[2016] UKFTT 32 (TC)

TC04825

Appeal number: TC/2014/02206

EXCISE DUTY – Jurisdiction of Tribunal – Cancellation of alternative evidence agreements by HMRC – Whether a "decision" has been made as to entitlement to Excise Duty drawback – No – Whether a "condition" imposed pursuant to Regulation 7(2) Excise Goods (Drawback) Regulations 1995 – No – Appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

INTERNATIONAL BRANDS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 15 January 2016

Tristan Thornton, of TT Tax, for the Appellants

Will Hays, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the application of HM Revenue and Customs ("HMRC") to determine, as a preliminary issue, whether the Tribunal has jurisdiction to hear the appeal of International Brands Limited (the "Company"). It concerns the evidence required for a claim for Excise Duty drawback, in particular the use of "alternative evidence agreements". These are documents, which reflect an agreement between a taxpayer and HMRC, in relation to specific brands of goods under which a claim for drawback can be made in the absence of a duty payment document.

Background

2. The Company was advised by HMRC's Drawback Central Assurance Team ("DCAT") in a letter, dated 12 March 2014, that its use of alternative evidence agreements between 1 October 2012 and 31 October 2013 would be considered to ascertain whether any of the agreements were dormant and should be withdrawn.

3. On 26 March 2014 DCAT wrote to the Company explaining that the review had found that of the 42 alternative evidence agreements the Company had in place only 18 had been used during the review period. The letter continued (with emphasis as stated in the letter):

> In the light of these findings, I intend to take the following action:
>
> 1. Alternative Evidence Agreements not used during the timescale of the review will be cancelled.
>
> 2. Action **required by you** for the remaining agreements: Current information should be supplied by your Intermediary and the Original Producer to confirm that they still supply these brands and products to you. You should only be requesting an Alternative Evidence Agreement for products and brands that you purchase on a regular basis. A SKU list should not be provided. A timescale of **six weeks** will be given for this part of the review; a response to this part of the review should be no later than 7 May 2014.
>
> 3. After the six week review period 7 May 2014. If I have no response to my request at point 2 above, I intend withdrawing your remaining agreements with immediate effect and will advise the Drawback Processing Centre to accept no new claims from you in connection with that particular supply chain where you are relying on the expired Alternative Evidence Agreement.
>
> Each Alternative Evidence Agreement is for a specific chain comprising of: **Original Duty Payer to Intermediary/Supplier to Claimant**. Once I have received the information requested in Step 2 above, I will issue you with a new Alternative Evidence Agreement reference number for each supply chain requiring an agreement and on which you will have supplied the necessary requested evidence (Only one reference number will apply to a specific supply chain). In future any changes to the initial agreement will be reflected in an Amended Alternative Evidence Agreement acknowledgement letter.

> HMRC will continue to monitor the Alternative Evidence Agreements you have in place, we will advise in writing of any further changes made by DCAT to your agreements. You are however reminded that you must notify HMRC immediately of any material changes to any of your supply chains which form the basis of the terms of our Alternative Evidence Agreements with you.

4. The letter concluded stating if the "decision" was disputed there were three options which could be taken by the Company. First, additional information could be provided for further consideration; secondly, the case could be reviewed by a different officer, and thirdly the Company could appeal to the Tribunal.

5. The Company appealed to the Tribunal on 23 April 2014. On 24 September 2014 HMRC made this application in relation to jurisdiction.

Statutory Framework – Drawback and Appeals

6. Section 2 of the Finance (No 2) Act 1992 provides:

> (1) Subject to the following provisions of this section, the Commissioners may, in relation to any duties of excise, by regulations make provision
>
> > (a) conferring an entitlement to drawback of duty in prescribed cases where the Commissioners are satisfied that goods chargeable with duty have not been, and will not be, consumed in the United Kingdom; and
> >
> > (b) conferring an entitlement to drawback of duty, in prescribed cases, on the shipment as stores, or warehousing in an excise warehouse for use as stores, of goods chargeable with duty
>
> (2) The power of the Commissioners to make regulations under this section shall include power—
>
> > (a) to provide for, or for the imposition of, the conditions to which an entitlement to drawback under the regulations is to be subject;
> >
> > (b) to provide for the determination of the person on whom any such entitlement is conferred;
> >
> > (c) to make different provision for different cases, including different provision for different duties and different goods; and
> >
> > (d) to make such incidental, supplemental, consequential and transitional provision as the Commissioners think necessary or expedient.
>
> (3) Without prejudice to the generality of subsection (2)(d) above, the power of the Commissioners to make regulations under this section shall include power, in relation to any drawback of duty to which any person is entitled by virtue of regulations under this section, to provide—

> (a) for entitlement to the drawback to be cancelled at any time after it has been conferred if there is a contravention of any conditions to which it is subject or in such other circumstances as may be prescribed; and
>
> (b)for such persons as may be prescribed to be liable to the Commissioners for sums paid or credited to any person in respect of any drawback that has been cancelled in accordance with any such regulations.

7. Provisions conferring an entitlement to drawback, made under s 2 Finance (No 2) Act 1992, are contained in the Excise Goods (Drawback) Regulations 1995 ("EGDR"). These provide that a claim for drawback can only be made in relation to "eligible goods (Regulation 5) by "eligible claimants" (Regulation 6).

8. Regulation 7 EGDR, "General Conditions", insofar as it is material to the present case, provides:

> (1) Subject to paragraph (2) below and without prejudice to any condition imposed by, or in accordance with section 133 of the Act, every eligible claimant shall—
>
> (a) save as the Commissioners may otherwise allow, comply with the conditions imposed by these Regulations; and
>
> (b) in addition to those conditions, comply with such other conditions as the Commissioners see fit to impose in a notice published by them and not withdrawn by a further notice.
>
> (2) If the Commissioners consider it necessary for the protection of the revenue they may, by a notice in writing delivered to a revenue trader, require him to comply with such additional conditions as they think fit to impose.
>
> (3) Sections 14 to 16 of the Finance Act 1994 shall have effect in relation to any decision of the Commissioners to impose additional conditions under paragraph (2) above as if that decision were a decision of a description specified in Schedule 5 to that Act.

9. Clearly, as stated in Regulation 7(1) any conditions imposed under the EDGR are without prejudice to those imposed by s 133 of the Customs and Excise Management Act 1979 "CEMA") which contains general provisions as to claims for drawback.

10. Section 133 CEMA provides:

> (1) Any claim for drawback shall be made in such form and manner and contain such particulars as the Commissioners may direct.
>
> (2) Where drawback has been claimed in the case of any goods [subsections (4) to (6)] below shall apply in relation to the claim.
>
> (3) [...]
>
> (4) No drawback shall be paid until the person entitled thereto or his agent has made a declaration in such form and manner and containing

such particulars as the Commissioners may direct that the conditions on which the drawback is payable have been fulfilled.

(5) The Commissioners may require any person who has been concerned at any stage with the goods or article—

(a) to furnish such information as may be reasonably necessary to enable the Commissioners to determine whether duty has been duly paid and not drawn back and for enabling a calculation to be made of the amount of drawback payable; and

(b) to produce any book of account or other document of whatever nature relating to the goods or article.

(6) If any person fails to comply with any requirement made under subsection (5) above, he shall be liable on summary conviction to a penalty of [F3level 3 on the standard scale].

11. Further conditions have been published by HMRC, in accordance with Regulation 7(1) EGDR, in Excise Notice 207 "Excise Duty drawback". Part 4 of the Notice describes the main conditions and requirements of drawback in a question and answer format. Paragraphs 4.8 and 4.9 state:

4.8 I am not the original duty payer of the goods on my drawback claims – what evidence of UK duty payment will I need?

If you are not the original duty payer you must provide evidence that clearly shows the goods on your drawback claim are UK duty paid and provide a clear audit trail between those goods and the original duty payment document.

You will need to gather evidence from the original duty payer or payers and any person in the supply chain who previously had ownership of the goods on your drawback claim.

You must provide the following evidence, numbered and scheduled in a way that makes it obvious which document related to which set of goods

[list of documentary evidence eg purchase invoices etc]

4.9 I am not the original duty payer of the goods on my drawback claim – what happens if I cannot obtain details of the original payment document?

In exceptional circumstances you might not be able to obtain the details of the original duty payment document from the original duty payer (this information is an essential part of the information requested at paragraph 4.8 that proves UK Excise Duty payment).

If the original duty payer cannot or will not provide you with the details of the original duty payment document, you can contact the Drawback Central Assurance Team (DCAT) to ask if alternative evidence can be submitted (known as an alternative evidence agreement).

If you would like to ask for an alternative evidence agreement, write to DCAT including the following information:

- evidence that you have tried to obtain details of the original duty payment document from the original duty payer but this was unsuccessful
- a written declaration on letter headed paper from the original duty payer's business, signed from an authorised signatory, stating:
- that they cannot or will not provide you (or your intermediary if one exists in the supply chain) with details of original duty payment
- that goods are supplied duty paid, and
- the type(s) and brand(s) of the goods supplied

If DCAT agree your alternative evidence agreement they will confirm this in writing. You can then submit your drawback claim with a copy of the alternative evidence agreement and the other information requested at paragraph 4.8 (the purchase invoice, details of the original duty payer and delivery notes).

Alternative evidence agreements must be agreed before you submit the NOI ["Notice of Intention to claim drawback"] form.

An agreed alternative evidence agreement can be used for future drawback claims that involve the same original duty payer, supply chain and products. However, if any component of the alternative evidence agreement changes, the agreement is void and a new agreement must be reached with DCAT. We will periodically review alternative evidence agreements to check there has been no change.

We will withdraw alternative evidence agreements where we identify non compliance or revenue risks.

12. The jurisdiction of the Tribunal in relation a claim for Excise Duty drawback is to be found in the Finance Act 1994.

13. Section s 16(1B) provides that an appeal may be made to the Tribunal against a "relevant decision" within the time limits specified. A "relevant decision" is, according to s 13A(2) of the Act "any of the following decisions" mentioned in that sub-section and, insofar as applicable to the present case, includes, at s 13A(2)

> …
>
> (e) any decision by HMRC as to whether or not any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled;
>
> …
>
> (j) any decision by HMRC which is of a description in Schedule 5 to this Act, …

14. Therefore, as accepted by the parties, the Tribunal would have jurisdiction to determine the Company's appeal if the decision taken by HMRC, in the letter of 26 March 2014, was either:

(1) a decision as to whether or not the Company is entitled to drawback of excise duty under s 13A(2)(e) of the Finance Act 1994; or

(2) a decision to impose "additional conditions" under Regulation 7(2) EGDR which, by virtue of Regulation 7(3) EGDR is treated, for the purposes of s 16 of the Finance Act 1994 as a "relevant decision".

15. I consider each in turn.

Entitlement to Drawback

16. Mr Tristan Thornton, for the Company, argues that the reference to "any decision" as to "whether or not any person is entitles to any drawback of excise duty" in s 13A(2)(e) of the Finance Act 1994 is sufficiently wide to include an "in principle" decision on entitlement to drawback without there having to be a specific drawback claim.

17. I disagree and prefer the submission of Mr Will Hays, who appears for HMRC, that s 13A(2)(e) does not assist the Company as, in the absence of a specific drawback claim, it is not possible to know whether the Company "is" entitled to drawback.

18. However, even if Mr Thornton is right and the legislation could be interpreted so as to include an "in principle" decision the jurisdiction of the Tribunal, itself a creation of statute, does not and cannot be extended to include a decision in the abstract or on a hypothetical basis, such as an "in principle" decision, as is apparent from the decisions in *Odhams Leisure Group Limited v Customs & Excise Commissioners* [1992] STC 332 and *Abbotsley Ltd & Ors (t/a Cambridge Meridian Golf Club) v HMRC* [2015] UKFTT 662 (TC).

Imposition of Conditions

19. Although initially advanced as an alternative to the s 13A(2)(e) argument it became apparent during the hearing that Mr Thornton placed greater reliance on his submission that HMRC's letter of 26 March 2014 imposed conditions additional to those contained in Excise Notice 207 namely:

(1) alternative evidence agreements not used during the timescale of the review (1 October 2012 to 31October 2013) would be withdrawn;

(2) alternative evidence agreements that had been used were also to be withdrawn, but that the Company had six weeks in which to obtain current information from the intermediary and the original producer to confirm that they still supply the brands and products to the Company which would then be issued with replacement alternative evidence agreements;

(3) that the Company should only request alternative evidence agreements for products and brands that it purchased regularly; and

(4) that if no response was received within six weeks HMRC would withdraw the remaining alternative evidence agreements with immediate effect and the

> Drawback Processing Centre advised not to accept any new claims in connection with the expired alternative evidence agreements,

which, he contends, should be considered bespoke conditions imposed under Regulation 7(2) EGDR. Accordingly, he submits that the Tribunal has jurisdiction to hear the Company's appeal by virtue of Regulation 7(3) EGDR and s 16 of the Finance Act 1994.

20. Mr Hays submits that HMRC's letter of 26 March 2014 does not impose conditions under Regulation 7(2) EGDR but falls within the scope of s 133 CEMA in that it requires the supply of information to establish that duty has been paid. He contends that Regulation 7 EGDR, which is without prejudice to s 133 CEMA, is not directed at establishing whether duty has been paid.

21. As is clear from s 2 Finance (No 2) Act 1992 the EGDR, which are without prejudice to s 133 CEMA, are directed at conferring an entitlement to drawback whereas s 133 CEMA concerns a requirement, imposed by HMRC, on any person furnish such information as may be required to establish that duty has been paid or produce "any document of whatever nature" relating to the goods on which drawback has been claimed. Clearly such information would include an alternative evidence agreement and in my judgment HMRC's letter of 26 March 2014, insofar as it relates to alternative evidence agreements, falls within s 133(5) CEMA rather than Regulation 7(2) EGDR.

22. It therefore follows that the Tribunal cannot have jurisdiction to consider the Company's appeal by virtue of Regulation 7(3) EGDR.

Conclusion

23. Therefore, for the above reasons, as the Tribunal does not have jurisdiction to hear the Company's appeal under either s 13A(2)(e) or by virtue of Regulation 7 EGDR any challenge to the contents of HMRC's letter of 26 March 2014 must be by way of judicial review.

24. Although I accept, as Mr Thornton submits, that judicial review is not always an ideal remedy, it does, as is clear from the decisions of the European Court of Human Rights in *Allgemeine Gold und Silberscheideanstalt v United Kingdom* (1987) 9 EHRR and *Air Canada v United Kingdom* (1995) 2 EHRR 150, offer an effective and sufficient remedy notwithstanding the decision in *William Leonard Powell v HMRC* (2005) E00900, in which the VAT and Duties Tribunal, on the particular facts of that case (which concerned the restoration of 3 kgs of tobacco, 4,800 cigarettes and a motorcycle on payment of £2,450) held that because of the legal complexity, the time involved and the cost of an application, judicial review was a "wholly unrealistic" effective remedy.

25. It is accepted that if the Tribunal did not have jurisdiction the appeal must be struck out in accordance with rule 8(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

26. I therefore strike out the Company's appeal.

Right to Apply for Permission to Appeal

27. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 21 JANUARY 2016