accepted, was that an employee of TNT, a Mr McDonald, took on trust what he was told by someone who identified himself as "Bola Adeniyi", and who claimed to represent BTFL. He provided Mr McDonald with various details, including in particular a VAT registration number. That number was later found to belong to another, wholly unconnected, company, Afritrade (Europe) Limited ("Afritrade"). Mr Adeniyi, or the person purporting to be Mr Adeniyi, told Mr McDonald that the goods were to be brought into the UK for repair before re-export (which, if true, would make them eligible for inward processing relief provided all the other relevant conditions were met). Although the decision contains no express finding to this effect, it is not disputed that once the import formalities had been completed the goods were delivered by TNT to the address given by Mr Adeniyi, and signed for.

4. The absence of bills of discharge (which TNT accepts were not provided to HMRC) led HMRC to send demands for the duty and VAT to Afritrade, since it was its VAT number which appeared on the declarations. Afritrade, not surprisingly, protested. Its protests led HMRC to make enquiries from which they discovered, in short, that Afritrade had no connection with the goods beyond the fraudulent use of its VAT number, and that the goods had effectively disappeared, presumably to be sold within the UK. The tribunal's decision contains more detail

about the investigation and the conclusions drawn from it, but for present purposes it is sufficient to record that it found (as HMRC have always accepted) that TNT is the innocent (if, as the tribunal thought, somewhat careless) victim of a deception perpetrated by the purported Mr Adeniyi. HMRC contend, however, that as TNT, innocent though it may have been, had furnished incorrect declarations on import it is liable for the payment of the duty and VAT. TNT acknowledged before the tribunal that the declarations were incorrect but did not accept that this fact rendered it liable to pay.

5. The tribunal found that it did, on the basis that TNT "was not empowered to act as a representative of whoever was the true importer of the goods" (see [76]). It went on to add, at [80], that

> "although the Appellant was not aware at any relevant time that it was not validly empowered to be a representative of the importer(s) of the goods in issue, it should reasonably have been aware of that fact. The Appellant had a responsibility deriving from its participation in the customs procedure to carry out reasonable checks (due diligence) as to the accuracy and correctness of the information included in the form C88 declarations made by it. The Appellant failed in that responsibility, in particular in not verifying that BTFL was a company existing at the time(s) of the importation(s) and a person who could validly empower the Appellant to act as its representative".

6. The crux of the tribunal's conclusions appears at [81]:

> "The Appellant, as a person who stated that it was acting in the name of or on behalf of another person (BTFL) without being empowered to do so is therefore deemed for the purposes of the Community Customs Code Regulation to have acted in its own name and in its own behalf (article 5(4) of the Community Customs Code Regulation)."

7. Mr Timothy Brown, appearing before us for TNT, accepted that he could not challenge any of the tribunal's findings of fact; but he argued that the conclusion that TNT was not empowered to act as a representative of the true importer of the goods, whoever that might have been, did not withstand scrutiny, and that the tribunal had misinterpreted, or misapplied, the relevant provisions of the Customs Code (Council Regulation 2913/92/EEC, since replaced but in effect at the time) ("the Code").

8. The provisions of the Code relevant to this appeal are to be found in arts 5 and 201 to 205. Article 5, so far as material, provides that

> "(1) … any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.
>
> (2) Such representation may be—
>
> - direct, in which case the representative shall act in the name of and on behalf of another person, or
> - indirect, in which case the representative shall act in his own name but on behalf of another person …

> (4) A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.
>
> A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.
>
> (5) The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative."

9. It was accepted before the tribunal that TNT had declared itself to be the indirect representative of BTFL in 11 cases, and its direct representative in the remaining 41. Its contention that this was a mistake, and that it should be treated as the direct representative in all 52 cases, was rejected by the tribunal. Whether or not TNT made a mistake, the obligation imposed by art 5(4) to state whether the representation is direct or indirect is mandatory and, as the tribunal determined, it is not open to TNT now to avoid any liability it might otherwise have by claiming that it was in fact acting as a direct representative. There is no appeal against that finding and, as we shall indicate, it does not seem to us (nor did it to the tribunal) to make any difference to the outcome whether the representation, or more accurately the stated representation, was direct or indirect.

10. Mr Brown's argument, in essence, was that even though TNT may not have been authorised to act on behalf of the non-existent BTFL, it nevertheless had the authority to act on behalf of someone with sufficient connection with the goods to give that authority: the tribunal had accepted the evidence of the telephone call, and that the goods had been delivered to the address given by the supposed Mr Adeniyi. There is, he pointed out, no definition in the Code of the term "importer". It was clear, nevertheless, that TNT was not the importer: it was obvious from the manner in which the declarations had been completed that in submitting them TNT was acting on information provided to it, and was submitting the declarations only in the capacity of agent. All that the Code requires is that the person furnishing the declaration has the authority of another person to make the declaration; it does not require that he has authority from the person identified on the declaration as the consignee.

11. Alternatively, even if TNT was not properly authorised, it believed on reasonable grounds that it was. There was nothing in the tribunal's decision to suggest that TNT had acted in anything other than good faith, and HMRC's computer system (commonly referred to by its acronym of CHIEF) had not alerted TNT to the problem, by revealing the mismatch between the supposed consignee and the VAT registration number provided when the declaration was entered. The tribunal was mistaken in relying on its conclusion to the contrary, based as it was on an incorrect view that there was an obligation on a person submitting a declaration to exercise due diligence. That the information given to the representative, on which he relied when completing the declaration, later proved to be false was irrelevant.

12. For the Commissioners, Mr Alan Bates submitted that, when the person furnishing the declaration has failed to comply with the basic requirement of the first paragraph of art 5(4) it directly follows that he is subject to the consequences which are spelt out by the second paragraph, and is thus to be treated as having made the declaration on his own behalf. There was no support in the Code itself for Mr Brown's argument that a representative satisfied his obligations by merely repeating in a declaration what he had been told, uncritically and without verification: if that were so, he said, a representative could with impunity submit a declaration he knew to be false. The conclusion that a representative bears the consequences of an incorrect declaration is reinforced, he said, by the power conferred on the customs authority by art 5(5) to demand evidence of the representative's appointment. Those provisions struck a fair balance between the rights and obligations of authorised representatives on the one hand and the public purse on the other.

13. In our judgment Mr Bates' argument is unanswerable. Although other errors in a declaration may be capable of correction, the status of the person making it is plainly of fundamental importance. The clear purpose of art 5 is to ensure that the customs authority knows unequivocally who is liable for any duty and VAT which may be payable. We see no scope for the importation into art 5(4) of any implied proviso such as Mr Brown suggested, relieving the supposed representative from liability if what he was told turns out to be wrong. Even if there should be any room for doubt about that conclusion, it is removed by art 199 of Commission Regulation (EEC) No 2454/93 ("the Implementing Regulation", also since replaced but in effect at the time):

> "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 presented, and
> - compliance with all the obligations relating to the entry of the goods in question under the procedure concerned."

14. It is perfectly clear from that provision that the accuracy of the declaration is of cardinal importance, and that responsibility for it is to be determined wholly objectively. Although it is not immediately obvious whether the word "him" in the third line means the declarant or the representative, the effect of the second paragraph of art 5(4), as we have said, is to treat the supposed representative as if he were the declarant and in this context there is no ambiguity.

15. In short, the tribunal's conclusion that as BTFL did not exist it could not have authorised TNT was inevitable, as was its finding that TNT had not derived lawful authority (that is, authority for which there was any evidence which might satisfy the purpose of art 5(5)) from any other source. It was in our judgment correct to determine that as a result TNT was to be treated as having made the declaration on its own behalf. It thus makes no difference whether the purported representation was direct or indirect.

16. The consequence of that conclusion is to be found in arts 201 to 205 of the Code, which collectively provide for a variety of different eventualities. The only one which seems to us relevant to this appeal is art 204, the material parts of which provide that

> "(1) A customs debt on importation shall be incurred through—
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> (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 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 …
>
> (2) The customs debt shall be incurred 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.
>
> (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."

17. The "obligation whose non-fulfilment gives rise to the customs debt" relied upon by HMRC is, as we have said, the failure to submit timely bills of discharge. Mr Brown argued that the tribunal, in concluding that the combined effect of arts 5 and 204 was to place the obligation for payment on TNT, failed to take any, or any adequate, account of art 537 of the Implementing Regulation, which provides that

> "An authorisation [which includes an authorisation to operate the inward processing relief procedure] shall be granted only where the applicant has the intention of re-exporting or exporting main compensating products."

18. Mr Brown put his point in this way in his skeleton argument:

> "Article 537 … states that authorisation for IPR shall be granted only where the 'applicant' has the intention of re-exporting the goods imported: it cannot be the case that an agent, whether acting in its own name or not, can comply with obligations which require physical control of the goods … the goods were delivered by the appellant to the address given and signed for in the name of Bola Adeniyi. Therefore, the importer had physical control of the goods and not the appellant."

19. In our view that argument fails for the reason given by Mr Bates. As he said, it runs quite contrary to art 5(4) of the Code. The representative who fails to comply properly with its requirements is treated as acting on his own behalf, from which it follows that he assumes for himself the obligations which attach to the

customs procedure to which the goods were declared. That he chooses to hand them over to someone else cannot relieve him of the responsibility for performing those obligations.

20. In our judgment the tribunal reached the correct conclusion for the right reasons and the appeal must be dismissed.

Colin Bishopp
Upper Tribunal Judge

Edward Sadler
Upper Tribunal Judge

Release date: 7 February 2012